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Volume 11 | Number 2 Article 12

3-1-1991

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Recommended Citation

Edmund J. Sherman, *Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University*, 11 Loy. L.A. Ent. L. Rev. 657 (1991).
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GOOD SPORTS, BAD SPORTS: THE DISTRICT COURT ABANDONS COLLEGE ATHLETES IN *ROSS V. CREIGHTON UNIVERSITY*

I. INTRODUCTION

College athletics are in a state of crisis. While college athletics are increasing in popularity and achieving revenue levels unparalleled in their history,[1] a nationwide travesty of corruption at all levels of revenue-producing intercollegiate sports has been discovered over the past decade. From recruiting violations[2] to athletes receiving illegal gifts and payments,[3] from grade falsification[4] to substance abuse,[5] college athletics

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1. *CBS Pays $1 Billion for NCAA,* Newsday, Nov. 22, 1989, (Sports), at 157. The most recent television contract signed in 1989 between the NCAA and Columbia Broadcasting System ("CBS") sports for exclusive coverage of the NCAA's men's college basketball tournament pays the NCAA $1 billion over 7 years. The package also includes rights to televise other college events, such as women's college basketball and some track, gymnastics, and volleyball events, but the men's basketball tournament is by far the most popular event of the package. CBS sports president Neal Pilson said "The NCAA was a business transaction that made tremendously good sense . . . We anticipate making money on the tournament." *Id.* The previous contract between CBS and the NCAA paid $166 million over three years. *Id.* CBS has paid the College Football Association ("CFA") $64 million over the 1987-1990 period for the television rights to its games. *Id.* ABC will pay the Big Ten and Pacific Ten $66 million for the rights to its football games between 1990-1995. *Id.*

It is ironic that with all this income most university athletic programs lose money. The most financially benefitted parties seem to be star coaches and athletic directors, who are paid handsomely. One reason programs are currently losing money is because of an "arms race" mentality between schools, spending large sums to pay coaches salaries and build new stadiums and arenas. *See* Sherman, *Dick Schultz: A Man on a Mission; There's no Rest for the NCAA Boss in his Battle for Reform,* Chicago Tribune, July 1, 1990, (Sports), Zone C, at 3.

2. For a case arising out of extensive recruiting violations in a college basketball program, *see* National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988). In *Tarkanian,* University of Nevada at Las Vegas basketball coach Jerry Tarkanian challeged the lack of due process standards in the NCAA investigation of the university athletic program, which resulted in a finding of 38 university violations of NCAA rules. Tarkanian was found to have committed 10 of these violations, including obstructing the NCAA investigation. *Id.* at 186. The Court held that NCAA investigations and sanctions do not constitute state action, and are not subject to the requirements of the 14th Amendment. *Id.* at 199.

3. A recent example involved the discovery of $1000 cash which allegedly fell out of an Emery Air Freight envelope sent from an assistant coach of the University of Kentucky to the father of high school basketball star Chris Mills. *See* Baker, *He's Expressing Himself Nicely; Arizona Transfer Mills Still Taunted, But Has Shown He Can Play,* L.A. Times, Feb. 7, 1991, § C, at 1, col. 2. In his book CAUGHT IN THE NET, former Clemson Coach Tates Locke describes the secret slush fund created by alumni boosters to provide money to basketball players and their families. T. Locke, CAUGHT IN THE NET, excerpted in SPORT AND HIGHER EDUCATION, 69-80, at 73-75. (D. Chu ed. 1985).

4. *See infra* note 100.

have received substantial negative attention. Among the various abuses occurring, the phenomenon of a high percentage of college athletes failing to graduate or acquire any meaningful education while in college stands out. This occurrence, known as athletic exploitation, goes to the core of the purpose and meaning of college athletics, and the defined role of the student-athlete as a member of the student body.[6]

The National Collegiate Athletic Association ("NCAA"), the governing body of college athletics, has promulgated rules of conduct and meted out punishments in an attempt to remedy the abuses in college athletics. Throughout the 1980s, the NCAA has instituted reforms aimed at cleaning up college sports. These reforms, however, have focused on entrance requirements and punishments for NCAA member schools, rather than on directly protecting student athletes or providing standards for the educational needs of academically deficient athletes.

In *Ross v. Creighton University*[7] ("*Ross*"), Kevin Ross, a former college basketball player, sued his school for alleged athletic exploitation. This Note will discuss the failure of the federal district court to create a tort precedent in the *Ross* case, where a college basketball player attended school and played intercollegiate basketball for four years despite academic scores that would not have allowed him to be admitted as a regular student. Ross failed to graduate or achieve any meaningful education. This Note will argue that the federal district court looked at the wrong policies in deciding that the player had no tort claim against the

5. In a 1989 NCAA survey of 2300 athletes, 5% reported using anabolic steroids. Most of the respondents were football players, but men and women participating in eight other sports also admitted using the muscle enhancing drug. *See Survey Reports Slight Increase in Steroid Use*, L.A. Times, Oct. 17, 1989, § C, at 2, col. 1. Brian Bosworth, a number one draft pick of the Seattle Seahawks in 1987, admitted using steroids as a player at the University of Oklahoma. *See* Wright, *As an NFL Player, Bosworth Was All Mouth and No Heart,* L.A. Times, July 18, 1990, § P, at 11, col. 1 (late final ed.). In the aftermath of University of Southern California quarterback Todd Marinovich's arrest for cocaine and marijuana possession in early 1991, many current and former Trojan players claimed that players had been cheating on school drug tests for years. In one alleged method players procured "clean" urine from other players or students, strapped it to their bodies in plastic bags, and used it during required drug tests. The players resorted to cheating to avoid detection of their drug use. One former player explained, stating "[c]oke, [cocaine], they were all hiding coke." *See Systematic Cheating on Drug Tests at USC*, L.A. Times, Feb. 3, 1991, § C at 1, col. 1. In its subsequent investigation of the L.A. Times story, USC has claimed the alleged cheating never occurred. *See* Almond, *USC; No Evidence of Cheating; Drug Testing: Review Committee Conducts Interviews with Athletes and Finds no Wrongdoing in School Program, but Some Procedures are Questioned*, L.A. Times, Feb. 21, 1991, § C, at 1, col. 6.

6. NCAA CONST. art. 2.4, *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1990-91 [hereinafter NCAA MANUAL], defines the student-athlete as an integral member of the student body.

7. 740 F. Supp. 1319 (N.D. Ill. 1990).

university for educational misfeasance. This Note will also argue that a tort cause of action would stimulate NCAA reform to directly protect the student-athlete's right to be educated during his or her playing eligibility, while able to benefit from the players' athletic scholarship.

II. Statement of the Case

A. *The Facts*

Kevin Ross was an outstanding high school basketball player in Kansas City, Kansas.[8] In 1978, Creighton University in Nebraska recruited Ross and gave him a basketball scholarship to begin after he graduated high school later that year. Creighton offered the scholarship despite that Ross scored a nine out of a possible thirty-six on his college entrance American College Test ("ACT").[9] The incoming class that year averaged 23.2 on the same exam.[10] Although his scores were low and his reading skills were well below the junior high level, Ross attended Creighton University and played intercollegiate basketball for the school for four years, until his eligibility expired.[11] Ross did not graduate. He achieved only ninety-six out of the required 128 credits toward graduation at Creighton, finishing with a "D" average.[12] Ross' curriculum at Creighton included such courses as "ceramics, marksmanship, and the respective theories of basketball, track and field, and football."[13] According to the *Ross* opinion, "[u]nder its rules, the university would not have accepted the pursuit of this esoteric curriculum by a non-athlete."[14] After losing his eligibility after the 1982 season, Creighton placed Ross in the renowned Westside Preparatory School ("Westside Prep") in Chicago, which had noted success in educating underprivileged kids.[15] Creighton paid Ross' $6500 yearly tuition. The *Ross* court described Ross' reading level at the time of entering Westside Prep as that of a seventh grader, and his overall language ability as that of a fourth grader.[16] Other accounts place his reading and language ability levels

8. *Id.* at 1322.
9. *Id.*
10. *Id.*
11. *Id.*
12. Ross v. Creighton University, 740 F. Supp. 1319, 1322.
13. *Id.* (citing Ross' third amended complaint).
14. *Id.*
15. *Id. See also* Curry, *Suing for a Second Chance to Start Over*, N.Y. Times, Jan. 30, 1990, § B, at 9, col. 2 (hereinafter "Curry"). Westside Prep was founded by noted black educator Marva Collins, and stresses basic skills achievement.
16. *Ross*, 740 F. Supp. at 1322.

much lower.[17] At Westside Prep, Ross shared classes with children reading at elementary grade levels.[18]

At Westside Prep, Ross made substantial academic progress and became a national symbol of the fight against illiteracy and the failure of the college athletic system. In one year he increased his reading ability to the twelfth grade level.[19] Ross appeared on television talk shows and news shows such as "Face the Nation."[20] His life was the basis of a television movie.[21] He testified before Congress on the subject of illiteracy,[22] and toured the lecture circuit at major universities and organizations, speaking on illiteracy and his experiences in school.[23]

Ross graduated from Westside Prep in 1983, at the age of twenty-four.[24] At this point, Creighton terminated its financial commitment to Ross' further education.[25] Ross attempted further college education in the Chicago area, but due to financial hardship he was unable to achieve a degree.[26]

Once his education ceased, Ross began to experience psychological problems.[27] He had difficulty finding work and began to abuse alcohol.[28] Ross' problems reached a crisis point on the morning of July 23, 1987, when he barricaded himself in his eighth floor room at the Quality Inn Hotel in downtown Chicago and began tearing apart the room, throwing furniture and other objects out the window.[29] Ross held the police at bay for hours, finally giving up after speaking with Marva Collins, the head of Westside Prep, who had become his friend and mentor.[30] Ross was ultimately ordered to pay $7500 restitution to the hotel.[31]

As a result of the hotel rampage, Ross sued Creighton University in the Cook County Circuit Court in 1989, claiming breach of contract,

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17. Various newspaper and magazine accounts place Ross' reading level at the 2nd grade level when he entered Westside Prep. *See* Curry, *supra* note 15, and Smith & Wattley, *College Athlete Beat Illiteracy, Not Frustrations*, Chicago Tribune, July 24, 1987, Chicagoland section, Zone C, at 1 (hereinafter "Smith & Wattley").

18. Curry, *supra* note 15, at 9, col. 2.

19. *Id.*

20. *See T.V. Topics: Tulane, U.S. - Japan Relations*, Washington Post, April 7, 1985.

21. Smith & Wattley, *supra* note 17, at 1.

22. Curry, *supra* note 15, at 9, col 2.

23. *Id.*

24. *Id.*

25. *Id.*

26. Smith & Wattley, *supra* note 17, at 1.

27. Curry, *supra* note 15, at 9, col. 2.

28. *Id.*

29. Ross v. Creighton University, 740 F. Supp. 1319, 1322 (N.D. Ill. 1990).

30. Smith & Wattley, *supra* note 17.

31. *Ross*, 740 F. Supp. at 1322.

emotional distress, and the novel tort of negligent admission.[32] Ross' amended complaint described "negligent admission" as a hybrid of negligent infliction of emotional distress and educational malpractice, "intertwining to form the novel tort of '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,' exacerbated by the enrollment of plaintiff in a school with children half his age and size."[33]

The Illinois state court granted Creighton's motion for removal to the United States District Court for the Northern District of Illinois, based on diversity.[34] Creighton then moved for dismissal for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6).[35] On June 14, 1990, the federal district court granted the motion to dismiss, with prejudice.[36]

B. The District Court's Holding

The district court held that Ross had failed to prove that any duty existed under Illinois law requiring a university to "non-negligently admit, counsel and educate students."[37] The court noted that creating such a duty would be bad policy.[38] As to Ross' contract claims, the court held that while there might be a contract between the student-athlete and the university, Ross failed to show any express covenants to educate him.[39] Finally, the court rejected Ross' claim for emotional distress, citing the Illinois requirements of physical impact, zone of physical danger, and need for an underlying tort basis for recovery.[40]

C. The District Court's Reasoning

In deciding that Ross had failed to state a cause of action, the district court reviewed the state of educational tort law and the policy considerations involved. The court stated that the decision to create an educational malpractice cause of action is a question of law; the court must determine whether a duty runs from plaintiff to a defendant.[41] The

32. *Id.* at 1322-23.
33. *Id.* at 1327.
34. *Id.* at 1322.
35. *Id.*
36. Ross v. Creighton University, 740 F. Supp. 1319, 1332.
37. *Id.* at 1328.
38. *Id.*
39. *Id.* at 1330-31.
40. *Id.* at 1329-30.
41. Ross v. Creighton University, 740 F. Supp. 1319, 1327.

court cited as factors in this analysis "[t]he likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon defendant."[42] The court proceeded to consider Ross' argument using Illinois state case law, and by examining other states' educational malpractice law.

In denying Ross' malpractice claim, the court focused on the duty and proximate cause elements of the negligence analysis. As to duty, the court agreed with other educational negligence cases that imposing a duty of care to educate "would put insufferable strains upon educators, forcing them to 'litigate every suit claiming negligence in the selection of curriculum, teaching methods, teachers, or extra-curricular activities.' "[43] As to proximate cause, the court stated that there is a "practical impossibility" of proving that a teacher's alleged malpractice caused the student's learning deficiency.[44] In support of this point, the court pointed to the many factors involved in education, such as the " 'student's attitude, motivation, temperament, past experience, and home environment.' "[45] The court stated that these factors were especially true in college education "which usually puts the onus of course selection and attendance on the student."[46] Tying the two concepts together, the court found that both duty and proximate cause failed to meet the foreseeability test of tort analysis because the educational institution cannot control these factors and because of the pressure such a duty would place on educators.[47]

In addition, the court noted that because education is provided on such "an immensely greater scale than other professional services," the courts would be deluged with litigation and the schools would be "closed down."[48] While denying that this reason alone justified denial of the tort claim, the court reasoned that the anticipated flood of litigation "shows the disutility of the proposed remedy."[49] The court concluded that "[i]f poor education (or student laziness) is to be corrected, a common law

42. *Id.* (citing Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 98 Ill. Dec. 1, 5, 493 N.E.2d 1022, 1026 (1986) (quoting Lance v. Senior, 36 Ill. 2d 516, 224 N.E.2d 231, 233 (1967))).

43. *Ross*, 740 F. Supp. at 1328 (quoting Wilson v. Continental Ins. Co., 87 Wis. 2d 310, 274 N.W.2d 679, 686 (1979)).

44. *Ross*, 740 F. Supp. at 1328 (citing Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 391 N.E.2d 1352, 1355, 418 N.Y.S.2d 375, 379, (1979)).

45. *Id.*

46. *Ross*, 740 F. Supp. at 1328.

47. *Id.*

48. *Id.* at 1329.

49. *Id.*

action for negligence is not a practical means of going about it."[50]

Having dispensed with educational malpractice, the court addressed Ross' response to Creighton's motion to dismiss, in which Ross argued that because his case was "so unique and egregious" the court should allow a new, *sui generis* cause of action for the benefit of college athletes.[51] Ross requested that "a special tort be created for the benefit of student athletes, or more precisely for the benefit of student athletes whose academic performance would not have qualified them to be students had they not been athletes."[52] Ross argued that this claim did not involve classroom methodology, but involved the question of whether he should have been admitted to college, and whether, once admitted, Creighton had a duty to truly educate him rather than "just maintain his eligibility for basketball."[53]

The court responded negatively to this argument as well. The court maintained that such a *sui generis* tort must have some basis in the common law.[54] Having reviewed the judicial condemnation of educational malpractice, and holding that it would not create such a tort, the court refused to take what it viewed as the additional step of creating this new tort of negligent admission.[55] The court also pointed to other policy considerations. First, "[s]chools would be forced to undertake the delphic science of diagnosing the mental condition of potential recruits."[56] Second, the court saw no reason to create this tort just for student-athletes, but believed it should be available to all tuition paying students.[57] Following this point, the court felt that such a tort duty would "endanger the admissions prospects of thousands of marginal students, as schools scrambled to factor into their admissions calculations" the potential damages of a future negligent admissions claim.[58]

The court denied Ross' contract claim for the same policy reasons stated in denying his tort claim. The court stated that "otherwise, any educational malpractice claim could be repleaded as a contract claim."[59] In addition to relying on the policy considerations presented in the tort context, the court refused to utilize the implied covenant of good faith

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50. *Id.*
51. Ross v. Creighton University, 740 F. Supp. 1319, 1330.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. Ross v. Creighton University, 740 F. Supp. 1319, 1330.
57. *Id.*
58. *Id.*
59. *Id.* at 1331.

and fair dealing to imply any terms to provide Ross with adequate educational opportunity.[60] Ross alleged that Creighton provided inadequate tutoring, did not afford him a reasonable opportunity to take advantage of the tutoring services, and refused to allow him to "redshirt," not play basketball during his first year of eligibility in order to catch up academically and adjust to college life.[61] The court declined to utilize the implied covenant based on its belief that the court is not institutionally competent to supervise "the relationship between colleges and student-athletes," or to create a new relationship between them.[62] In deciding this, the court stated that it "believes it should leave the supervision of college athletics to private regulatory groups such as the NCAA, which presumably possesses the staff and expertise to carry out the job."[63]

III. MALPRACTICE LAW: THE FRAMEWORK

A malpractice action is a claim of professional negligence, and the proponent of such an action must assert and prove the four elements of tort negligence: duty, breach of duty, proximate causation, and damages.[64] Whether a duty exists between two parties is a question of law for the court to decide upon an analysis of a series of factors that determine whether a relationship between two parties is socially important, involves foreseeable harm, and is capable of being analyzed within parameters that clearly define the obligations owed between the parties.[65] The breach of a

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60. *Id.*

61. Ross v. Creighton University, 740 F. Supp. 1319, 1331.

62. *Id.* at 1332.

63. *Id.*

64. W. PROSSER & W.P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 30 at 164-165 (5th ed. 1984) (hereinafter PROSSER & KEETON).

65. In Raymond v. Paradise Unified School District, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963), the court gave a thorough definition of duty, stating:

> An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens— such are the factors which play a role in the determination of duty.

Id. at 8, 31 Cal. Rptr. at 851-52.

duty is a question of fact, focusing on the actor's conduct.[66] Proximate causation involves both factual and legal elements. The conduct that breached the duty must have actually caused the harm and be within legal limitations of causation.[67] Finally, damages requires proof of harm to a legally recognized interest that can be translated into a monetary or other remedial award.[68]

Malpractice actions can be brought against doctors, lawyers, accountants, architects, and engineers.[69] The standard of care required of these professionals is known as "the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[70] If a professional holds himself out as an expert or specialist, the standard of care will be the common standard of that specialty.[71] Where a particular field has various schools of thought, the practitioner is held to the common standards of the school to which he or she adheres.[72] While tort law recognizes differing professional approaches, schools of thought cannot be capriciously created. Writing in the medical malpractice context, Professor Prosser stated that a " 'school' must be a recognized one within definite principles, and it must be the line of thought of a respectable minority of the profession."[73] Even between recognized schools of thought, stated Prosser, there are usually "minimum requirements of skill and knowledge" which any practitioner in a profession must possess.[74] The standard of care in malpractice lawsuits is usually established through expert witness testimony of a practitioner in the field.[75]

In addition to the reasonable actor approach, the standard of care may also be set forth in a statute. Tort law requires that the statute express a standard of care intended to cover the harm in question and the class of plaintiff involved. In such cases, the duty has been determined as "negligence per se."[76]

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66. PROSSER & KEETON, *supra* note 64, at 164.
67. *Id.* at 165.
68. *Id.*
69. *Id.* at § 32, at 185-86.
70. RESTATEMENT (SECOND) OF TORTS § 299A (1965).
71. *Id.* Comment b.
72. *Id.* Comment f.
73. PROSSER & KEETON, *supra* note 64, § 32, at 187.
74. *Id.*
75. *Id.* at 188-89.
76. *Id.* § 36, at 220-26.

IV. An Overview of Educational Malpractice

A. Cases From the Public School System

Courts have dealt with the concept of educational malpractice in the public school context entirely on policy grounds. In one case involving a claim of educational malpractice the court summed up its approach by stating:

> [I]t may very well be that even within the strictures of a traditional negligence or malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded. Thus, the imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators. Nor would creation of a standard with which to judge an educator's performance of that duty necessarily pose an insurmountable obstacle . . . . As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established. This [point in the analysis] would leave only the element of injury and who can in good faith deny that a student who upon graduation from high school cannot comprehend simple English . . . has not in some fashion been 'injured.'
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> The fact that a complaint alleging 'educational malpractice' might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether . . . as a matter of public policy [courts should] entertain such claims. We believe they should not.[77]

Courts denying claims of educational malpractice have emphasized three distinct policy reasons for declining to find a duty. One has been a protective attitude toward the public school systems, from which most educational malpractice actions stem. Thus, in *Peter W. v. San Francisco Unified School District*,[78] where a high school awarded a student a

77. Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 443-44, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377 (1979).

78. 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

diploma despite his inability to read, the court expressed sympathy for the school district, stating:

> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure . . . according to some critics they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey.[79]

Amplifying these concerns, a second policy consideration to which the courts have referred is the social and financial problems that the public schools face because their budgets are not within their control. This concern was a factor in *Hunter v. Board of Education of Montgomery County,*[80] where a student was allegedly misdiagnosed through educational tests and required to repeat the first grade. In *Hunter,* the court spoke about the "extreme burden which would be imposed on the already strained resources of the public school system"[81] were a tort action allowed. In *Peter W. v. San Francisco Unified School District,* the court mentioned that schools "are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation."[82]

Courts have also considered a belief that the courts are not institutionally competent to judge educational standards. This view stresses the differences of opinion over educational methods within the education profession and among people within the United States.[83] In *Donohue v. Copiague Union Free School District,*[84] the court spoke at length about this factor and concluded that educational decisions "rested in the professional judgment and discretion of the chancellor, the board of educa-

79. *Id.* at 825, 131 Cal. Rptr. at 861.

80. 292 Md. 481, 439 A.2d 582 (1982).

81. *Id.* at 484, 439 A.2d at 584.

82. *Peter W.*, 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861.

83. In *Peter W.*, the court wrote that "[u]nlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might — and commonly does — have his own emphatic views on the subject." *Id.* at 824, 131 Cal. Rptr. at 860-61.

84. 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979).

tion and, ultimately that of the Commissioner of Education, rather than in the courts . . . . Recognition in the courts of this cause of action would constitute blatant interference with . . . school administrative agencies."[85] The plaintiff in *Donohue,* a student who, like the plaintiff in *Peter W.,* received a high school diploma despite being unable to read and write, sued the school district for educational negligence. The court dismissed Donohue's case.

Beyond these policy issues of duty, courts have also emphasized a belief that determining the proximate causation behind a student's failure to learn involves too many non-school related external factors to allow analysis. The *Ross* opinion reiterated these factors, such as attitude, motivation, past experience and home environment.

Thus, the courts have refused to allow educational malpractice claims no matter how outrageous, damaging, and preventable the wrong that the student suffered. Perhaps the most disturbing educational malpractice case dismissed by the courts was *Hoffman v. Board of Education of the City of New York.*[86] In *Hoffman,* a kindergarten student, Daniel Hoffman, was tested by a certified clinical psychologist employed by the New York City School District. The examination determined that Hoffman had an intelligence quotient ("I.Q.") of seventy-four and the psychologist recommended that Hoffman be placed in classes for the mentally retarded.[87] The psychologist, however, was unsure of the results because the child suffered from a speech defect that made it difficult to assess his mental level based on the primarily oral intelligence tests administered.[88] Because of this uncertainty, the psychologist recommended that Hoffman be retested in two years.[89]

Hoffman was enrolled in classes for the mentally retarded, and although his academic progress was monitored by twice yearly academic testing, he was never given the I.Q. retest recommended by the psychologist.[90] Twelve years later, after being enrolled in a vocational high school for the mentally retarded, Hoffman's mother demanded that he be retested.[91] The retest found that Hoffman had an I.Q. of ninety-four, and

85. *Id.* at 445, 391 N.E.2d at 1354, 418 N.Y.S.2d at 378 (citing James v. Board of Education, 42 N.Y.2d 357, 366-67, 366 N.E.2d 1291, 1297-98, 397 N.Y.S.2d 934, 941-42 (1977)).

86. 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

87. *Id.* at 123-24, 400 N.E.2d at 318, 424 N.Y.S.2d at 377.

88. *Id.* at 124, 400 N.E.2d at 318, 424 N.Y.S.2d at 377.

89. *Id.*

90. Hoffman v. Board of Education of the City of New York, 49 N.Y.2d 121, 124, 400 N.E.2d 317, 319, 424 N.Y.S.2d 376, 378 (1979).

91. *Id.* at 124, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

was not retarded.[92]

Hoffman sued the school district, claiming negligence in the original testing and in the failure to retest him in two years.[93] He claimed that he suffered injury to his intellectual and emotional well being, and that his placement in mentally retarded classes reduced his ability to obtain employment.[94]

Hoffman won and was awarded $750,000 damages.[95] The appellate division affirmed the judgment of negligence based on the school district's failure to retest Hoffman. That court would have remanded the damages award had Hoffman not agreed to accept a reduced judgment of $500,000.[96] The New York Court of Appeals, however, overturned Hoffman's judgment, stating that a cause of action for educational malpractice "should not, as a matter of public policy, be entertained by the courts of this State."[97] The dissent of three justices agreed with the appellate division that the case involved affirmative negligence that was the proximate cause of Hoffman's injuries, and that his recovery should stand.[98]

Hoffman exemplifies the rigidity of the courts' refusal to allow claims of educational negligence. In *Hoffman*, the issue was not one of educational policy. No difficult choices or borderline interpretation had to be made. No significant money had to be expended. The school district simply failed to follow through on the recommendations of a testing specialist who was hired specifically for the function of assessing educational needs.

B. The Extent of Educational Malpractice in College Sports

Whether defined through suits brought against universities, studies of athletic graduation rates, or academic studies of the college athletic system, ample evidence exists showing that athletes involved in revenue producing sports are not receiving the same education and making similar academic progress as the rest of the student body. Researchers and recent events point to active misfeasance on the part of coaches who do not want to lose players to academic ineligibility, boosters[99] who enjoy

92. *Id.*

93. *Id.*

94. *Id.* at 125, 400 N.E.2d at 319, 424 N.Y.S.2d at 378.

95. Hoffman v. Board of Education of the City of New York, 49 N.Y.2d 121, 125, 400 N.E.2d 317, 319, 424 N.Y.S.2d 375, 378 (1979).

96. *Id.*

97. *Id.* Whereas most states call their highest court the Supreme Court, the highest court in New York is called the Court of Appeals.

98. *Id.* at 127, 400 N.E.2d at 321, 424 N.Y.S.2d at 380.

99. A booster is a college sports enthusiast who may have no other affiliation with the

unsanctioned and unethical relationships with college athletes, and administrators who either actively or tacitly participate in athletic exploitation.

1. The Lawsuits

Over the past decade, athletes and others affiliated with college sports have filed a variety of lawsuits alleging educational malpractice. In *Echols v. Board of Trustees of the California State University and Colleges*,[100] ("*Echols*") seven former student-athlete basketball players who played at California State University at Los Angeles sued the California State College Board of Trustees in tort and contract for educational malpractice. The lawsuit did not define the harm in terms of the students' academic achievement, but rather in terms of access to university educational services denied to the students.[101] The students alleged that they were instructed to receive academic counseling solely from the athletic department coaches and were specifically prohibited from receiving counseling from the usual academic counselors.[102] The students also alleged that they were counseled by the coaches to take primarily physical education courses in order to avoid losing their athletic eligibility.[103] The students further claimed to have been instructed to repeat courses they had already passed and to accept passing grades in courses they never attended.[104]

In settling the lawsuit before trial, the plaintiffs in *Echols* received compensation for educational expenses that they had personally incurred, repayment of student loans that they were fraudulently induced to take, a trust fund to pay for future educational expenses if the athletes chose to return to college, and over $10,000 each in punitive damages.[105]

In another case which focused national attention on college athletic

university. Boosters can be alumni, but are often community business people who feel that supporting the local university athletic programs helps create a good business image. Boosters organize parties, fund raising drives, and other social events revolving around support for the university athletic program. Boosters also entertain prospective athletic recruits, provide gifts and money to players and coaches, and attempt to influence the athletic program in various ways. *See* Frey, *Boosterism, Scarce Resources, and Institutional Control: The Future of American Intercollegiate Athletics*, in SPORT AND HIGHER EDUCATION, *supra* note 3, 115-29.

100. Echols v. Board of Trustees of the California State University and Colleges, No. C-266,777 (Ca. Super. Ct., L.A. County, filed Oct. 22, 1979) (hereinafter "*Echols*") (discussed in Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 109-11.

101. *Id.* at 110.

102. *Id.*

103. *Id.*

104. *Id.*

105. Note, *supra* note 100, at 110 n.88.

exploitation in the 1980s, Jan Kemp, an English professor at the University of Georgia who taught in the school's Developmental Studies program, was awarded $2.57 million in back pay and damages after being fired from the university for speaking out against educational abuses to reward revenue-producing athletes.[106] According to trial testimony, the university lowered its admission standards in order to admit athletes, promoted athletes from its remedial education program even though they were not achieving passing grades, and were giving athletes more than the permitted four quarters to complete the Developmental Studies Program.[107] The damage award included $1.5 million punitive damages against the University Vice President for Academic Affairs, and $800,000 against the Developmental Studies Director.[108] The record did not have any evidence of the athletes receiving any compensation.[109]

Another case brought in the 1980s illustrates how athletic exploitation may begin well before the college level. In *Jones v. Williams*,[110] the mother of a Detroit public school student claimed that after the school had diagnosed her son as having learning difficulties and had placed him in a school for slow learners, the school district subsequently removed him from the special school and enrolled him in a regular junior high and high school to take advantage of his basketball talent.[111] The complaint stated that after Curtis Jones graduated high school, he was "academically carried" for two years at North Idaho Junior College as part of a plan for him to achieve eligibility to play at the University of Michigan.[112] Jones never made it to Michigan, however, as he suffered a mental breakdown while attending junior college which he attributed to other students' teasing him about his illiteracy.[113]

Unlike the plaintiffs in *Echols*,[114] Jones received no compensation for his claims. The court denied the suit against the Detroit school district based on sovereign immunity,[115] and denied the suit against the jun-

106. L.A. Times, Feb. 13, 1986, § 3, at 1, col. 5.

107. *Id.*

108. *Id.*

109. *Id.*

110. 172 Mich. App. 167, 431 N.W.2d 419 (1988).

111. *Id.* at 170, 431 N.W.2d at 422.

112. *Id.*

113. *Id.*

114. *Echols*, *supra* note 100.

115. Jones v. Williams, 172 Mich. App. 167, 172, 431 N.W.2d 419, 422. Sovereign Immunity is the doctrine that states the government cannot be sued unless it consents to be sued. In this case, although at the time of trial Michigan had repealed its immunity, Jones' cause of action had occurred before Michigan had repealed its immunity, and the court held he could not sue.

ior college for lack of jurisdiction.[116]

2. The Studies

Various formal and informal studies have been conducted to measure the academic progress of student athletes at big-time sports schools. These studies have focused on graduation rates, grade point averages, study time, and test scores of student athletes compared to the general student population.

In one extensive study of 2091 athletes, conducted over a ten year period at Colorado State University, a Division 1A[117] school, the researchers concluded that these athletes "scored lower than nonathletes on the measures most commonly used to assess educational attainment: They entered with poorer academic backgrounds, they received lower grades than their nonathletic peers, and fewer of them graduated."[118] The study made two other findings. First, as between scholarship and non-scholarship athletes, scholarship athletes fared worse in academic performance. Second, the researchers found evidence that "athletes in the male revenue sports of football and basketball have a relatively low probability of receiving an education compared to nonathletes or athletes in other sports," because of the excessive demands of their sports and because the competitiveness of their sports causes coaches to recruit solely for athletic talent rather than academic ability.[119] In contrast to revenue-producing sports, however, the study noted that academic achievement by athletes in minor, non-revenue-producing sports was similar to that of the general student population.[120]

In an NCAA study of graduation rates of athletes and non-athletes from schools in the Big Eight conference, the researchers focused on students who entered and graduated in a five year period.[121] Studying the 1980 through 1985 period, only the University of Nebraska had a higher overall percentage of athletes graduate than the general population.[122] In the revenue-generating sport of football, however, all the schools had

116. *Id.* at 426.

117. Division 1A is the most competitive ranking within the NCAA football structure. *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, 292 n.34 (1989).

118. Purdy, Eitzen, and Hufnagel, *Are Athletes Also Students? The Educational Attainment of College Athletes*, in SPORT AND HIGHER EDUCATION, *supra* note 3, 221-34, at 229-31.

119. *Id.* at 231.

120. *Id.*

121. Note, *Achieving Educational Opportunity Through Freshman Ineligibility and Coaching Selection: Key Elements in the NCAA Battle for Academic Integrity of Intercollegiate Athletics*, 14 J.C. & U.L. 383, 387 (1987) (citing BIG EIGHT GRADUATION RATES).

122. *Id.*

lower graduation rates among the players, with the extreme examples of Oklahoma State, University of Oklahoma, and University of Colorado, which graduated only 16%, 31% and 27%, respectively, of their football players in the five year period.[123] These rates were between 40 and 51 percentage points lower than the general student population.[124]

An NCAA study of the Southwest Conference showed that only 17% of senior basketball players who played regularly graduated in 1982.[125] At the University of Texas at Austin, a Southwest Conference member school, only 39% of football players and 18% of basketball players who entered school between 1975 and 1981 earned degrees.[126] The graduation rate for the general student population was 54%. At Memphis State University, between 1973-83, only six of fifty-eight basketball players graduated.[127]

Another recent NCAA study of the work habits and time demands of student athletes showed that during their sports' season college basketball and football players spend thirty hours per week training for their sport, which is more time than they spend on preparing for and attending classes combined.[128] The athletes missed an average of two classes per week.[129] The study showed that even in the off-season the players spend more time on their sport than preparing for classes.[130] Football and basketball players reported that they felt they were not reaching their academic potential due to the demands of their sport.[131]

Although this NCAA study reports that student-athletes spend more time playing and practicing than studying, other studies and anecdotal reports from players claim that the thirty hour per week demand is vastly understated.[132] A recent book on college sports mentions a Louisiana State University study that found varsity athletes spend up to fifty hours per week on their sport.[133] The author also cites a Sports Illus-

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123. *Id.*

124. *Id.*

125. Note, *supra* note 117, at 303 (citing Sanoff, *Classroom Crackdown on College Athletes,* U.S. NEWS AND WORLD REP., Jan. 24, 1983, at 76).

126. *Id.* (citing Sanoff, *College Sports' Real Scandal,* U.S. NEWS AND WORLD REP., Sept. 15, 1986, at 63).

127. *Id.*

128. *Id.* at 299 (citing *Commission's Study of Student-Athletes Released,* NCAA NEWS, Dec. 5, 1988, at 1, col. 1).

129. *Id.*

130. Note, *supra* note 117, at 299 (citing *Commission's Study of Student-Athletes Released,* NCAA NEWS, Dec. 5, 1988, at 1, col. 1).

131. *Id.*

132. *See infra* notes 133-35.

133. M. SPERBER, COLLEGE SPORTS, INC., at 302 (1990).

trated article that covered a week spent with a University of Wisconsin football player, which included fifty-one hours of football related activity.[134] Isiah Thomas, a professional basketball player who played basketball at Indiana University, claimed that college athletes spend eight to ten hours a day on their sport.[135]

In addition to these studies, other informal reports from people affiliated with college sports reveal the lack of academic standards for college athletes. University of New Mexico President William Davis stated, "[o]ur recruits were recruited to be athletes, not students. It was never the expectation that they'd get . . . out of bed at 8 o'clock to go to class and turn in their assignments."[136] From 1970-1980 the athletic department at the University of Southern California maintained separate admissions powers, admitting 330 athletes in that decade who did not meet the general USC requirements.[137]

V. THE ROLE OF THE NCAA IN REGULATING COLLEGE SPORTS

As the regulatory body of competitive college sports, the NCAA has established rules of conduct in everything from recruiting methods to academic standards to dates of accepting bowl and playoff bids. The NCAA additionally has created punishments for violations of its rules. These punishments sanction both the schools and the athletes by prohibiting televised games, disallowing bowl and playoff participation, suspending student eligibility to play, and requiring reimbursement of money won in bowl or playoff competition.[138] While these punishments

134. *Id.*

135. *Id.*

136. *See* Note, *supra* note 100, at 100 n.20 (citing Axthelm, *The Shame of College Sports*, NEWSWEEK, Sept 22, 1980, at 54, 56).

137. *See* Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 88 (1982) (citing University of Southern California, Academic Conduct, Admission, Advisement and Counseling of Student Athletes at the University of Southern California: A Report to the USC Community, (Oct. 12, 1980) at 9).

138. *See* NCAA BYLAW, art. 19, *reprinted in* NCAA MANUAL 1990-91. The NCAA regulations passed in the mid-1980's are commonly referred to as the "Death Penalty." The "Death Penalty" is imposed when the NCAA finds that a "major" violation of its rules has occurred. A major violation is one that "provide[s] an extensive recruiting or competitive advantage" to a school. *Id.* at 19.02.2.2, *reprinted in* NCAA MANUAL 1990-91. A major violation may be caused by repeated secondary violations, those that provide "only a limited recruiting of competitive advantage and that is isolated or inadvertent in nature." *Id.* at 19.02.2.1, *reprinted in* NCAA MANUAL 1990-91. The minimum penalty for a major violation includes a two-year probationary period, a one-year prohibition on coaches' off-campus recruiting visits, one year of sanctions prohibiting bowl or playoff competition, one year of television sanctions, and termination, suspension, or reassignment of all university staff members involved in the misconduct. *Id.* at 19.4.2.2, *reprinted in* NCAA MANUAL 1990-91. What conduct constitutes a secondary or a major violation is decided by the NCAA Committee on

are formidable, they do not provide a remedy for the student athlete who has been denied an education by a negligent university. The student-athlete suffers the loss of television and bowl exposure for his athletic talents along with the university, but has no recourse under the NCAA rules to receive the educational commitment owed under his or her athletic scholarship. A student athlete who has used up his or her eligibility to play has no recourse either, and has no further years of an academic scholarship to pursue an education.

A. *The NCAA View of the Student-Athlete*

According to the NCAA, the college athlete is a student first and an athlete second. The NCAA Constitution contains "The Principle of Student-Athlete Welfare," which states that "intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes."[139] It also contains "The Principle of Sound Academic Standards," which proclaims that "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."[140] Although education is at the core of the NCAA's purpose, the NCAA has never guaranteed an education or provided a remedy for a student who has been educationally mistreated. The NCAA also leaves evaluation of student-athlete progress up to the individual school.[141] What it has done is implement rules to attempt to create some academic integrity.[142]

B. *The Reform Effort of Propositions 48 and 42*

In 1983, the NCAA passed a proposition, to be effective in 1986, that required incoming athletes to have at least a 2.0 grade point average in a "core curriculum" and a 700 Scholastic Aptitude Test ("SAT") score or a 15 score on the American College Test ("ACT") in order to be

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Infractions. NCAA BYLAW, art. 19.1.3, *reprinted in* NCAA MANUAL. For a thorough critique of the NCAA death penalty rules *see* Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985 (1987).

139. NCAA CONSTITUTION, art. 2.2, *reprinted in* NCAA MANUAL 1990-91.

140. *Id.* at 2.4.

141. To be eligible to play, the NCAA requires that a student-athlete be in "good academic standing" and making "satisfactory progress toward a baccalaureate" degree. The meaning of both these terms is "determined by the academic authorities who determine the meaning of such phrases for all students of the institution." NCAA BYLAW, art. 14.4.1, 4.2, *reprinted in* NCAA MANUAL 1990-91.

142. *See infra* notes 143-57.

eligible to play as freshmen.[143] The alternative under Proposition 48 was to allow an athlete to be recruited and given an athletic scholarship, but be unable to play until satisfactory grades were achieved after the freshman year of college.[144] As might be expected, Propositon 48 has resulted in many freshmen sitting out their first year, but some people within college sports believe that once admitted, the student-athlete inevitably becomes eligible to play for his sophomore year.[145]

Proposition 48 has been criticized from many directions, including charges that it is racist.[146] However, prominent black sociologist Harry Edwards of the University of California at Berkeley has taken the position that the Proposition 48 requirements are too *lenient*, and that Proposition 48 fails to create goals for athletes once they are in college.[147] One author asserts that to achieve a 700 on the SAT a student need correctly answer only 13 out of 60 math questions, and 24 out of 85 verbal questions.[148] The same author also asserts that cheating on the SAT has increased since the passage of Propositon 48, primarily in the form of having substitute students take the exam for athletes.[149]

In 1989, the NCAA strengthened Proposition 48 by enacting Proposition 42, which prohibits schools from offering any scholarships to nonqualifying freshmen.[150] Through a recent amendment to Proposition 42, however, these students may receive institutional financial aid from nonathletic university sources.[151] Given the availability of booster money and university financial aid, Proposition 42 may have no effect in keeping academically deficient student-athletes out of college sports.

Another reform element of Proposition 48 was the requirement that student athletes achieve satisfactory grades in a "recognized baccalaureate degree program."[152] According to one author, the result of this rule has been the creation or takeover of majors by the athletic departments in order to offer athletes a recognized degree program controlled by the

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143. NCAA BYLAW, art. 14.3.1.1(a)-(b) *reprinted in* NCAA MANUAL 1990-91.

144. *See* Note, *supra* note 117, at 306-07.

145. *See* M. SPERBER, *supra* note 133, at 224.

146. H. EDWARDS, *Educating Black Athletes*, in SPORT AND HIGHER EDUCATION, *supra* note 3, 373-84, at 377-78.

147. *Id.* at 381.

148. M. SPERBER, *supra* note 133, at 218.

149. *Id.* at 224.

150. *See* Sullivan, *Scorecard, The Battle of Dallas*, SPORTS ILLUSTRATED, Jan. 22, 1990, at 7. The rule change is found in NCAA BYLAW, art. 14.3.2.1 and 3.2.1.1, *reprinted in* NCAA MANUAL 1990-91.

151. NCAA BYLAW art. 14.3.2.1 and 3.2.1.1, *reprinted in* NCAA MANUAL 1990-91.

152. NCAA BYLAW art. 14.4.2., *reprinted in* NCAA MANUAL 1990-91.

coaches and athletic department personnel.[153] One example is the creation of sports management programs taught and controlled by coaches. These programs are only the most recent manifestation of the "hideaway curriculums" provided to preserve the eligibility of athletes.[154]

Recently, the NCAA has continued its reform efforts by taking steps to shorten certain sport seasons and practice time required of players.[155] Effective in 1992, the college basketball season will be cut from twenty-eight games to twenty-five.[156] Additionally, the basketball and football practice seasons will be shortened.[157] The new NCAA Executive Director, Dick Schultz, has candidly expressed his belief that the NCAA and college sports have image as well as substantive problems, and has expressed his desire to increase academic responsibility to the student-athletes.[158] Realizing these goals, however, will pit the academic reform elements within the NCAA against the athletic and financial interests, who have already shown strong resistance to change.[159]

For all of its reform-minded rulemaking, the NCAA has only placed some obstacles in the path of the most flagrant abuses in college sports. The NCAA has neither replaced the university-chosen curriculum with its own, nor instituted its own tests to measure student-athletes' academic progress. The NCAA has chosen to punish by witholding sports exposure, but not through enforcing academic duties. In the face of a long history of rule-breaking, the NCAA has simply created more procedural rules for universities to follow in the recruiting of athletes, while not fundamentally changing the competitive forces that drive college sports, such as competition for football bowl bids and playoff berths in the NCAA basketball tournament, as well as increased television exposure. The admission of partial-qualifiers for the freshman year only tempts the schools to make sure that the recruits receive passing grades to be eligible to play the following year, beginning the typical cycle of phony academic standards. Why the NCAA expects these rules to be effective is unclear, especially where academic cheating can simply be shifted to or shared with the high school level to keep athletes eligible to

153. M. SPERBER, *supra* note 133, at 283.

154. *Id.* at 283-84.

155. Robbins, *NCAA Convention; Delegates Say: Shorten Basketball Season, Give Recruits Grad Rates*, L.A. Times, Jan. 10, 1990, § C, at 7, col. 1.

156. *Id.*

157. *Id.*

158. *See* Asher, *Schultz Proposes Vast NCAA Changes; Makes Announcement at Convention*, Wash. Post, Jan. 8, 1990, § D, at 5.

159. *Id. See also* Rhoden, *Harmony and Dissonance as NCAA Meets*, N.Y. Times, Jan. 12, 1990, § A, at 28, col. 1.

enter college. Finally, it has not created a compensation scheme to see that athletes receive some education, much less graduate, if they can prove that the university failed to provide them with meaningful courses and academic help. In short, relying on the NCAA to effectively govern college sports and protect the student-athletes' education, as the *Ross* court did, reflects a lack of appreciation for the depth of corruption in college sports, the history of university attempts to circumvent NCAA rules, and the failure of the NCAA to enforce the students' right to an education.

VI. Critique of the *Ross* Decision

Against this backdrop of legal cases and studies, revelations of college sports scandals, and the minor reform efforts of the NCAA, the federal district court refused to allow Kevin Ross to proceed with proof that Creighton University had been negligent in admitting him and re-enrolling him for four years until his eligibility expired, despite its knowledge of his academic weakness and lack of progress. In doing so, the court ignored the social importance of education compared with the relative unimportance of college basketball, exaggerated the difficulties involved in determining educational malpractice, equated big-time college athletics with the problems of the public school system, and ignored the defenses available to Creighton University in a tort action.

A. The Imbalance of the Risk of Harm to Student-Athletes to the Purpose of College Athletics

One factor that enters the judicial balancing act to determine tort duty is the relationship between the "social utility of the activity out of which the injury arises, compared with the risks involved in its conduct."[160] Applying this risk/benefit factor to college athletics shows a drastic imbalance in priorities. The social utility of big-time college sports is entertainment for spectators and television audiences,[161] and reputation enhancement for the university. This benefit carries a very low priority compared to the risks involved: the exploitation of young student-athletes who are warehoused but not educated and given an illusory benefit of a meaningless scholarship. Athletes are harmed to the extent that they do not develop knowledge or skills that they can use in a career after they graduate, except the very small percentage who play

160. Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851 (1963). *See also* RESTATEMENT (SECOND) OF TORTS § 291 (1965).

161. M. SPERBER, *supra* note 133, at 345. *See also* HART-NIBBRIG AND COTTINGHAM: THE POLITICAL ECONOMY OF COLLEGE SPORTS, 11, 33-51, 61-63 (1986).

professional sports.[162] They lose because they gain no monetary rewards for their services, unless they are willing to engage in violations of NCAA rules.[163] Finally, they may be emotionally damaged when their days of playing have ended and they face the reality of having no usuable skills or direction.[164]

Professional athletes have acknowledged a difficult transition process when their playing careers have ended, leading professional teams and players unions to establish counseling and career guidance programs.[165] All these risks are inherent in athletic exploitation, and were involved in the *Ross* case.

From this utility-risk perspective, the benefits of big-time college sports hardly justify the risks. Rather than evaluate the relative importance of college sports, however, the *Ross* court focused instead on the perceived problems of causation and forseeability of harm.

B. *The Exaggerated Difficulties of Proving Educational Malpractice*

Faced with a claim that Kevin Ross had been given a curriculum filled with sports classes and ceramics, the federal court launched into a detailed evaluation of the complexity of determining causation in educational malpractice cases, focusing on teaching methodologies and the many factors involved in successful learning.[166] In doing so, the court ignored the forms of negligence alleged in the case and the forms most commonly found in college athletics: the failure of the university to provide any curriculum at all in the fundamental areas of learning, the pressure exerted by athletic departments to monopolize athletes' time, and the pressure exerted by athletic departments to pass student-athletes who

162. Charles Grantham, a former college player, coach, and administrator, and current Executive Director of the National Basketball Association ("NBA") Players Association, wrote "[y]et, the N.B.A. will draft just 54 college players in its annual draft. By season's end only about 35-40 rookies will remain on active rosters." Grantham, *It's Time to Give College Players a Cut,* N.Y. Times, Mar. 18, 1990, § 8, at 10, col. 2.

163. The amount of money a college athlete can receive from any source is tightly regulated by the NCAA rules. *See* NCAA BYLAW art. 15 and art. 16, *reprinted in* NCAA MANUAL 1990-91.

164. For a good discussion of the psychological effects athletes encounter upon retirement *see* Wolff, *Views of Sport: What Happens When the Cheering Stops,* N.Y. Times, Apr. 23, 1989, § 8, at 10, col. 2.

165. The post-career educational program created by Northeastern University, and accepted by the Boston Bruins hockey team for its retired players, is described in Hammonds, *Training for Life After the Game is Over,* BUSINESS WEEK, Mar. 14, 1988, at 74. The New York Giants football team also provides a post-career educational program for its players. *See* Sciullo, *From Black and Blue to the Blackboard for New York Giants,* Chicago Tribune, Apr. 9, 1989, § Sports, at 14.

166. *See Ross,* 740 F. Supp. at 1328.

are not performing at a passing level in substantive courses. From the Jan Kemp remedial studies lawsuit at the University of Georgia,[167] to the surveys and reports about athletes time commitments,[168] to the *Echols*[169] case involving repeated physical education courses, precedent shows that the immediate problem in college athletics is a lack of any academic standards required of athletes, not a complex interplay of forces. Athletes are either not given any substantive courses, or fraudulently passed through courses, or given a phony curriculum through the athletic department.

To determine negligence in this area does not require a difficult analysis. The proof would be a factual determination of what type of curriculum was offered the student, who served as teachers and as advisers, what academic advice was given, and whether an athlete actually passed courses, all judged against professional standards of education. These standards could be state accreditation standards, the standards of the university itself, or state or local public school special education standards, where relevant.[170] The professional teacher training curriculum to which all state certified teachers are exposed is another source of standards.[171]

Where an athlete was given a curriculum devoid of any courses involving reading, writing, science, or math, educational negligence would be implicit. Where an athlete scoring well below the university minimum in incoming grades and test scores is admitted and given none or minimal tutoring, educational negligence is likely. At the least, the average grades and test scores of the student body show the level of competiton faced by the student-athlete, which sets the standards for the university. A student-athlete functioning academically at a junior high school reading level, or lower, cannot be expected to read and perform competitively at the college level.

Where athletes scoring well below university minimum requirements are admitted and given no further diagnostic testing to determine skill levels or learning disabilities, such evidence supports a claim of negligence. Sequentially levelled reading diagnostic tests exist and are employed as a basic part of teaching reading.[172] These materials allow a teacher to test a student's reading level by having the student read pro-

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167. *See supra* notes 106-09 and accompanying text.

168. *See supra* notes 128-35 and accompanying text.

169. *See supra* note 100.

170. *See infra* note 177.

171. *See* Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent of Careless Teaching*, 73 NW. U.L. REV. 641, 730-31 (1978).

172. *See* W. MILLER, TEACHING ELEMENTARY READING TODAY, 355-67 (1984).

gressively more difficult passages, until the student cannot fluidly read through a passage. Comprehension tests and word recognition tests supplement this procedure.[173] The results give the teacher a very close approximation of the reading level of the student.[174] Such tests are not time consuming, expensive, or difficult to administer. They can be repeated to confirm results and to measure reading progress.[175]

Standards for testing and evaluating students with learning difficulties exist in every state that receives federal funds under the Education of the Handicapped Act.[176] This legislation requires states to identify students who are having learning difficulties, test them using accepted psychological tests administered by educational psychologists, and prepare an individualized educational program ("I.E.P.") for those students found to have a learning disability.[177] The I.E.P. process is a comprehensive evaluation procedure, and provides a framework of due process rights and interaction between a student, parents and professional educators.[178] Local school districts have extensive experience with these procedures,[179] and though this legislation does not apply to colleges, there is no reason that universities could not employ the same methods of testing with low-achieving student-athletes. This would follow accepted educational practice and be consonant with the tort concept of being judged by the community standards of the profession.

Another sign of negligence might be entire curriculums designed and taught by the athletic coaches, especially where the coach has no background in the subject taught. Coaches have an inherent conflict of interest when they have the power to evaluate athletes on whom their success may depend. Coaches serving as academic advisers would also be an indicator of negligence, especially where the coaches have no coun-

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173. *Id.*

174. *Id.*

175. One sequentially developed reading assessment program including sight word vocabulary and reading comprehension is SILVAROLI, CLASSROOM READING INVENTORY, (4th ed. 1982). The Silvaroli test takes approximately 12 minutes to administer to each student. *Id.* at 4.

176. 20 U.S.C. §§ 1400-1485 (1988), *amended by* Pub. L. No. 101-476 (1990).

177. *See* BIEHLER, SNOWMAN, PSYCHOLOGY APPLIED TO TEACHING 180-195, (5th ed. 1986).

178. For a detailed explanation of the IEP process, see LERNER, LEARNING DISABILITIES, THEORIES, DIAGNOSIS, AND TEACHING STRATEGIES 59-97 (4th ed. 1985). *See also* Note, *Education—Board of Education v. Rowley: The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children,* 61 N.C.L. REV. 881, 885 & n.33 (1983).

179. For articles and notes which mention state guidelines *See* Elson, *supra* note 171, at 738 n.370. *See also* Note, *Hunter v. Board of Education & Doe v. Board of Education—No Cause of Action for Educational Malpractice Against Public School Teachers and Psychologists,* 42 MD. L. REV. 582, 590-591 n.54 (1983). *See also* Note, *supra* note 178, at 887 n.44.

seling degree or training, and do not act as counselors to students other than athletes.

These forms of negligence do not require the court to evaluate difficult issues of educational methods. The testing for basic skill levels, design of curriculum from within a range of professionally accepted alternatives, provision of adequate study time, and honest evaluation of student performance are all capable of review by state standards and professional judgment.

C. *The Court's Erroneous Analogy to the Public Schools*

In the *Ross* decision, the court borrowed heavily from public school negligence cases and concluded that the flood of litigation that would ensue would force the schools to shut down.[180] Equating the business of college sports, with its television contracts, multimillion dollar stadiums, and highly paid coaches, and the educational resources possible through such revenues, with the strapped conditions of many urban public school districts is an invalid comparison. Universities have no legal obligation to create major sports programs.[181] They do so in order to provide entertainment[182] and name recognition for the school, and for these reasons ought not to be shielded from liability. The endeavors of college athletes bring revenues to the university, with which it can purchase insurance or create a reserve to pay such claims, rather than just building larger and more modern stadiums. Further, the tort proposed by the *Ross* case would be limited to college athletes, a class much smaller than the entire student body, and thus a smaller pool for potential litigation.

Universities involved in revenue-producing sports seek athletes from around the country, even around the world.[183] They have complete control over the type of student athletes they recruit, and some programs have excellent academic records.[184] For those that choose to recruit aca-

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180. *Ross*, 740 F. Supp. at 1329.

181. College sports began as a recreational outlet for "keeping the spirit pure" in the 19th century American college. It grew in popularity over the years and has emerged as a major enterprise today, but school's participate only by choice, and not all schools choose to keep up. *See* HART-NIBBRIG AND COTTINGHAM, *supra* note 161, at 3, 18-29.

182. *See supra* note 161.

183. In 1988, Seton Hall University recruited Andrew Gaze, a 23 year-old Australian professional basketball player. Gaze arrived at Seton Hall in October, just in time for the start of the basketball season, and left after Seton Hall was eliminated from the NCAA tournament. His academic program consisted of ethics, first-aid, youth activities, and creative movement. M. SPERBER, *supra* note 133, at 235.

184. Duke University and the University of Notre Dame have successful athletic programs that are also well respected for high graduation rates and an emphasis on educational achievement. *See* Note, *supra* note 117, at 303-04.

demically deficient athletes there is no public policy reason to protect them from liability. Unlike the public schools, these universities are under no mandate to educate every student who wishes to enter, especially those that don't meet the university published requirements. Like a business, they assume this risk of failing to educate when they accept the student and seek to exploit the student's talent.

D. *The Court Ignored the Defenses Available to the University in a Malpractice Litigation*

The *Ross* court pointed out that, unlike younger age groups, at the collegiate level students have more responsibility in procuring their education.[185] Although an academically deficient student should not be expected to have the same ability to learn on his own as a student who meets university requirements, the idea that the student-athlete is an adult does go toward creating a duty to participate and give effort in learning. To this end, the university can invoke the defenses of contributory or comparative negligence to defend itself against an educational malpractice claim.

In order to succeed in asserting educational malpractice, a student would have to withstand evidence that he or she did not attend class, missed tutoring sessions, failed to complete assignments, showed a non-cooperative attitude, and didn't participate in class or tutoring sessions.[186]

Evidence of this could be kept in dated records of the teachers and tutors involved with the student. Periodic academic testing would also provide a record of academic progress, and periodic evaluation sessions with written evaluations of the testing results and teacher evaluations would supply a continuing record of educational progress and prove that the student was honestly apprised of his performance.

In states which follow the theory of contributory negligence, proof of negligence on the student's part is a total defense, precluding any recovery by the student.[187] In states which allow a pure comparative negligence defense, the student's recovery is diminished by the student's percentage of blame.[188] Many states follow a modified version of comparative negligence, where the student-plaintiff can recover diminished damages as long as his negligence is either less than 50% or no more

185. *Ross,* 740 F. Supp. at 1328.

186. Elson, *supra* note 171, at 751.

187. PROSSER & KEETON, *supra* note 64, § 65 at 461.

188. *Id.* § 67 at 471-72.

than 50%.[189] Student negligence found to be above these levels would result in no recovery. Both of these systems provide the student with a cause of action and offer protection to the school as well.

Instead of proving that the integrative process of learning makes it impossible to determine causation, the focus on student participation affords the university a strong defense without denying the student a cause of action. The student-athlete who has no intention of studying and putting forth the effort to learn will be denied recovery, and will be dissuaded from attempting the lawsuit by counsel that objectively evaluates the case. Thus, a flood of litigation will be avoided, and those students with justifiable arguments will not lose an opportunity to gain a remedy.

VII. THE UTILITY OF EDUCATIONAL MALPRACTICE LAWSUITS ON THE NCAA: THE CASE STUDY OF THE BRADLEY BILL

Above all, the NCAA wishes to avoid any outside regulation of its control of college athletics.[190] The effect that outside governmental influence can have on the NCAA policy and rule making functions has been demonstrated recently during the consideration and passage of legislation titled "The Student Athlete Right to Know Act" in the United States Congress (The "Bradley Bill").[191] This legislation, sponsored by Senator Bill Bradley, a former National Basketball Association player and college athlete, and Representative Tom McMillan, another former college and professional basketball player, requires that athletic recruiters from universities that receive federal funds present the school's graduation statistics to potential recruits as a necessary part of the recruiting process.[192] The legislation was motivated by the Senate's belief that the NCAA was neglecting academic values,[193] and it includes in its introductory language "the academic performance of student athletes, especially student athletes receiving football and basketball scholarships, has been a source of great concern in recent years."[194]

The Bradley Bill requires that graduation statistics of each school's athletic team members who received athletic scholarships must be broken down by categories of sport, race and gender.[195] Graduation rates for the university as a whole must be presented as well, broken down by

189. *Id.* at 473.
190. *See infra* notes 199-203 and accompanying text.
191. Pub. L. No. 101-542 (Nov. 8, 1990).
192. *Id.* at § 104(e)(1)(F)(2).
193. *See* Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 267 (1990).
194. Pub. L. No. 101-542 § 102(4).
195. *Id.* at § 104(e)(1)(A).

race and gender.[196] The legislation requires other forms of graduation information concerning athletes who received scholarships, such as graduation rates over the past four years and degrees attained.[197] This information must be reported to the United States Department of Education, and shown to all student-athletes recruited by the school, as well as their parents and school guidance counselors.[198]

Manifesting a desire to avoid governmental regulation, the NCAA responded to the Bradley Bill while it was still under consideration by the Senate.[199] At its 84th annual convention, held in January, 1990, the NCAA passed its own version of the Bradley Bill, requiring member schools to reveal graduation rates to recruits.[200] The NCAA had been collecting such information for years, but had never passed a rule to make it public.[201] Commenting on the proposed rule as he introduced it to the NCAA convention, Texas Christian University Chancellor William Tucker stated "[l]et me put the matter in academic terminology. We either take this action for ourselves or we shall have it done for us. And if it is done for us, so to say, it will be done to us."[202] Many other conventioneers echoed this desire to avoid governmental intrusion into NCAA affairs.[203]

The NCAA reaction to the Bradley Bill reveals a number of important points. One is that as a political organization, the NCAA can be motivated to make meaningful reforms through external pressure. Another is that the NCAA collects data and has reform ideas that are stifled from within its ranks. Finally, the NCAA only acted when it was certain that the Student Right to Know Act would pass, and then attempted to have the legislation withdrawn.[204]

The Bradley Bill may not have a strong effect on high school ath-

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196. *Id.* at § 104(e)(1)(D).

197. *Id.* at § 104(e)(1)(E).

198. *Id.* at § 104(e)(1)(F)(2).

199. *See* Smith, *supra* note 193, at 267.

200. Rabun, *NCAA Agrees to Make Graduation Data Public,* United Press International, Jan. 9, 1990.

201. *Id.*

202. *Id.*

203. "It's the worst thing that can happen," said the Rev. Theodore M. Hesburgh, former president of Notre Dame. Sherman, *NCAA Feeling the Pressure From Congress,* Chicago Tribune, Jan. 7, 1990, at 1, Zone C. "It's better for us to be regulated by ourselves than to be regulated by something we have no control over," said University of Colorado President Gordon Gee. *id.* One opposite view was stated by Big Ten Conference Commissioner Jim Delany, who said, "I can't say I'm enthusiastic about government getting involved, because I'm not . . . [but] [i]f it takes external pressure to get our house in order, then that's fine by me." *id.*

204. *See* Smith, *supra* note 193, at 267 n.268.

letes with dreams of becoming professionals and might not have influenced Kevin Ross' college experience. A tort lawsuit, with the opportunity it would provide to thoroughly expose the treatment of a college athlete, and assess damages, would be a much more effective response to athletic program abuses. However, the Bradley Bill is an example of external pressure being brought on the NCAA to reform college athletics. Like the Bradley Bill, allowing Ross' lawsuit to go to trial would have subjected the NCAA to national attention and possible embarassment that it desperately does not want. The public forum of a lawsuit delving into how a college basketball player was educationally treated by his school could have been the external pressure needed to push through continued reforms at future conventions, including specific guidelines for academic testing of student-athletes, remedial programs for academically weak athletes, regular monitoring of academic progress, counseling and other programs to help assure that a college athlete has an opportunity to achieve an education while he or she is able to take advantage of having an athletic scholarship. The NCAA might even institute a remedy of a continuing scholarship for a student-athlete who could prove academic negligence. If the NCAA responded to the *Ross* suit with such detailed and serious reforms, it could make such suits rare in the future.

VIII. CONCLUSION

In denying a cause of action for educational malpractice, the court in *Ross* lost an opportunity to provide a forum and bring the power of the judicial system to bear on an area of education that urgently needs reform. Although college sports has a regulatory body in the NCAA, its history of protecting athletes rights is woefully inadequate, and even the current reform climate has not addressed a student-athlete's right to be anything but culpable along with the athletic department. Further, as a political organization, the reform efforts within the NCAA could expire at any time, with athletic directors regaining power lost in recent years to university presidents, or university presidents losing the will to reform.

With the growth of cable television and the growing international appeal of American sports,[205] especially football and basketball,[206] there

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205. College football has already gone international, with Boston College playing the Army Academy in the Emerald Isle Classic in Dublin, Ireland, on Nov. 19, 1988. A crowd of 42,525 fans attended. Facts on File World News Digest, Dec. 31, 1988.

206. The National Football League, ("NFL") according to a plan of developing international marketing, has played exhibition games in England, Germany, Montreal and Tokyo for the past few years. These games have been called the "American Bowl." *See NFL's American*

appears to be only increasing interest in expanding the entertainment potential of college sports, which leads to student exploitation. As a business endeavor for the entertainment of the television viewing public, college sports deserves no immunity from liability. The sacrifice of these years of educational potential for student-athletes is not justified, and tort lawsuits could provide the pressure needed to compel meaningful reform, as well as balance the scales of power between the athletes and the institution.

*Edmund J. Sherman**

Bowl Expanded, United Press International, Apr. 10, 1990. *See also Denver, Seattle to Open Bowl Series in Tokyo*, L.A. Times, Apr. 12, 1990, § P, at 10, col. 6. Future sites for these games may include Moscow. *Id.* The NFL also has plans for an international league, the World League of Professional Football, to begin play in 1991. The plans call for franchises in Barcelona, Montreal, Mexico City, London and other international locations as well as American cities. *See Birmingham Gets World League Team*, L.A. Times, Apr. 17, 1990, § P, at 10, col. 3. *See also* Schmidt, *Cheerful Gathering in London*, N.Y. Times, Feb. 18, 1991, § 1, at 39, col. 4. In what one magazine termed "a giant marketing test," the Utah Jazz and the Phoenix Suns of the NBA opened the 1990-91 season with two sold out regular-season games in Japan. The event was planned by the NBA along with its Japanese business partner, C. Itoh and Co., because Japanese fans no longer wanted to watch exhibition games. *See* McCallum, *East Meets West: The NBA Showed How to Export a Product to Japan, Where the Jazz and Suns Split Regular-Season Wins*, SPORTS ILLUSTRATED, Nov. 12, 1990, at 42. While the NCAA at present has no similarly ambitious plans, the potential may develop as the professional leagues prove the economic viability of international play.

* This note is dedicated to my wife, Stacy, who now knows more about college sports than she ever desired.