The Forgotten "Student" in "Student–Athlete": Why a New Cause of Action Is Needed To Remind Universities that Education Comes First

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I. INTRODUCTION

In January 2019, the National Collegiate Athletic Association (NCAA) found the University of Missouri guilty of academic misconduct and imposed severe penalties on its football, baseball, and softball programs.[1] A two-year investigation by the NCAA revealed that a tutor had completed academic coursework for twelve of Missouri's student–athletes, including having completed an entire course for one student.[2] The penalties were harsh; the NCAA banned each program for one year, vacated records from when the twelve athletes participated, reduced scholarship money, restricted recruiting, and imposed fines, among other punishments.[3] After an appeal, the NCAA upheld its sanctions in full.[4] Fans of the Missouri Tigers were outraged by the decision, but not because they doubted that violations had occurred.[5] In fact,

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1. *N.C.A.A. Punishes Missouri Teams for Academic Misconduct*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/2019/01/31/sports/ncaa-missouri-academic-misconduct.html [https://perma.cc/8EQY-65EA].
2. *Id.*
3. *Id.*
4. Kevin Graeler & Eric Blum, *Missouri's NCAA Appeal Denied, Confirming Postseason Ban for Football, Baseball and Softball*, USA TODAY (Nov. 27, 2019, 3:16 PM), https://www.usatoday.com/story/sports/ncaaf/sec/2019/11/26/ncaa-denies-missouri-appeal-postseason-ban-football-baseball/4311250002/ [https://perma.cc/BZ2Q-J29J].
5. *See* Dave Matter, *NCAA Denies Mizzou's Appeal, Upholds Postseason Ban and Other Sanctions*, ST. LOUIS POST-DISPATCH (Nov. 26, 2019, 2:00 PM) https://www.stltoday.com/sports/college/mizzou/ncaa-denies-mizzous-appeal-upholds-postseason-ban-and-other-sanctions/article_10f0a157-a2e3-5c4f-af2c-655cabc4f9f3.html [https://perma.cc/47PV-ENWE].

Missouri officials admitted to the misconduct.[6] Instead, the frustration arose out of the NCAA's inconsistency in dealing with academic fraud, and fans drew a particular line to the University of North Carolina (UNC) scandal just two years prior.[7]

In 2017, the NCAA dove deep into an investigation of UNC athletics that revealed "one of the worst academic fraud schemes in college sports history, involving fake classes that enabled dozens of athletes to gain and maintain their eligibility."[8] In stark contrast to the Missouri case, UNC faced no penalties at all.[9] The NCAA justified its ruling based on the reasoning that the courses subject to the investigation were offered to all students, not just student–athletes, and therefore UNC had broken no NCAA rules.[10]

Subsequently, former UNC student–athletes filed a class-action lawsuit against both the university and the NCAA[11] alleging, among other things, that they were denied an education when they became involved in the academic fraud.[12] Nothing came of the lawsuit as it was dismissed, but the NCAA revealed much about itself when it stated that "it [took] no legal responsibility 'to ensure the academic integrity of the courses offered to student-athletes at its member institutions.'"[13] The public sharply critiqued the NCAA's stance for conflicting with its own oft-quoted "foundational principle" that "student-athletes [are] students first."[14] Evidently, the NCAA's position shows no signs of change; in August 2019, it dropped a proposal for academic fraud reform that would have given it greater reach over academic integrity.[15]

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6. Andy Staples, *Why Missouri Football Got the Punishment that UNC Hoops (and Other Academic Fraud Culprits) Avoided*, SPORTS ILLUSTRATED (Jan. 31, 2019), https://www.si.com/college/2019/02/01/missouri-postseason-ban-academic-fraud-unc-basketball [https://perma.cc/XY3H-EGEH].

7. *Id.*

8. Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html [https://perma.cc/8DJR-5WJR].

9. *Id.*

10. *Id.*

11. McCants v. NCAA, 201 F. Supp. 3d 732, 736 (M.D.N.C. 2016).

12. Sara Ganim, *NCAA: It's Not Our Job To Ensure Educational Quality*, CNN, https://www.cnn.com/2015/04/01/sport/ncaa-response-to-lawsuit/index.html [https://perma.cc/5JQK-LTNR] (Apr. 2, 2015, 12:54 PM).

13. *Id.*

14. Dan Kane, *NCAA Faces Criticism for UNC Decision*, NEWS & OBSERVER (Oct. 14, 2017, 8:11 PM), https://www.newsobserver.com/sports/college/acc/unc/article178784981.html [https://perma.cc/F3BR-9ZFV]; *Frequently Asked Questions About the NCAA*, NCAA, http://www.ncaa.org/about/frequently-asked-questions-about-ncaa [https://perma.cc/U3D7-MQ7K].

15. Dan Kane, *NCAA Drops Proposed Academic Fraud Reform*, NEWS & OBSERVER (Sept. 18, 2019, 3:09 PM) https://www.newsobserver.com/news/local/education/unc-scandal/article233693507.html [https://perma.cc/39AZ-X38W].

Apparently lost in the drama unfolding around these scandals is the "student" in "student–athlete" because students caught up in these scandals now have no available recourse. The NCAA refuses to take responsibility, deferring then and now to the schools. But the very schools that commit academic fraud surely are not the likely entities to resolve it. In fact, many NCAA institutions have been accused of committing some kind of academic fraud[16]—none more egregious than UNC—yet the denial of the student–athletes' education has never been redressed. The students have turned to the courts, but historically the courts have not been a responsive medium.[17]

Cases of educational malpractice and similar claims, like those brought by the former UNC student–athletes, are not new to the legal system. In 1992, former Creighton University basketball player Kevin Ross sued Creighton for educational malpractice after leaving the school with the language skills of a fourth grader and the reading level of a seventh grader.[18] He alleged that the school was only concerned with his ability to play basketball and thus enrolled him in "bonehead" classes, such as ceramics and the theory of basketball, to help him maintain his eligibility.[19] Nevertheless, Ross was only able to achieve a "D" average and sought remedial education after his time at Creighton.[20] For a year, Ross sat in classes among grade-school children, hoping to learn basic skills he was not taught at the university.[21] He eventually suffered a "major depressive episode" in which he threw furniture out of a motel window, frustrated that Creighton had wronged him.[22] Unfortunately for Ross, the court dismissed his case for failure to state a claim, explaining that educational malpractice would not be recognized because of public policy concerns cited in prior court decisions.[23]

Those concerns can be traced back to 1976, when a California appellate court refused to recognize educational malpractice as a cause of action, citing four policy reasons: 1) it is too difficult to establish a standard of care against which to measure a school's administrative and academic processes; 2) there is no certainty that plaintiffs suffer an injury within the meaning of the law; 3) there is a lack of definite causal connection; and 4) recognition would bring

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16. *See, e.g.*, Bradley David Ridpath et al., *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT 75, 78 (2015).

17. *See infra* Part II.B.2.

18. Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992).

19. Ross v. Creighton Univ., 740 F. Supp. 1319, 1322 (N.D. Ill. 1990), *aff'd in part, rev'd in part* 957 F.2d 410.

20. *Id.*

21. *Id.*

22. *Ross*, 957 F.2d at 412.

23. *Id.* at 414–15.

a flood of litigation into an already overburdened court system.[24] Over time, educational malpractice has become universally rejected as a cause of action, with courts citing the same four policy concerns time and time again.[25]

While courts thoroughly analyzed these four well-justified policy concerns in early educational malpractice cases, courts have since blanketly applied this reasoning to all cases asserting an educational malpractice claim. This is problematic because these cases require fact-specific analyses. The policy concerns should not extend to academic fraud cases, such as the UNC case, because these cases involve schools affirmatively interfering in students' education. The school's wrongdoing is not failure to educate a student to a certain level but rather is the denial of the student's opportunity to receive an education.

In these instances, student–athletes, like those at UNC, should not be left without a remedy, and it is time for the courts to adopt a new cause of action: one that renders moot the four policy issues that have caused the death of educational malpractice claims. This Comment proposes a new cause of action called intentional interference with educational benefits and argues that if courts were to consider this claim only where a school takes affirmative actions to impede a student–athlete's education—like the academic fraud at UNC—the policy concerns that have precluded educational malpractice claims will be irrelevant. Part II briefly describes illustrative cases of academic fraud from the NCAA's past, including the scandals at UNC and Missouri, and details the history of educational malpractice. Part III explains how the NCAA, the universities, the legislatures, and the courts have all failed to redress the issue and begins to analyze why judicial recognition of a new, viable cause of action is now necessary. Part IV argues that the relationship between student–athletes and their schools creates a duty for the school not to affirmatively interfere in a student–athlete's educational pursuits, and that recognizing this new cause of action in these specific instances of academic fraud will not bring about the concerns that courts regularly cite. Part V concludes.

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24. Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 859–61 (Ct. App. 1976).

25. *See, e.g.*, *Ross*, 957 F.2d at 414–15; Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979); *see also* George L. Blum, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 11 A.L.R 7th §§ 1–2, 7–8 (2016).

II. BACKGROUND

A. Academic Fraud in the NCAA's Past

Although the UNC case is now infamously associated with collegiate academic fraud, it is not an isolated incident, and the substantial body of academic fraud in the NCAA's history suggests a recurring problem for student–athletes. Dating back to only 1990, the NCAA has investigated over forty instances of academic fraud within Division I[26] athletics.[27] A cursory review of a few recent, notable instances will demonstrate how each academic fraud case is unique in its facts and which facts are most pertinent.

1. Auburn University, 2004–05

The Auburn case centered around a sociology professor who offered over 270 "directed-reading" courses across the 2004–05 academic calendar.[28] Over a quarter of the students in the "directed-reading" courses were student–athletes, and the professor "was carrying the workload of more than three and a half professors" at one point.[29] Eighteen football players were implicated in the scandal, while another professor in the sociology department noted that these classes became a "dumping ground for athletes."[30] The classes required minimal work and were even described as "fake" by a professor.[31] For example, one football player joined a "directed-reading" course nine or ten weeks into a fifteen-week semester, wrote a ten-page paper on one book, and received a "B" grade.[32] The football players averaged a 3.31 GPA in these courses, compared to a 2.14 GPA in the rest of their classes.[33]

The Director for Student Athlete Support Services set up the courses, although he was not responsible for scheduling, which was left to the dean's

26. The NCAA governs three divisions of college sports. Division I, the top division, is where the academic fraud tends to take place because that is where the financial benefits are most prevalent, amplifying the incentive to win at all costs. *Cf.* Ridpath et al., *supra* note 16, at 75–76.

27. *See id.* at 84–85.

28. Pete Thamel, *Top Grades and No Class Time for Auburn Players*, N.Y. TIMES (July 14, 2006), https://www.nytimes.com/2006/07/14/sports/ncaafootball/14auburn.html [https://perma.cc/ST24-XFP3].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

office.[34] Student–athletes had academic counselors within the athletic department who often suggested the "directed-reading" courses to them.[35]

The Auburn case, at its core, was facilitated by a single professor, although clearly the advisors within the athletic department knew that these classes could be utilized to boost student–athlete GPAs at the very least.[36] Nothing reported indicates that the school did anything more than merely suggest these courses. Generally, the student–athletes backed the legitimacy of the classes.[37] In 2008, the NCAA determined that Auburn did not commit academic fraud in allowing its students to take these courses "that required little or no time in the classroom," mostly because only a minority of the students in these classes were student–athletes.[38]

2. University of Michigan, 2004–07

Similarly to Auburn, the Michigan case involved a psychology professor who offered 251 independent study courses over a three-year span.[39] Athletic department counselors steered the student–athletes to this particular professor's courses, where the student–athletes could receive three or four credits for meeting with him for just fifteen minutes every two weeks.[40] The student–athletes averaged a 3.62 GPA in these independent study courses while maintaining a 2.57 GPA in other classes.[41] Advisors often encouraged student–athletes whose GPAs dropped below the required eligibility standard to take this professor's class.[42] Some evidence suggested that the co-directors of the Academic Support Program within the athletic department set up the student–athletes to take those courses.[43]

This was another case with a single professor at the center of the incident, surrounded by athletic department faculty and advisors who directed the student-athletes—and perhaps compelled them—to take the fraudulent courses. Michigan asserted the classes were legitimate, open to all students,

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *N.C.A.A. Clears Auburn*, N.Y. TIMES (Sept. 19, 2008), https://www.nytimes.com/2008/09/20/sports/ncaafootball/20ncaa.html [https://perma.cc/2Y3K-LH4F].
39. Justin Rogers, *University of Michigan Athletes Steered to Professor*, MLIVE (Apr. 4, 2019), https://www.mlive.com/wolverines/academics/stories/2008/03/athletes_steered_to_prof.html [https://perma.cc/CS6R-HEBB].
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

and not created to benefit student–athletes.[44] Accordingly, the NCAA did not punish the university.[45]

3. University of North Carolina, 1993–2011

Over the course of eighteen years, the University of North Carolina turned itself into the poster child for academic fraud within college athletics. The NCAA found that UNC had funneled thousands of students, about half of whom were student–athletes, into fake "paper classes" where they received "artificially high grades."[46] One investigative report estimated that at least 3,100 students took the classes but noted that that number "very likely falls far short of the true number."[47] Some classes never met and required merely one paper to satisfy course requirements.[48] One UNC student even received an "A-" final grade for a 146-word, grammatically poor final "paper."[49] Originally, the fraudulent courses were thought to be the work of a single professor within the African American Studies department, but further investigation revealed that his assistant, several athletic department advisors, and some coaches knew of the classes.[50] One coach even stated that he was told the classes were "part of [a] strategy to keep players eligible."[51]

In this case, the academic fraud was undoubtedly systemic.[52] Although the central focus was one professor and his assistant, the fraud was closely and directly tied to the athletic department, with some reports finding that academic advisors informed the assistant exactly what grades were needed to

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44. *A Look Back at Previous Cases of Academic Fraud*, NEWS & OBSERVER, https://www.newsobserver.com/sports/college/acc/unc/article23102505.html [https://perma.cc/J6PQ-RV93].

45. *Id.*

46. Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud To Keep Athletes Playing*, CNN, https://edition.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/TM57-TW6M] (Oct. 23, 2014, 2:28 AM).

47. *Id.*

48. *North Carolina Escapes NCAA Punishment After Years-Long Academic Scandal*, USA TODAY (Oct. 13, 2017, 11:22 AM), https://www.usatoday.com/story/sports/ncaab/acc/2017/10/13/ncaa-hands-down-no-punishment-north-carolina-academic-scandal/760924001/ [https://perma.cc/8B97-EG8B].

49. Peter Jacobs & Tony Manfred, *The NCAA Will Not Sanction UNC After an Academic Scandal—Here's How a Student-Athlete Got an A-Minus with a One-Paragraph Final Essay*, BUS. INSIDER (Oct. 13, 2017, 9:52 PM), https://www.businessinsider.in/the-ncaa-will-not-sanction-unc-after-an-academic-scandal--heres-how-a-student-athlete-got-an-a-minus-with-a-one-paragraph-final-essay/articleshow/61072382.cms [https://perma.cc/Q7WS-ZFMJ].

50. Ganim & Sayers, *supra* note 46.

51. *Id.*

52. Tracy, *supra* note 8.

maintain eligibility.[53] Furthermore, the advisors forced many of the student–athletes into the courses.[54]

Unlike at Auburn and Michigan, student–athletes at UNC felt so deprived of an education that they sought a legal remedy.[55] The NCAA did not sanction UNC,[56] and the lawsuit was ultimately unsuccessful.[57] This case, however, can help provide the framework for the proposed claim of intentional interference with educational benefits.

4. University of Missouri, 2016

Finally, the Missouri case exemplifies smaller-scale academic fraud that could nonetheless be potentially detrimental to students. In 2016, a former Missouri athletic department tutor admitted to completing the academic coursework of twelve student–athletes, including an entire course for one football player.[58] While she stated to the NCAA that she felt pressure to ensure the athletes stay eligible, the NCAA reported that its investigation did not support a finding that the department directed her to complete the coursework.[59]

Here, depending on which facts are believed, the fraud appears less systemic and more like the acts of a "rogue" tutor.[60] Also notable is that the coursework assigned was legitimate, while the manner in which it was completed was not.[61] The fraud does not appear to be linked to the school outside the athletic department.[62]

In examining the historical background of academic fraud within the NCAA, it is clear that each case is unique, but the investigations shed light

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53. Steve Berkowitz, *North Carolina, NCAA Sued for Academic Scandal*, USA TODAY (Jan. 22, 2015, 9:50 PM), https://www.usatoday.com/story/sports/college/2015/01/22/lawsuit-filed-against-north-carolina-ncaa-on-academic-scandal/22173755/ [https://perma.cc/PQ8S-7Z34].

54. Sara Ganim, *More Lawsuits in UNC Academic Scandal; Whistleblower Settles with University*, CNN, https://www.cnn.com/2015/02/25/us/unc-academic-fraud/index.html [https://perma.cc/TP2L-R8W5] (Feb. 25, 2015, 10:28 AM).

55. *See* McCants v. NCAA, 201 F. Supp. 3d 732, 749–50 (M.D.N.C. 2016).

56. Tracy, *supra* note 8.

57. McCants v. NCAA, 251 F. Supp. 3d 952, 962 (M.D.N.C. 2017); *McCants*, 201 F. Supp. 3d at 749–50.

58. N.Y. TIMES, *supra* note 1.

59. *Id.*

60. Ben Frederickson, *BenFred: Cooperation Doesn't Seem To Matter as Mizzou Gets the Shaft from NCAA*, ST. LOUIS POST-DISPATCH (Feb. 1, 2019), https://www.stltoday.com/sports/columns/ben-frederickson/benfred-cooperation-doesn-t-seem-to-matter-as-mizzou-gets/article_90bb1108-5f04-56a9-a8b4-9ff7dd8a8ef1.html [https://perma.cc/HB2K-V5E2].

61. *See id.*

62. *Id.*

on which facts are generally most important. In each instance, the focus is on whom from the university is involved and how, what actions constituted academic fraud, and who was in control. Lastly, while the focus tends to be on athletics, whether the students were deprived of an education is rarely contemplated. And even if students believe that they were denied an education, the UNC case reveals that they currently have no recourse.[63]

B. A History of Educational Malpractice as a Cause of Action

In the past, students who felt robbed of an education by their schools have pursued an educational malpractice lawsuit, but courts have shut down this cause of action early and often for policy reasons.[64] The result is that the doctrine has never been thoroughly developed in the nearly half-century that courts have seen it. As it appears today, a claim of educational malpractice spells almost certain doom for the plaintiff. A review of the caselaw establishes how this came to be.

1. Defining Educational Malpractice

So far, educational malpractice has been defined as "the failure to adequately educate a student in basic academic skills."[65] It is often analogized to other professional misconduct, such as legal or medical malpractice.[66] Those causes of action are based on the idea that professionals in those fields hold themselves out to society as having knowledge and skill above that of an ordinary citizen.[67] Educators, however, are not viewed as professionals by the majority of courts and are therefore not held to a professional standard in the same manner as lawyers and physicians.[68]

If a claim requires a court to analyze the quality of education received, and in that analysis the court "must consider principles of duty, standards of care, and the reasonableness of the defendant's conduct, then the claim is one of

63. *See* McCants v. NCAA, 201 F. Supp. 3d 732, 748–49 (M.D.N.C. 2016).

64. Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 865–66 (1997).

65. Blum, *supra* note 25, § 1.

66. Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 61 (1992).

67. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 164, 186–87 (5th ed. 1984).

68. Ann H. Rodriguez, *Reviving an Educational Malpractice Argument for Student-Athletes: What Remedy Exists for Student-Athletes Denied an Educational Opportunity?*, 11 WILLAMETTE SPORTS L.J. 65, 81–82 (2014).

educational malpractice."[69] It does not matter whether the claim is repackaged as a breach of contract claim instead of a tort claim.[70] So long as the essence of the complaint is that the school failed to provide an "effective education," it forces the court to enter into an inappropriate review of educational policy and procedure.[71] One commentator has noted that this demonstrates an apparent contradiction by the courts in refusing to hold educators to a professional standard while simultaneously deferring to them as if they are considered professionals.[72]

Plaintiffs bringing a claim for educational malpractice have attempted to establish that academic institutions have a duty to their students to educate them to a "minimum level of competenc[y] in basic subjects."[73] Accordingly, student–athletes suing their NCAA institutions seek to establish that the university failed to meet a legal obligation to impart this minimum level of education.[74] In various suits, the student–athlete plaintiffs have argued that the schools either passively or actively interfered with their ability to progress academically.[75]

Today, educational malpractice is rejected as a matter of course, having become incognizable in most jurisdictions.[76] However, while courts dispose of educational malpractice claims pursuant to stare decisis, original denials were based in public policy.[77] The history of the caselaw reveals that the courts have only lightly scrutinized the applicability of the policy concerns.[78]

2. From the Foundation of Educational Malpractice to Its Modern Convergence with College Athletics

The two seminal cases on educational malpractice are *Peter W. v. San Francisco Unified School District* and *Donohue v. Copiague Union Free School District*. These cases created the groundwork upon which courts have built a universal rejection of educational malpractice. Thus, in the years since, student–athlete plaintiffs have been precluded from bringing successful educational malpractice claims. Eventually, Congress recognized a growing

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69. Blum, *supra* note 25, § 1.
70. *Id.* § 2.
71. *Id.*
72. Rodriguez, *supra* note 68, at 82.
73. Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 746–47 (1981).
74. Davis, *supra* note 66, at 59, 61, 74.
75. *Id.* at 61.
76. *See generally* Blum, *supra* note 25.
77. Emerick, *supra* note 64, at 865–66.
78. *See id.* at 866.

concern for academics among college athletes, but it has only passed limited legislation to resolve the issue at hand.[79]

a. Peter W. v. San Francisco Unified School District

In 1976, a California appellate court held that educational malpractice cannot be recognized as a valid cause of action.[80] An eighteen-year-old high school student brought suit against his school district, alleging educational malpractice after he graduated with the reading level of a fifth-grader.[81] He based his theory on a school's duty to provide adequate instruction to its students in basic academic skills.[82] The court rejected this basis, noting that without a statutorily mandated duty[83] or judicial precedent, whether there is a duty of care is a question of law to be determined in light of policy considerations.[84]

The court, analyzing the specific facts before it, held that the plaintiff could not maintain this tort cause of action based on four policy concerns.[85] First, it would be too difficult to establish a standard of care against which to measure a school's conduct.[86] The court noted that "[t]he science of pedagogy itself is fraught with different and conflicting theories," and far too many factors weigh into a student's progress, many of which are unrelated to the school's actions.[87] Second, there was a lack of certainty that the plaintiff was injured within the meaning of the law of negligence.[88] Third, for the same reasons as the first policy concern, establishing a causal connection would be exceedingly difficult.[89] Fourth, recognizing this cause of action could open the floodgates to unrestrained litigation.[90] Thus, the court found that the plaintiff pleaded no cause of action and accordingly dismissed the case.[91]

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79. *See infra* Part II.B.2.e.
80. Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 862 (Ct. App. 1976).
81. *Id.* at 856.
82. *Id.*
83. The court contemplated a California statute that allowed negligence claims against public schools but noted that the statute still required an underlying "acceptable theory of liability." *Id.* at 857.
84. *Id.* at 859.
85. *Id.* at 859–61.
86. *Id.* at 860–61.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 861, 863.

b. Donohue v. Copiague Union Free School District

Only three years later, the Court of Appeals of New York rejected a similar claim for similar reasons.[92] The plaintiff in *Donohue* alleged that, despite having graduated from high school, he did not possess the basic academic skills to even fill out employment applications.[93] Similarly to *Peter W.*, the court found the state legislature did not "impose a duty flowing directly from a local school district to individual pupils to ensure . . . a minimum level of education."[94] However, unlike the California court, this court recognized that there may be a duty of care and a causal connection but nevertheless held that public policy still compelled rejection of the claim as a cause of action because it is not up to the courts to define the duty of care.[95] Primarily, the court was concerned with the judiciary sitting "in review of the day-to-day implementation of [school] policies."[96] In a subsequent case, the Court of Appeals affirmed its refusal to interfere in academic matters but hinted at the possibility of carving out an exception where courts could intervene in circumstances involving "gross violations of defined public policy."[97]

c. Ross v. Creighton University

Educational malpractice and college sports finally converged in 1992 when the Seventh Circuit dismissed a student–athlete's tort claim against his university.[98] Former Creighton University basketball player Kevin Ross sued his school under tort and contract law, asserting that the university committed educational malpractice by failing to prepare him for employment or "provid[e] him with a meaningful education."[99] Ross had endured a sympathetic four-year spell at Creighton. He complained that the school was only concerned with his eligibility to play basketball and never considered that he was "pitifully unprepared to attend Creighton."[100] The athletic director and coaches circumvented the issue by choosing easy classes for him, such as ceramics and the theory of basketball.[101] Even so, he could only manage a

92. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354–55 (N.Y. 1979).

93. *Id.* at 1353.

94. *Id.*

95. *Id.* at 1353–54.

96. *Id.* at 1354.

97. Hoffman v. Bd. of Educ., 400 N.E.2d 317, 320 (N.Y. 1979).

98. Ross v. Creighton Univ., 957 F.2d 410, 414–15 (7th Cir. 1992).

99. *Id.* at 412.

100. Ross v. Creighton Univ., 740 F. Supp. 1319, 1322 (N.D. Ill. 1990), *aff'd in part, rev'd in part*, 957 F.2d 410. Ross scored a 9 on his ACT, far below the school's then-average of 23.2. *Id.*

101. *Id.*

"D" average and earned just 96 of the 128 credits required to graduate.[102] Many of those credits did not even count toward a university degree.[103] He further asserted that the athletic department assigned a secretary to complete coursework for him but failed to provide him with the sufficient tutoring promised to him.[104]

Ross left Creighton upon the expiration of his NCAA eligibility with the "language skills of a fourth grader and the reading skills of a seventh grader."[105] He subsequently sought a year of remedial education, where he sat in classes alongside grade-school children.[106] Five years after leaving Creighton he suffered a "major depressive episode" in which he barricaded himself in a motel room and threw furniture out the window, apparently out of frustration with the Creighton employees who had wronged him.[107]

Nevertheless, the *Ross* court dismissed the tort suit for failure to state a claim, basing its disposition on the same policy reasons previous courts had cited.[108] In analyzing this educational malpractice claim, however, the Seventh Circuit did not rely on any of the specific facts of the case.[109] Instead, the court rendered judgment in light of nearly every other jurisdiction's refusal to recognize the cause of action based solely on generalized policy concerns.[110]

Similarly, in *Jackson v. Drake*, a student–athlete alleged educational malpractice against his university for scheduling mandatory practices that interfered with his tutoring and study schedule.[111] Relying in part on *Ross*, the Southern District of Iowa dismissed his claim without considering whether the facts before it gave rise to the policy concerns repeatedly cited.[112]

d. McCants v. NCAA

Following the public disclosure of the UNC academic scandal, a North Carolina district court dismissed yet another educational malpractice suit.[113] Former UNC student–athletes Rashanda McCants and Devon Ramsay

102. *Ross*, 957 F.2d at 412.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 414–15.
109. *See id.*
110. *Id.* at 414 (reiterating the policy concerns after noting that "the overwhelming majority of states that have considered [educational malpractice] claim . . . have rejected it").
111. Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991).
112. *Id.* at 1494.
113. McCants v. NCAA, 251 F. Supp. 3d 952, 961 (M.D.N.C. 2017).

brought a class-action lawsuit alleging that both the NCAA and UNC denied "nearly 2000" student–athletes of a "meaningful education."[114] They asserted that the NCAA assumed a fiduciary duty to protect student–athletes and accused the NCAA of breaching that fiduciary duty and an implied covenant of good faith and fair dealing corresponding to that duty.[115] Although the lawsuit was couched as a breach of fiduciary duty, the substance—that UNC student–athletes were denied a meaningful education—indicates that the suit may be fairly categorized as an educational malpractice claim in disguise.[116] The court ultimately found that the NCAA had no duty to the student–athletes,[117] and the claims against UNC were decided not in tort or contract law but on Eleventh Amendment jurisdictional grounds.[118]

e. Student Right-To-Know Act

Away from the educational malpractice context, Congress recognized a growing concern with student–athlete academic performances and took a step to resolve the issue when it enacted the Student Right-To-Know Act in 1990.[119] Seeking to raise awareness, the Act requires all colleges and universities with athletes on scholarship to submit an annual report detailing statistics pertaining to scholarship numbers and graduation rates, among other things, each broken down by race, sex, and sport.[120] Schools offering scholarships to prospective student–athletes must then disclose this data to the student and the student's parents, counselor, and coach.[121]

Congress notably intended the Act to enhance students' decision-making in choosing which college or university to attend.[122] It sought to "protect parents and students from institutions that encourage students to enroll but fail to focus on student retention as a part of providing a quality educational

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114. Complaint at 1, 44, McCants v. NCAA, 201 F. Supp. 3d 732 (M.D.N.C. 2016) (No. 1:15-CV-00176).

115. *McCants*, 201 F. Supp. 3d at 747.

116. *Id.*

117. *Id.* at 749–50.

118. *McCants*, 251 F. Supp. 3d at 958–61 (finding that the University of North Carolina was an arm of the State and holding that it had not waived its Eleventh Amendment immunity). The Eleventh Amendment establishes that federal courts do not have jurisdiction to hear claims by private citizens against the states. *See* U.S. CONST. amend. XI; *see also* Hans v. Louisiana, 134 U.S. 1 (1890).

119. Student Right-To-Know Act, Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. §§ 1001, 1092).

120. 20 U.S.C. § 1092(e)(1).

121. *Id.* § 1092(e)(2).

122. Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 194–95 (2000).

experience."[123] Thus, the Act serves as a prophylactic measure and was not intended to remedy past wrongdoings.

In the time since *Peter W.*, state and federal legislatures have failed to promulgate remedial legislation for student–athletes, and courts have refused to recognize educational malpractice claims on the basis of the same or similar policy considerations that were cited in 1976. It has culminated with plaintiffs like Rashanda McCants and Devon Ramsay being forced to reframe their claims to induce mere consideration by the courts. The upshot is that courts no longer analyze the facts of educational malpractice claims the way the *Peter W.* and *Donohue* courts did. Instead, the entire genre of educational malpractice has become judicial taboo, and courts dismiss these cases on sight.

III. THE NEED FOR JUDICIAL RECOGNITION

The history of academic fraud in the NCAA[124] demonstrates that student–athletes need added protection, but unfortunately, the NCAA, the universities, and the legislatures all fail to offer an adequate remedy. The judiciary, which has so far been unreceptive to educational malpractice, must then provide the solution for these vulnerable plaintiffs by recognizing a new cause of action.

A. Regulatory Bodies—the NCAA

As the governing body of Division I college sports, the NCAA is in a prime position of power to implement remedial measures for wronged student–athletes. However, because it is driven by business incentives and lacks a legal duty extending to student–athletes, it is unlikely to make changes to its current policies. For example, the NCAA already has a provision within its rules that prohibits student–athletes from receiving "impermissible academic assistance."[125] The provision's bite is undermined, however, by a caveat that allows student–athletes to receive any academic assistance that is "generally available to an institution's students."[126] It is this very caveat that guided Auburn, Michigan, and UNC's escapes from NCAA sanctions.[127] The

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123. H.R. REP. NO. 101-518, at 3368 (1990).

124. *See supra* Part II.A.

125. NCAA, 2020-2021 NCAA DIVISION I MANUAL, art. 14.02.10, at 166 (effective Aug. 1, 2020), http://www.ncaapublications.com/productdownloads/D121.pdf [https://perma.cc/4T4R-6SZR].

126. *Id.*

127. *See supra* notes 28, 39, and 46.

NCAA could amend this portion of its rules by removing the "generally available" language, or it could add language that codifies fraudulent classes as an impermissible benefit. The panel that investigated UNC even suggested to the NCAA membership "that if it wished to condemn what happened at North Carolina, it needed to write such rules."[128]

The financial reality of the business, however, incentivizes the NCAA to ensure first and foremost that it produces an attractive product. While it preaches that "student-athletes [are] students first,"[129] its regulatory tendencies—policing amateurism heavily and academics lightly[130]—may suggest otherwise. Because the courts have approved of the NCAA's deference to schools regarding academic integrity,[131] the NCAA is not compelled to take any steps to remedy academic fraud when it would prefer the schools handle it. Amending the rules to define fraudulent classes as an impermissible benefit could help theoretically, but without financial motivation or a legal duty, the NCAA is not the body to redress the issue.

B. Universities

Because the universities receive deference from the NCAA to police academic fraud, the schools could, in theory, be the ones to provide student–athletes with a remedy. However, there is little reason to lean on the morals of a university that itself deprived a student–athlete of an education. The UNC case exemplifies the ineffectiveness of the current system. While it is widely regarded as the biggest academic fraud scandal in NCAA history, the university, playing both the roles of judge and perpetrator, found itself innocent.[132] UNC excused itself by declaring that, while the classes may not have been up to UNC standards, they were not necessarily fraudulent.[133] The NCAA panel that investigated the scandal noted that "[w]hat ultimately matters . . . is what U.N.C. [said] about the courses."[134]

Furthermore, the universities face the same financial incentives that deter the NCAA. Schools may be driven to win at all costs and accordingly prioritize student–athletes' eligibility rather than their academics. To be sure, not all member institutions cut corners to ensure athletic success, but over

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128. Tracy, *supra* note 8.

129. NCAA, *supra* note 14.

130. *See infra* text accompanying notes 168–175.

131. *See, e.g.*, McCants v. NCAA, 201 F. Supp. 3d 732, 749 (M.D.N.C 2016) (finding that the NCAA owes student–athletes no duty to ensure the "academic soundness" of classes at UNC).

132. Tracy, *supra* note 8.

133. *Id.*

134. *Id.*

forty instances of academic fraud between 1990 and 2015[135] is certainly strong evidence that many schools actively respond to these financial incentives.

Finally, perhaps the primary reason the universities cannot currently be trusted to police their individual academic fraud is UNC's own successful defense. Even before UNC, the long list of academic fraud evinced a willingness by schools to risk getting caught, so they may reap the benefits of athletic prowess. Those incentives have not changed, and now schools have a template defense, diminishing the deterrence value of potential NCAA punishment.

C. Federal and State Legislatures

The legislatures, too, have not been effective in facilitating a solution. While Congress recognized a need for some protective laws, the Student Right-To-Know Act is only helpful ex ante. No legislation provides a remedy for students *after* they have been harmed. Furthermore, the federal government may be hesitant to interfere too deeply in educational matters, as education is generally regarded as a province of the states.[136]

State legislatures have been similarly insufficient in providing the needed protection to student–athletes. Exemplified in both *Peter W.* and *Donohue*, state education statutes often impose broad duties on the states' educational bodies, but they do not create a duty so narrow as to run directly from the schools to the students nor do they protect against the risk of traditional educational malpractice.[137] While current state education statutes demonstrate that state legislatures have the power to create such an educational duty, the fact that states have not done so has led plaintiffs to attempt vainly to shoehorn educational malpractice claims into other statutes.[138] The lack of state legislatures codifying educational malpractice

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135. *See* Ridpath et al., *supra* note 16, at 83–85. The authors who produced these numbers also note that their study was limited to only football and men's basketball. *Id.* Furthermore, many cases were not documented in the NCAA database that the authors searched because those cases did not receive an NCAA Enforcement Staff investigation (including the aforementioned Auburn and Michigan cases). *Id.* Thus, it is fair to conclude that there were even more than forty instances of academic fraud in this twenty-five-year period, averaging nearly two instances per year. *Id.*

136. *See, e.g.*, Bishop v. Ind. Tech. Vocational Coll., 742 F. Supp. 524, 525 (N.D. Ind. 1990) (holding that "educational malpractice is a matter of state law").

137. *See supra* notes 83 and 94 and accompanying text.

138. Plaintiffs have brought unsuccessful educational malpractice claims under the guise of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act, among other statutes. *See* Blum, *supra* note 25, §§ 20, 22–23.

despite *Peter W.* and its progeny also leaves little hope for future legislation of the sort.

D. The Courts

Although the courts have so far failed to provide an adequate remedy to student–plaintiffs, they still have the potential to be the most effective source of protection for student–athletes. The courts have long held that educational malpractice will not be recognized as a cause of action because of concerns with 1) establishing a standard of care, 2) recognizing a legal injury, 3) identifying causation, and 4) overburdening the courts.[139] Both the *Peter W.* and *Donohue* courts were concerned that establishing an educational standard of care would be problematic.[140] In both cases, the plaintiff challenged the *quality* of the education.[141] The *Peter W.* court took issue with its ability to set forth a standard of educational quality.[142] In other words, how does a court decide what constitutes a sufficient quality of education? Does the required quality differ for different schools? For different degrees or majors? And how would a court even measure educational quality? These types of questions were impossible for the court to answer.[143] The *Donohue* court later held that while these questions actually may be answerable, courts should not assume the responsibility of evaluating a school's day-to-day educational policies.[144]

Relatedly, the foundational cases were also concerned with whether there was any injury within the meaning of the law. In *Peter W.*, the plaintiff alleged the school failed to educate him.[145] The court found this to be too attenuated to recognize as a legal injury.[146] Subsequently, plaintiffs have sought to circumvent this concern by couching the injury differently,[147] but to no avail.

Prior educational malpractice cases also found difficulty in finding a causal connection between the schools' actions and each plaintiff's injury. This once again stemmed from the issue of alleging quality of education as

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139. *See supra* notes 24 and 25 and accompanying text.

140. Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353–54 (N.Y. 1979); Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 860–61 (Ct. App. 1976).

141. *Donohue*, 391 N.E.2d at 1353–54; *Peter W.*, 131 Cal. Rptr. at 860–61.

142. *Peter W.*, 131 Cal. Rptr. at 860–61.

143. *Id.*

144. *Donohue*, 391 N.E.2d at 1354.

145. *Peter W.*, 131 Cal. Rptr. at 856.

146. *Id.* at 861.

147. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992) (alleging breach of contract); McCants v. NCAA, 201 F. Supp. 3d 732, 747 (M.D.N.C. 2016) (alleging breach of fiduciary duty); *Donohue*, 391 N.E.2d at 1353 (alleging that plaintiff's job prospects were damaged because he could not fill out employment applications).

the basis for the claim. Furthermore, plaintiffs seemed to conflate what they *learned* with the school's ability to *educate*. But "the failure to learn does not bespeak a failure to teach."[148] Courts aptly noted that there is a myriad of factors that can affect what a student learns, and the school's ability to educate is merely one of them.[149] This made it nearly impossible for the courts to find causation.

Finally, the courts were rightly concerned with allowing any student who graduated with an underwhelming education to sue his or her school. Understandably, the courts were worried about overburdening an already busy court system and imposing crushing liability upon universities.[150]

Nevertheless, the courts have the potential to function as a viable medium for student–athletes seeking to regain access to the education they were promised. As mentioned, economic incentives deter the NCAA and its member universities from resolving the issue. Likewise, legislators are influenced by lobbyists and their monetary motivations.[151] But the judiciary provides an arena free of financial bias; the decision-makers are not driven to pursue pecuniary gains.

Furthermore, the courts are impartial within each case. They have no stake in finding universities faultless, while the NCAA may instead prioritize athletics to ensure the best possible product. The courts will have clarity in their focus on the wronged student–athletes, while the NCAA may be concerned with the exterior consequences of penalizing an iconic sporting university like UNC. Similarly, the universities have an abundance of self-regulatory power,[152] and as seen in the UNC case, they can be all too willing to abuse it. The neutrality of the courts makes them a reliable source of protection for the student–athletes.

Finally, the courts offer flexibility in remedy. Courts will be able to analyze the facts of each case and decide upon proper relief. Thus, the courts are best suited to restore student–athletes to the position they were in before they were wrongfully denied the opportunity to receive an education.

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148. Donohue v. Copiague Union Free Sch. Dist., 407 N.Y.S.2d 874, 881 (App. Div. 1978), *aff'd*, *Donohue*, 391 N.E.2d 1352.

149. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 861 (noting that there may be "physical, neurological, emotional, cultural, [or] environmental" factors that affect the pupil outside of the teaching process).

150. *Id.*

151. William M. Howard, Annotation, *Validity, Construction, and Application of State and Municipal Enactments Regulating Lobbying and of Lobbying Contracts*, 35 A.L.R. 6th § 2 (2008) (noting that "'lobbying' refers to addressing or soliciting members of a legislative body" to influence their vote, and that it is "an indispensable element of the legislative process").

152. Tracy, *supra* note 8.

IV. A CLAIM OF INTENTIONAL INTERFERENCE WITH EDUCATIONAL BENEFITS

Because the NCAA, its member universities, the legislatures, and the courts have thus far not provided a solution to wronged students, the students—and student–athletes in particular—lack any current recourse. The judiciary has the potential to provide the ideal solution, but public policy has stayed its hand. If the judiciary recognizes intentional interference with educational benefits and limits the action to instances where a university's affirmative conduct impedes its student–athletes' education, all past policy considerations fall by the wayside. The UNC and Missouri cases can provide illustrative applicability of this new, narrowed cause of action.

A. Intentional Interference with Educational Benefits: Preserving the Educational Rights of Student–Athletes

Despite a current lack of recourse, the unique relationship that student–athletes have with their schools demonstrates the need to protect student–athletes. This relationship imposes a duty upon the universities not to affirmatively interfere in their student–athletes' educational pursuits.

Courts then have the opportunity to enforce this duty and provide a workable solution by analyzing each claim of intentional interference with educational benefits on a case-by-case basis. If a court finds that a school affirmatively interfered with a student–athlete's opportunity to obtain an education—as opposed to merely failing to facilitate it—this new claim should be recognized as a valid cause of action. This is consistent with the notion that "the standard [for malpractice] is one of conduct, rather than consequences."[153]

Furthermore, the first educational malpractice cases rested on valid and interrelated policy concerns that arose out of the facts before those courts. In the years since, those same policy concerns governed judicial dispositions without being scrutinized. The two limiting elements of intentional interference with educational benefits—student–athlete and affirmative conduct—will ameliorate all four of the historical policy concerns.

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153. Stijepko Tokic, *Rethinking Educational Malpractice: Are Educators Rock Stars?*, 2014 BYU EDUC. & L.J 105, 112 (quoting KEETON ET AL., *supra* note 67, at 164–65).

1. The Relationship Between the Student–Athlete and the School Creates a Duty of Care

Both the cause of the rampant academic fraud within the NCAA and the glaring lack of a remedy can be attributed to the relationship between each school and its student–athletes. NCAA student–athletes have a complex relationship with their schools in part because of the business and magnitude of college athletics.[154] The relationship is further complicated by the details of NCAA rules and regulations as well as guidelines set forth by the individual institutions.

The relationship bears legal significance as well because it is vital for successful tort plaintiffs to establish first that the defendant owed them a legal duty,[155] and intentional interference with educational benefits is no different. Whether a school owes its student–athletes a duty, and what the scope of that duty is, stems from the relationship they have. Through a factual analysis of the relationship between NCAA institutions and their student–athletes, it becomes clear that the relationship begets a duty of care.

a. The Significance of the Student–Athlete

The magnitude of college sports as a business significantly alters the relationship between a school and its student–athletes. In 2017, the NCAA eclipsed the one-billion-dollar mark in revenue and turned in $105 million in profits.[156] It derives the majority of its revenue from March Madness—its annual men's basketball tournament—through the massive television contract it has with CBS Corp. and Time Warner Inc.'s Turner Sports.[157] Revenues will only continue to grow due to built-in escalations from the media rights deal.[158] Over half of the NCAA's expenses take the form of payments to member institutions.[159] In short, college sports is a booming business fueled by student–athletes' athletic performances.

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154. *See* Craig D. Alfred, Comment, *The Illusion of Amateurism: A Climate of Tortious Interference in the World of Amateur Sports*, 86 TUL. L. REV. 465, 481 (2011) ("It cannot be seriously maintained that college football is not a business, or that the relationship between a college and a student-athlete is not a business relationship.") (quoting Barile v. Univ. of Va., 441 N.E.2d 608, 615 (Ohio Ct. App. 1981)).

155. *Peter W.*, 131 Cal. Rptr. at 857.

156. Bloomberg, *The NCAA Raked In over $1 Billion Last Year*, FORTUNE (Mar. 7, 2018, 11:57 AM), https://fortune.com/2018/03/07/ncaa-billion-dollars/ [https://perma.cc/5892-6WR2].

157. *Id.* The NCAA signed the tournament's media rights over to CBS and Turner for $761 million. *Id.*

158. *Id.*

159. Steve Berkowitz, *NCAA Reports Revenues of More than $1 Billion in 2017*, USA TODAY (Mar. 7, 2018, 7:53 PM), https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-

Student–athletes also financially benefit their schools indirectly. A 2013 study by Harvard Business School Assistant Professor of Marketing Doug J. Chung found that when a school's athletic performances increase, the school's applications dramatically rise as well.[160] This so-called "Flutie Effect"[161] allows schools to mass market themselves as academic institutions by being great athletic institutions.[162] When Florida Gulf Coast University became the first fifteen seed to reach the NCAA men's basketball tournament's "Sweet Sixteen" round, the university experienced a thirty-five percent increase in applications, while the average freshman's GPA rose from 3.35 to 3.86.[163] In 2018, the University of Maryland, Baltimore County (UMBC), shocked the sports world by becoming the first-ever sixteen seed to defeat a number one seed when it took down the tournament favorite Virginia.[164] In the following months, visitations by potential students at UMBC rose nearly thirty percent, applications and student quality increased substantially, and the school appeared in thousands of news articles around the world.[165] Professor Chung's research concluded that to achieve similar results without the use of its athletic department, a school would have to either decrease tuition by nearly four percent or increase salary payments by about five percent to hire better faculty and improve academic quality.[166]

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reports-revenues-more-than-1-billion-2017/402486002/ [https://perma.cc/7WHY-7GSK]. The NCAA reported payouts of over $560 million to member institutions in fiscal year 2017. *Id.*

160. Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/ [https://perma.cc/2KTT-N7QM].

161. The Flutie Effect is named after Doug Flutie, who threw a miraculous game-winning touchdown pass for Boston College in a 1984 football game against the defending national champion University of Miami. *Id.* In just the two years following, applications to Boston College spiked thirty percent. *Id.*

162. *Id.*

163. Gordie Jones, *UMBC Now Looks To Make Its Shining Moment Last*, FORBES (Apr. 2, 2018, 1:54 AM), https://www.forbes.com/sites/gordiejones/2018/04/02/umbc-now-looks-to-make-its-shining-moment-last [https://perma.cc/6KVY-7EHW].

164. Mike Lopresti, *What Life Has Been Like at UMBC Since That Incredible Upset of No. 1 Virginia*, NCAA (Nov. 2, 2018), https://www.ncaa.com/news/basketball-men/article/2018-11-02/umbc-what-life-has-been-upsetting-virginia-ncaa-tournament [https://perma.cc/X6DZ-5LZQ].

165. *Id.* Additionally, UMBC trended globally on Twitter and was featured in the *Washington Post* and *New York Times* crossword puzzles. *Id.* The team was invited to the governor's mansion, and the coach threw out the first pitch at a Baltimore Orioles baseball game and announced a draft pick for the Baltimore Ravens football team. *Id.*

166. Silverthorne, *supra* note 160.

b. Rules and Regulations Affecting the Relationship

In exchange for everything student–athletes provide for their schools, they receive grants-in-aid, which are more commonly known as athletic scholarships.[167] They may also receive "cost of attendance," which includes funds to help pay additional college costs related to education but not covered by the scholarship.[168] These scholarships and funds create a contractual relationship between the student–athlete and the school in which the student–athlete provides athletic services in exchange for an education.[169] The scholarships can be awarded in up to five-year terms,[170] but many only have a one-year duration.[171]

To remain eligible for their scholarships, student–athletes are required to maintain their amateurism.[172] Amateurism is important to the NCAA and its member institutions because it maintains "a clear line of demarcation between intercollegiate athletics and professional sports."[173] Furthermore, the NCAA requires student–athletes to maintain academic eligibility, but it defers to the institutions for the academic standards to be met.[174] Ultimately, at the core of the amateurism model is the promise made by student–athletes to remain eligible in exchange for the promises made by the school to provide financial aid and an opportunity to play.[175]

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167. *How We Support College Athletes*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/how-we-support-college-athletes [https://perma.cc/J5RL-VBAT].

168. *Id.*; *see also In re* Nat'l Collegiate Athletic Ass'n Litig., 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019). These funds are meant to cover things like computers or lab equipment, for example. *Id.*

169. Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 287 (2016); MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 109 (5th ed. 2020). The contractual relationship is further strengthened in the private school context because the "basic legal relation between a student and a private university or college is contractual in nature." Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972)).

170. NCAA, *supra* note 125, art. 15.02.8, at 210.

171. Next Coll. Student Athlete, *Are Athletic Scholarships Guaranteed for 4 Years?*, SPORTS ENGINE (Aug. 14, 2019), https://www.sportsengine.com/article/are-athletic-scholarships-guaranteed-4-years [https://perma.cc/L93H-4D7C].

172. NCAA, *supra* note 125, art. 2.9, at 3. In short, the NCAA's amateurism model prohibits student–athletes from profiting off their athletic ability before and during their time as an NCAA student–athlete. *See Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism [https://perma.cc/E5T6-VPWK].

173. NCAA, *supra* note 125, art. 1.3.1, at 1.

174. *Division I Progress-Toward-Degree Requirements*, NCAA, http://www.ncaa.org/about/division-i-progress-toward-degree-requirements [https://perma.cc/5RLY-7MP4].

175. Epstein & Anderson, *supra* note 169, at 287.

While the NCAA preaches that amateurism and education are the primary goals of college athletics,[176] it has taken drastically different approaches in regulating the two facets of its product. Traditionally, the NCAA has been quick to police violations of amateurism. In 2010, among other penalties, the NCAA retroactively stripped the University of Southern California of any football wins it achieved while its former running back Reggie Bush was on the team after he was found to have been ineligible.[177] The penalties were considered to be the harshest since the NCAA gave the Southern Methodist University football program the "death penalty" in 1986, shutting it down completely for two years for similar amateurism violations.[178] More recently, the NCAA found James Wiseman, one of the nation's best college basketball players, ineligible because his family was provided with $11,500 to aid his family's move to Memphis.[179] The NCAA suspended Wiseman for twelve games, and he consequentially chose to leave his school and forgo college basketball altogether.[180]

In contrast, the NCAA tends to take a hands-off approach to academic standards. In response to the lawsuits that followed the UNC scandal, the NCAA stated that it had no legal responsibility "to ensure the academic integrity of the courses offered to student-athletes at its member institutions."[181] The NCAA continued, further stating that it "did not assume a duty to ensure the quality of the education of student-athletes," and it "does not have 'direct, day-to-day, operational control' over member institutions like UNC."[182] The deference that the NCAA adamantly gives to its member institutions over academic policies is vital to protect the NCAA in its legal position because "the law does not and has never required the NCAA to ensure that every student-athlete is actually taking full advantage of the

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176. Emerick, *supra* note 64, at 881.

177. Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, N.Y. TIMES (June 10, 2010), https://www.nytimes.com/2010/06/11/sports/ncaafootball/11usc.html [https://perma.cc/H8WJ-7DFV].

178. *Id.* The NCAA clearly does not take amateurism violations lightly. The "death penalty" imposed upon SMU had ripple effects that lasted nearly twenty years, causing the football team not to reach another bowl game until 2009. *Id.*; *SMU Mustangs Football Bowl History*, COLLEGESPORTS-FANS.COM, http://www.collegesports-fans.com/bowls/schools/smu.html [https://perma.cc/LJ4T-BHPU].

179. Jeff Borzello & Myron Medcalf, *NCAA Rules Memphis' James Wiseman Ineligible; Top Prospect Gets Stay To Play Friday*, ESPN (Nov. 8, 2019), https://www.espn.com/mens-college-basketball/story/_/id/28037071/ncaa-rules-memphis-james-wiseman-ineligible-top-prospect-gets-stay-play-friday [https://perma.cc/G72W-JBPL].

180. Myron Medcalf, *James Wiseman Leaves Memphis, To Enter NBA Draft*, ESPN (Dec. 19, 2019), https://www.espn.com/mens-college-basketball/story/_/id/28335497/james-wiseman-leaves-memphis-enter-nba-draft [https://perma.cc/6WDL-QH68].

181. Ganim, *supra* note 12.

182. *Id.*

academic and athletic opportunities provided to them."[183] Thus, within the scope of academics, the relationship between the student–athlete and the school is much stronger than the relationship between the student–athlete and the NCAA.

Furthermore, a university's control over a student–athlete extends beyond merely setting GPA standards and graduation requirements. Many universities have academic support systems in place purportedly to benefit the athletes.[184] However, many advisors assigned to student–athletes work in the athletic department.[185] Because of the tremendous financial benefits surrounding successful college sports, immense pressure to win is placed upon athletic departments and, in turn, those departments' academic advisors.[186] This often leads the advisors to steer or even compel student–athletes to take easy—or in the worst cases, fraudulent—academic courses.[187] For example, UNC was accused of controlling the student–athletes' "academic track[s], with the sole purpose of ensuring that football student–athletes were eligible to participate in athletics, rather than actually educating them."[188]

c. The Legal Significance of the Relationship: Establishing the Duty of Care

The educational control that NCAA institutions have over student–athletes is paramount to a claim of intentional interference with educational benefits because a tort claim by a student–athlete against a university will not be successful without establishing that the relationship gives rise to a duty of care.[189] An established duty of care may then be violated through action or inaction,[190] with bad action often considered misfeasance and inaction often considered nonfeasance.[191] An affirmative duty not to commit nonfeasance, however, only arises if there is a special relationship between the parties.[192]

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183. *Id.* (quoting NCAA chief legal officer Donald Remy). The NCAA also analogized its role to the ABA, noting that the ABA does not get sued every time a lawyer acts inappropriately. *Id.*

184. Emerick, *supra* note 64, at 896.

185. *Id.* at 897.

186. *Id.*

187. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992) (describing how plaintiff Kevin Ross was placed in courses such as marksmanship and the theory of basketball).

188. Sara Ganim, *Former UNC Athlete Sues School over Academic Scandal*, CNN, https://www.cnn.com/2014/11/07/us/unc-academic-scandal/index.html [https://perma.cc/M434-6WAF] (Dec. 10, 2014, 11:52 AM).

189. Davis, *supra* note 66, at 74.

190. *See* RESTATEMENT (SECOND) OF TORTS § 284 (AM. L. INST. 1965).

191. Emerick, *supra* note 64, at 883–84.

192. *Id.* at 886, 898.

Commentators have suggested that such a special relationship exists between student–athletes and their NCAA institutions, which in turn would give rise to an affirmative duty.[193] However, finding a school liable for nonfeasance could require a court to review the school's day-to-day operations, which is an analysis the courts have repeatedly stated they do not wish to undertake.[194]

Alternatively, courts may focus on a school's duty not to commit misfeasance, or in other words, not to create a previously nonexistent risk to the student–athletes. Whether there is a duty not to commit misfeasance is determined by a consideration of a number of factors, including the social utility of the activity compared with the risk, the likelihood of injury, the degree of certainty that the plaintiff suffered injury, the relation between the defendant's conduct and the injury, any moral blame attached to the defendant's conduct, the difficulty of guarding against the injury, and the consequences of placing the burden upon the defendant.[195]

Courts must also consider that the universities owe a duty to student–athletes that they may not owe to other students. Student–athletes can be differentiated from the rest of the student body. First, they provide a great financial benefit to the schools unlike most other students.[196] Furthermore, they are often bound by agreements like the National Letter of Intent[197] and scholarships that come with requirements of their own.[198] Student–athletes are also restricted in their coursework,[199] whether that be through academic requirement by the school or out of necessity to fulfill athletic requirements, while non-athlete students usually have the entire curriculum to choose from. Student–athletes often have their entire schedules—both academic and athletic[200]—created by their athletic

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193. *Id.* at 901–02; *see, e.g.*, Davis, *supra* note 66, at 74.

194. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 414 (7th Cir. 1992); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979). This Comment does not mean to imply that such a special relationship necessarily does not exist, but it posits that the narrower proposed cause of action relies solely on misfeasance claims, as they ameliorate the public policy concerns that courts have cited better than nonfeasance claims.

195. Emerick, *supra* note 64, at 885.

196. *See supra* Part IV.A.1.a.

197. *About the National Letter of Intent*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html [https://perma.cc/5J8L-PEPM].

198. *See Division I Academic Requirements*, NCAA (Sept. 2019), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/DI_ReqsFactSheet.pdf [https://perma.cc/X47B-KY9G].

199. Andrew Rhim, Comment, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L.J. 329, 338 (1996).

200. By controlling a student–athlete's academic and athletic schedule while occupying such a substantial portion of the student's college life, it could be argued that schools effectively control a student–athlete's social schedule to some significant degree as well.

departments, giving them less autonomy over their daily lives than the average student.[201] Additionally, student–athletes are required to maintain their amateurism, which puts further restrictions on them that other students do not face.[202]

The unique relationship between student–athletes and their universities is highlighted by the magnitude of the business they are a part of. Additionally, while student–athletes are tightly monitored to ensure they comply with school and NCAA rules, the importance of athletic success manifests itself in universities' extended efforts to ensure their student–athletes can help them succeed on the field. Too often, this can lead schools to disregard the duty they may owe their student–athletes.

2. Standard of Care, Breach of Duty, and Causation in a Claim of Intentional Interference with Educational Benefits

The relationship that universities have with their student–athletes creates a duty that the schools not affirmatively interfere in student–athletes' education. Nevertheless, student–athletes have not been able to enforce this duty through the judiciary. Courts have long been concerned that it is too difficult to establish a standard of care, a legally recognizable injury, and a causal connection, and feared overburdening the court system.[203] Intentional interference with educational benefits provides manageable legal standards for the courts and thus creates a viable solution for wronged student–athletes.

First, courts have often cited a concern with establishing a standard of care. Under intentional interference with educational benefits, establishing a standard of care is simplified because the claim is limited to student–athletes who were affirmatively impeded in their education. Notably, a duty exists between a school and its student–athletes that may not run to most of the student body.[204] This is based on several factors,[205] including the social utility of promoting college sports, the firm control that schools have over their

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201. Rhim, *supra* note 199, at 338.

202. *See* NCAA, *supra* note 125, at art. 2.9, at 3. One amateurism restriction that the NCAA previously imposed upon student–athletes prohibited them from profiting off their names, images, and likenesses. *Id.* The NCAA recently announced that it will soon no longer prohibit this. Dennis Dodd, *Inside the NCAA's Move To Allow Athletes To Profit from Name, Image and Likeness Rights*, CBS SPORTS (Oct. 29, 2019, 5:45 PM), https://www.cbssports.com/college-football/news/inside-the-ncaas-move-to-allow-athletes-to-profit-from-name-image-and-likeness-rights/ [https://perma.cc/74H9-KB5C]. It remains to be seen exactly how the rule change will affect student–athletes and their relationships with their schools. *Id.*

203. Emerick, *supra* note 64, at 887–88, 898.

204. *Id.* at 888–90.

205. *See supra* text accompanying note 195.

student–athletes, and the direct moral blame that can be placed upon the schools in creating fraudulent classes to ensure athletic success. Furthermore, because the student–athletes are in an inherently vulnerable and subordinate position both as students and athletes,[206] it is difficult to otherwise guard against academic fraud, and it is reasonable to place the burden of owing a duty upon the schools. Finally, many student–athletes sign a National Letter of Intent or otherwise receive athletic scholarships,[207] and this contractual relationship cements that there is a duty running from the university to the student–athlete.

Additionally, under intentional interference with educational benefits, the standard of care is not one measured by test scores or similar metrics. The duty is not to provide a certain *quality* of education, but rather to merely *not interfere* with the student–athlete's opportunity to receive an education. When a school like UNC creates fraudulent classes and mandates that its student–athletes register for those classes, it clearly breaches this duty because it affirmatively interferes with the students' academics. Because there is a duty running from schools to student–athletes, and because courts would no longer be concerned with articulating what constitutes a sufficient quality of education, this is a workable standard of care for the courts. The concerns cited in *Peter W.* and *Donohue* are no longer of issue.

Second, courts have found trouble recognizing a legal injury. In a claim for intentional interference with educational benefits, the injury is easily identifiable. Because the school owes a duty not to impede a student–athlete's education, when it breaches that duty there is legal injury. Again, this is clearly distinguishable from the prior educational malpractice claims because the student–athlete would not be claiming that the school failed to educate her to a certain level but instead that it affirmatively interfered in her pursuit of the education she was owed due to the relationship with the school.

Moreover, the remedy provided for a claim of intentional interference with educational benefits plays a key role in addressing this identified legal injury.[208] One may argue that there is no harm when a student–athlete manages her way through collegiate athletics without taking real classes because from a certain perspective—a rather cynical one—the athlete's life and athletic career become easier when she does not have to worry about fulfilling academic duties. The proposed cause of action addresses this perspective by identifying the legal harm as the denial of the opportunity to receive an education. Thus, the appropriate remedy legally compels a school to offer the student–athlete another chance to receive that education. A

206. Emerick, *supra* note 64, at 891.
207. *See supra* notes 197–198 and accompanying text.
208. *See infra* Part IV.B.

student who shares the perspective of the cynic will not bring suit under this cause. The schools have only harmed those students who truly cared to be educated but were denied that opportunity.

Third, courts have found any causal connection between the school's action and the student–athlete's injury to be too attenuated or speculative to recognize.[209] In contrast, claims of intentional interference with educational benefits would ease the burden on the courts because, unlike the prior educational malpractice claims, the quality of education that a student receives is simply not the test. Instead, the question becomes whether the school affirmatively interfered with the student's pursuit of an education. No longer does it matter what the students learned, whether they can fill out employment applications, or how their future job prospects have been affected, because plaintiffs will only have to prove that the school actively interfered in their academics. The focus shifts from the student's learning ability to the school's actions. The external factors that could affect a student's learning would no longer be consequential to the claim, and there would be no concern in finding causation.

Fourth, courts have expressed a concern that recognizing claims by students against their schools may open the litigious floodgates.[210] However, recognizing intentional interference with educational benefits will not bring about this same concern. Simply, the two limiting elements of the new claim—that the plaintiff is a student–athlete and that the school took affirmative steps that interfered in the student–athlete's education—will limit the number of legitimate claims and prevent the floodgates from opening.

The proposed cause of action thus renders the previously cited policy concerns irrelevant. With those concerns aside, the courts may now analyze each case based on its specific facts instead of disposing of them for failure to state a claim. This finally grants student–athlete plaintiffs a legitimate opportunity to receive the legal remedy they have long suffered without.

B. Application and Remedies

Juxtaposing the recent UNC and Missouri academic fraud cases demonstrates what may constitute intentional interference with educational benefits and what factors a court should consider in each case-by-case analysis. In each instance, the court's focus should be on who from the university was involved and to what extent, what actions by the school

209. Emerick, *supra* note 64, at 886–90.
210. *Id.* at 887–88.

created the academic fraud, who was in control, and whether the student–athletes had the opportunity to receive an education.

1. University of North Carolina

Because the UNC case is the extreme example of academic fraud within the NCAA, it may best illustrate intentional interference with educational benefits as a cause of action. In the UNC case, various members of the school's faculty and staff were implicated, ranging from professors and their assistants to athletic department academic advisors and coaches.[211] Professors and assistants created fraudulent courses, and advisors forced students into them to help maintain their eligibility.[212] The athletic department and the educational faculty were in control; they worked together to create a strategic system that operated for nearly twenty years.[213] As a result, the students in those classes could not obtain an education because the classes never met, and students were assigned little to no work.[214]

Therefore, a court could recognize a claim of intentional interference with educational benefits for student–athlete plaintiffs. UNC clearly took the requisite affirmative steps to impede students' education when it deliberately created a system to administer and cover up fraudulent courses filled with student–athletes who were forced into them. These classes interfered with each student's education because they did not meet in person and required unreasonably minimal work.

One of the possible challenges that a court would face in recognizing this new claim is drawing the line between when a course is fake or fraudulent and when it is merely easy. However, courts need not create a bright-line rule, and courts could resolve this by analyzing a totality of the circumstances. The question is not, as the *Peter W.* and *Donohue* courts feared answering, a question of whether the class is challenging enough, but rather of whether the class is really a class at all. Here, the facts compel a finding that the courses were substantively fraudulent.[215] A class is merely a class by name if students

211. Ganim & Sayers, *supra* note 46.

212. *Id.*

213. *Id.*

214. *Id.*

215. In an editorial, former North Carolina Supreme Court Justice Bob Orr, while not explicitly answering whether he believes the classes were legitimate, noted that the courses had "no faculty involvement; no class attendance; no compliance with independent study requirements; high grades awarded by a staffer and in some cases forged grade rolls." Bob Orr, *Were UNC's Bogus Classes Merely Easy, or Completely Illegitimate?*, CHARLOTTE OBSERVER (Oct. 5, 2017, 9:33 AM),

never meet and a single-paragraph final paper earns an "A-" grade. Thus, student–athletes who were assigned these fraudulent courses could win a case on a theory of intentional interference with educational benefits.

2. University of Missouri

The Missouri case depicts a milder flavor of academic fraud, demonstrating that recognizing intentional interference with educational benefits will not unduly burden the courts with excessive lawsuits. In this case, an individual tutor, working within the athletic department, completed some coursework for twelve student–athletes, including an entire course for one of them.[216] She claimed she felt pressured into the misconduct by the athletic department, but the veracity of this is contentious.[217] It is clear, however, that no one outside the athletic department was involved.[218] Here, the full extent of the legal injury would vary from student to student, with the worst case being when the student–athlete was denied the chance to take an entire course.

Conversely to the UNC case, a claim for intentional interference with educational benefits by one of the Missouri student–athletes would not be likely to succeed. It is not nearly as clear that the school took affirmative steps to facilitate the fraud, but whether the athletic department compelled the tutor to complete the coursework would be a matter of fact-finding. There may also be a vicarious liability sub-issue, depending on the tutor's role within the department.[219] Nevertheless, the more apparent distinction between the Missouri and UNC cases is the extent to which the fraud interfered with the students' education. At Missouri, the tutor only completed some coursework, and in one instance an entire course. The students were also taking legitimate classes, unlike those offered at UNC. Thus, this likely does not amount to interference with a student's college education, and therefore these students would be unlikely to succeed on a claim of intentional interference with educational benefits. Perhaps the student who had an entire course taken for

https://www.charlotteobserver.com/opinion/editorials/article177045661.html [https://perma.cc/3G63-DGQD].

216. N.Y. TIMES, *supra* note 1.

217. *Id.*

218. *Id.*

219. Vicarious liability is liability for tortious conduct by the actual wrongdoer imputed to another entity, usually based on the relationship between those parties. STUART M. SPEISER ET AL., AM. L. OF TORTS § 4:1 (2020). In most of the academic fraud cases, vicarious liability would not present an issue because the wrongdoers would be employed faculty and staff, which would clearly impute their liability to their employers, the universities. Here, however, whether the tutor's relationship to the school is one that would impute liability could require further analysis.

him would have a stronger foundation upon which to lay a claim, but even then, his remedy would be substantially limited in comparison to the UNC student–athletes.

3. Remedies

In the foundational educational malpractice cases, plaintiffs sought monetary damages,[220] but because the courts disposed of the cases on policy grounds, they had no reason to further analyze whether that remedy was appropriate to seek. When the alleged tort was failure to provide a certain quality of education, a monetary remedy might have seemed appropriate because it would be difficult to compel a school to educate a certain student to a certain level of education. It was much simpler for the plaintiffs to demand money for not having been educated. However, a natural byproduct of this new claim is that, by understanding the misconduct to be affirmative interference in education, it opens the door to an equitable remedy.

Providing an equitable remedy may further two more purposes. First, it maintains notions of amateurism. Monetary remedies in cases like these bear some resemblance to a pay-to-play scheme. The student–athlete takes sham classes, learns little to nothing, keeps his grades up and his eligibility intact, performs on the field, and collects his money afterward via lawsuit. This is not to suggest that a school would invite a lawsuit as a recruiting tactic or something of the sort, but a monetary remedy could certainly give rise to a situation where, by the end of it, a school has essentially paid a student–athlete for his play. Second, an equitable remedy prevents a windfall for those athletes fortunate enough to become professionals. While most student–athletes end their playing days in college, the lucky few who make it to professional leagues would not be denied their remedy simply because they are now professional athletes.[221] If the remedy is monetary, the successful professional athletes would receive a windfall gain as they pursue careers that do not require a college education. But if the remedy is compensational credit hours, it would fairly redress the exact legal injury for both groups of student–athletes.

In the present cases, because UNC took affirmative steps that interfered in the education of its student–athletes, those student–athletes could succeed on a claim of intentional interference with educational benefits, which would

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220. *See* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979); Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Ct. App. 1976).

221. *Cf.* McAdoo v. Univ. of N.C. at Chapel-Hill, 736 S.E.2d 811, 823 (N.C. Ct. App. 2013) (holding that plaintiff's claim against UNC demanding compensation for injury to his future career prospects was now moot because he had become a professional football player).

entitle them to an equitable remedy. The students would be awarded the number of course credits they were denied when they were placed into fraudulent courses. This puts the student–athletes back in the position they would have been but for the academic interference.

On the other hand, the Missouri student–athletes would be unlikely to succeed on a theory of intentional interference with educational benefits. For most of the twelve student–athletes, their alleged injury would be de minimis. As for the student who was deprived of an entire course, if his case were successful, his remedy would be limited to that specific course.

V. CONCLUSION

Since the 1970s, students have been frustrated in their pursuit of a guaranteed education, and while all students find themselves at the mercy of their schools, few feel quite as vulnerable as the student–athletes. They tirelessly commit hours upon hours to their institutions to perform at their best, expecting to receive the education they were promised. "The fact that schools apparently don't guarantee that is the real scandal of our time."[222] When schools deny that compensation, there must be a way to redress the harm.

Unfortunately, educational malpractice has not found its footing in the courts, and it likely never will as courts currently understand it. Because the NCAA and its member institutions perpetuate the issue, they cannot be relied upon to provide a remedy. There is yet to be sufficient legislation on the matter, leaving the courts as the most promising medium for wronged student–athletes.

The courts should now recognize a theory of intentional interference with educational benefits, dictating that when a school affirmatively interferes in a student–athlete's education by forcing him or her into fraudulent classes, the school breaches its duty to the student. The school creates a previously nonexistent risk that should not go unresolved. Furthermore, courts need not fear their previous policy concerns about establishing a standard of care, recognizing legal injury, finding a causal connection, or opening the floodgates of litigation.[223] Intentional interference with educational benefits offers both a workable standard of care and a recognizable legal injury, thus allowing courts to more readily find a causal connection. The requirements that plaintiffs be student–athletes and defendants be schools that

222. Orr, *supra* note 215.
223. *See supra* notes 24–25 and accompanying text.

affirmatively interfered in education will naturally limit the number of new claims and thus will not overburden the courts.

The highlight of intentional interference with educational benefits, however, is that it provides a remedy for a so-far unsolved problem. Student–athletes are promised an education in return for their athletic services, but if they do not receive it, they are simply out of luck. Recognizing intentional interference with educational benefits not only resolves this issue, but it also simultaneously punishes universities who exploit their student–athletes and disincentivizes schools from committing similar acts in the future.

Justice William Douglas once famously wrote that "common sense often makes good law."[224] It seems only a matter of common sense to hold universities responsible for wrongly interfering in their student–athletes' academic pursuits. UNC, however, evaded punishment by openly admitting to its actions, a defense that is both counterintuitive and dangerous to the students. Recognition of a theory of intentional interference with educational benefits will not only preclude universities from justifying fraudulent academics, but it will offer injured student–athletes a long-needed remedy.

224. Peak v. United States, 353 U.S. 43, 46 (1957).