College Athletes: Illness or Injury and the Decision to Return to Play

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College Athletes: Illness or Injury and the Decision to Return to Play

CATHY J. JONES*

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ON March 4, 1990, Hank Gathers, one of the nation's premier college basketball players, collapsed during an intercollegiate conference tournament game.\(^1\) He was pronounced dead two hours later.\(^2\) The cause of death was given as "cardiomyopathy, a heart muscle disorder of unknown cause that damaged both lower heart chambers, or ventricles."\(^3\)

Gathers' fatal collapse was not the first indication of his heart disease. He had fainted during a game on December 9, 1989.\(^4\) Following the earlier collapse, Gathers was admitted to a hospital where he underwent diagnostic testing. He was diagnosed as having exercise-induced ventricular tachycardia.\(^5\) He was placed on 240 milligrams per day of propranolol (also known as inderal), a standard cardiac drug,\(^6\) and on December 21, 1989, was cleared to return to basketball by an internal medicine specialist at the hospital where his condition had been diagnosed.\(^7\)

What transpired after Gathers' December diagnosis and treatment is disputed. Following an autopsy which showed that at the time of his death Gathers had only 26 nanograms\(^8\) of propranolol per milliliter in his blood, the Medical Examiner concluded that the amount was less than a

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3. Id.


5. Altman, *Major Questions*, supra note 1, at B15. Ventricular tachycardia is a "rapid beating of the heart, usually applied to rates over 100 per minute . . . originating in an ectopic [aberrant; out of place] focus in the ventricle." *STEDMAN’S MEDICAL DICTIONARY* 1550 (25th ed. 1990) (ventricular tachycardia); id. at 488 (ectopic).

6. For a technical description of inderal, see *PHYSICIANS’ DESK REFERENCE* 2387-90 (1991) [hereinafter PDR].


therapeutic dose. This conclusion gave rise to the speculation that Gathers had not been taking the medication, or at least had not been taking it in therapeutic amounts, near the time of his death. There is apparently no dispute that the amount of propranolol Gathers was taking had been reduced a number of times from the initial dosage of 240 milligrams per day to 120 milligrams per day and finally to 80 milligrams per day at the time of his death.

There is dispute over whether Gathers, himself, or Paul Westhead, his coach at Loyola Marymount, requested the reduction.

On March 7, 1990, the Los Angeles Times reported that Gathers had failed to keep an appointment for a treadmill stress test the week before he died and that he was suspected of not taking his medication. An unidentified cardiologist quoted by the Los Angeles Times also reported that Gathers had been advised not to play basketball any longer.

A $32.5 million lawsuit filed by Gathers' family against Westhead and 12 other Loyola Marymount University officials and doctors, and a

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9. Altman, *Major Questions*, supra note 1, at B15. Pharmacology experts have challenged this conclusion because propranolol blood levels vary widely and are often inaccurate in persons taking the drug in therapeutic doses. *Id.*

The *Physicians Desk Reference* states:

Propranolol is almost completely absorbed from the gastrointestinal tract, but a portion is immediately bound by the liver. Peak effect occurs in one to one and one-half hours. The biologic half-life is approximately four hours. There is no simple correlation between dose or plasma level and therapeutic effect, and the dose-sensitivity range as observed in clinical practice is wide. The principal reason for this is that sympathetic tone varies widely between individuals. Since there is no reliable test to estimate sympathetic tone or to determine whether total beta blockade has been achieved, proper dosage requires titration.

PDR, *supra* note 6, at 2388.


12. Altman, *Major Questions*, supra note 1, at B15 (indicates dosage may have been reduced at Gathers' request); Altman, *Doctors Negligent*, supra note 4, at 43 (discusses physician correspondence in which a cardiologist states that Westhead had repeatedly urged a reduction in Gathers' medication). Gathers' cardiologist, Dr. Vernon Hattori, wrote in a letter to Gathers' primary physician that he met with Gathers to discuss options in terms of changing to another drug and to tell him that switching medications might keep him out of another game. According to the letter, Gathers is reported to have said that he preferred a lower dose of propranolol. *Id.*


14. *Id.*

15. Altman, *Doctors Negligent*, supra note 4, at 43.
subsequent suit filed on behalf of Gathers' son, Alleged, among other things, that Gathers was not told his heart condition was potentially fatal and that the propranolol was repeatedly decreased at the request of Westhead, who believed the medication was causing Gathers to perform below his potential. Furthermore, the Gathers' family attorney, Dr. Bruce G. Fagel, has asserted that Gathers did not miss a treadmill stress test and that family members had seen him taking his medication.

Hank Gathers represents only one of a number of college athletes who have been injured or have died while engaging in athletic contests while "knowing" of preexisting physical conditions which could lead to serious injury or death.

Tony Penny, a basketball player on an athletic scholarship at Central Connecticut State University, was admitted to the cardiac care unit of New Britain (Connecticut) General Hospital after he experienced chest pains while exercising. Dr. Milton J. Sands, Jr., Director of Cardiology at the hospital, ultimately refused to clear Penny to return to play basketball at Central Connecticut. Two other doctors, one a physician with the Boston Celtics, concurred with Sands' decision. Determined to return to college basketball, Penny found cardiologists who


17. Altman, Doctors Negligent, supra note 4, at 43.

The PDR, supra note 6, at 2389, indicates that "[m]ost adverse effects have been mild and transient and have rarely required the withdrawal of therapy." Among side effects affecting the central nervous system, the PDR lists light-headedness, mental depression manifested by insomnia, lassitude, weakness, and fatigue. Id. The PDR also states that "[t]otal daily doses above 160 mg (when administered as divided doses of greater than 80 mg each) may be associated with an increased incidence of fatigue, lethargy, and vivid dreams." Id. The lawsuit brought on behalf of the family also alleges that the team physician and trainer were negligent in failing to shock Gathers' heart with a defibrillator after he fell unconscious on the court. Altman, Doctors Negligent, supra note 4, at 43.


19. I place the word "knowing" in quotes because I believe that what an athlete (or any competent adult) "knows" and "consents to" in terms of medical treatment is a complex question involving more than our general lay person's interpretation of those words.


21. Id.

22. Id.
cleared him to play.\textsuperscript{23}\ With the approval of the Connecticut Attorney General, he resumed his basketball career at Central Connecticut and sued Sands for $1 million for disrupting his athletic career.\textsuperscript{24}\ After completing his college career, Penny went to England where he joined his brother on a professional basketball team.\textsuperscript{25}\ In February, 1990, Penny died while playing basketball.\textsuperscript{26}\ The Manchester, England, Coroner's Office said Penny's death was due to natural causes; it was not drug related and no inquiry was scheduled to be held.\textsuperscript{27}\ Prior to his death, Penny had dropped his suit against Dr. Sands.\textsuperscript{28}\ 

Marc Buoniconti, the son of a former professional football star, suffered injuries which left him a quadriplegic while making a tackle in a college football game.\textsuperscript{29}\ Buoniconti maintains that he was cleared to play football despite a neck problem, the severity of which was never made clear to him.\textsuperscript{30}\ Buoniconti filed suit against The Citadel, the college for which he played, and against the team doctor.\textsuperscript{31}\ His suit against the college was settled out of court; he lost the suit against the physician.\textsuperscript{32}\ 

Mark Tingstad was luckier than Marc Buoniconti. When Tingstad, a two-time Academic All-American football player at Arizona State University, tackled the opposing quarterback during a game, his body went numb.\textsuperscript{33}\ Tingstad knew he had a preexisting problem with his neck and back.\textsuperscript{34}\ Earlier, two physicians had discovered that he had a congenital defect, a narrowing in his spinal column, and had advised him to leave football.\textsuperscript{35}\ Another physician, an orthopedist and the Director of the Sports Medicine Center at the University of Pennsylvania, while acknowledging that Tingstad could be injured and suffer an episode of transient paralysis, believed that Tingstad could return to football and not suffer permanent injury.\textsuperscript{36}\ Although members of the Arizona State med-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Gerald Eskenazi, \textit{Athletes and Health: Many at Risk}, N.Y. \textit{Times}, Mar. 11, 1990, § 8 (Sports), at 1.
\item \textsuperscript{30} Id. at 1.
\item \textsuperscript{31} Id. at 2.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\end{enumerate}
\end{footnotesize}
ical staff were reported to be reluctant to allow Tingstad to play football, they considered the orthopedist's advice, as well as the wishes of Tingstad and his parents, and allowed him to play. Within hours of his injury, Tingstad recovered. He then gave up football.

In October, 1988, Mark Seay, the leading receiver for the Long Beach State College football team, was visiting his sister's home and was shot by a street gang member. Because of the shooting, he lost a kidney and continues to have a bullet lodged near his heart. Long Beach State subsequently told Seay he would not be permitted to return to the football team because the risk to his remaining kidney was too great. In August, 1989, Seay sued the university. The judge hearing the matter denied Seay's motion for an injunction because there was no "clear proof" that Seay's kidney was functioning properly. In March, 1990, as Seay's case against the university was set to go to jury trial, he and the university entered into a settlement by which Seay would be permitted to play football if he signed a waiver relieving the school of all liability should injury occur to his remaining kidney and if he agreed to wear a flak jacket while playing.

While the catastrophic results experienced or potentially experienced by these five athletes are fortunately not typical of the experiences of most college athletes, the examples share a common theme that is

37. Id.
38. Id.
39. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. The NCAA reports that between 1931 and 1985, there were 79 college student fatalities directly related to football. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SPORTS MEDICINE HANDBOOK 22, Table I (1987) [hereinafter NCAA SPORTS MEDICINE HANDBOOK]. More than half of those fatalities occurred between 1931 and 1959. Id. Six were reported for the decade ending in 1985. Id. Another 73 college student fatalities were indirectly related to football between 1931 and 1985, with 11 of those occurring in the decade ending in 1985. Id. at Table II. Between 1975 and 1985 the incidence of fatalities directly related to college football fluctuated between 0.00 and 2.67 per 100,000 participants. Id. at Table III. Between 1977 and 1985, 14 college football players suffered permanent cervical cord injuries due to football. Id. at Table V. Between 1982 and 1985 there were no college athlete deaths directly related to sports other than football, and 5 college athlete deaths indirectly related to sports other than football (basketball, 2; ice hockey, 1; tennis, 2). Id. at Table VI. No college athlete deaths were reported between 1982 and 1985 for the sports of baseball, gymnastics, lacrosse, soccer, swimming, track, cross country, or wrestling. Id. Three college athletes suffered "catastrophic injuries" between 1982 and 1985 in sports other than football (1 each in gymnastics, lacrosse, and swimming). Id. at Table VII. No catastrophic injuries were reported for those years for the sports of baseball, basketball, ice hockey, soccer, tennis, track,
potentially relevant to every college athlete. All five had been diagnosed as having a preexisting medical condition that could subject them to serious injury or death if they continued to pursue their athletic careers, and all five wanted to continue their careers. All five were ultimately cleared, by physicians and by university officials, to return to play. Two of the five died while engaging in their chosen sports activities (albeit one, Penny, while he was no longer a student); two were paralyzed, one permanently. At least two, Gathers and Penny, had high hopes of lucrative professional careers following their college playing days. All, by standard legal definitions, were adults when they chose to continue playing their sports. Two, Penny and Seay, sued those whom they believed responsible for trying to prevent them from returning to athletics. Two, the representatives of Gathers' family and Buoniconti, sued the universities and team physicians following their catastrophes alleging, among other things, that they should not have been cleared to play.

Shortly before Hank Gathers died, I had completed work on an article in which I examined the doctrine of informed consent to medical treatment, both in its theory and its practice. In that article, I had

cross country, or wrestling. Id. The Chronicle of Higher Education reported that 2 college football players died of heart-related illnesses during the 1989-90 academic year and 2 college players suffered permanent paralysis from football related injuries. Douglas Lederman, Two College Football Players Died of Heart-Related Ailments in 89-90, CHRON. HIGHER EDUC., July 25, 1990, at A27, A29. No college players died during the year as a result of injuries directly related to football. Id. In May, 1991, the Chronicle reported that during the 1990 football season no college player died as a result of injuries directly related to the sport. Douglas Lederman, Athletics Notes: Study Shows No Football-Related Deaths in 1990 Season, CHRON. HIGHER EDUC., May 1, 1991, at A34. Three deaths were indirectly related to football — one each due to heart failure, heat stroke, and sickle-cell anemia. Id. Approximately 12 athletes suffered permanent paralysis from football related injuries in 1990. Id. As of October 15, 1991, two college football players had died during the current season. An autopsy reported that James Glenn, a walk-on kicker at Texas A&M University who died before a practice, had an enlarged heart. Colleges, WASH. POST, Oct. 2, 1991, at F2 (Fanfare). The autopsy also showed that Glenn did not have coronary artery disease. Id. Rodney Stowers, a junior lineman at Mississippi State University, died of a pulmonary hemorrhage and an inability to oxygenate his blood while hospitalized with a broken leg he had suffered in a game the previous day. Mississippi State Player Dies, N.Y. TIMES, Oct. 4, 1991, at B14.

A recent review article reported that 5 out of every 100,000 young athletes may have heart conditions making them vulnerable to sudden death and that 10 percent of those vulnerable — or 1-2 out of every 200,000 athletes — will actually die. Francis M. McCaffrey et al., Sudden Cardiac Death in Young Athletes, 145 AM. J. DISEASES CHILDREN 177, 177 (Feb. 1991).

46. In college athletics, 13% of all injuries are reinjuries. Eskenazi, supra note 29, at 2.
47. Smith, Death of a Dream, supra note 1, at 11-12 (Gathers); Altman, Doctor's Warning, supra note 20, at C3, (Penny).
48. See Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980), for a long list of the instances in which college students are considered to be adults.
concluded that even though the law claims to believe in patient autonomy and self-determination and purports to protect patients' decision-making powers in the context of medical care, neither law nor medicine does so. Rather, once mandating that physicians make certain disclosures to patients, the law then does little or nothing to require or even encourage health care providers to ensure that their patients understand the information disclosed; similarly, the law neither requires nor encourages patients to make decisions concerning their health care. 50 I rejected the reasons given by health care providers in support of their beliefs that patients are unable or unwilling to make such decisions. 51 I argued that the doctrine of informed consent in the context of medical treatment is a goal worth pursuing and I suggested a number of ways in which that goal might be furthered. Specifically, I proposed that health care providers take steps to ensure that their patients understand the information necessary to make decisions and also that patients be encouraged to make and be supported in making those decisions. 52 In addition to suggesting that patients make those decisions, I also proposed that they be held responsible for those decisions, leaving patients the right to sue health care providers for medical malpractice only if the providers were actually negligent in making the required disclosures or in performing the agreed upon diagnostic or therapeutic procedures. 53 I believed my ideas, although certainly subject to debate, were worth trying in the context of competent adult patients seeking medical treatment.

And then Hank Gathers died. I began to wonder if my ideas about the theory and practice of the doctrine of informed consent to medical treatment, which I previously thought applicable to all competent adults, would hold up in the context of college athletics. College athletes, while legally adults, are nevertheless quite young. 54 That youth may contribute not only to an immature ability to make decisions, but also to feelings of immortality and invincibility — that is, even if the athletes' conditions could result in dire consequences to someone else, the athletes believe

50. Id. at 385-86, 391.
51. Id. at 406-27. I addressed four broad arguments generally advanced by health care providers in response to the suggestion that competent adult patients are capable and should be required to make their own health care decisions. Those arguments are that: (1) patients neither understand nor remember what they are told; (2) testing patients' understanding of what they have been told is too resource intensive; (3) patients want physicians to make decisions for them; and (4) physicians can convince almost any patient to do what the physician believes is best for the patient. Id. at 409-25.
52. Id. at 406-27.
53. Id. at 408.
54. Although Hank Gathers was 23 at the time of his death, Rhoden, supra note 1, at D27, many college athletes are between the ages of 18 and 21.
those consequences could not happen to them because they are young and strong.\textsuperscript{55} Furthermore, the reports of pressures imposed on college athletes — to perform and to win — by coaches, other students and teammates, alumni/ae, university officials, and themselves are legion.\textsuperscript{56}

I wondered, therefore, whether my theory now must be revised in the context of college athletes. Maybe athletes, because of their youth, their strength, their (in)ability to resist certain pressures, could not understand the information presented to them and/or could not voluntarily, as that word is to be understood in the informed consent context,\textsuperscript{57} make decisions concerning their own medical care and their athletic careers.

If college athletes cannot make such decisions, however, other questions arise. Who should be delegated the responsibility for making those decisions? And who should bear the responsibility if an athlete who is cleared to return to play is subsequently injured or dies for reasons attributed to the medical condition and the athletic activity? If athletes are not cleared to play, may they sue — the physician, the coach, the university — and if so, what relief would they request and on what theories would their requests be based?

This Article analyzes the question of whether college athletes should be accorded the same rights and responsibilities as other competent adults in making decisions concerning their medical care and their daily activities, and the related issues if the answer to that question is “No.” Part II of the Article discusses briefly the doctrine of informed consent to medical care as it has been developed in the United States. Part III reviews and analyzes the issue of educational institutions’ general responsibility for the welfare of their students, the doctrine traditionally known as \textit{in loco parentis}.

Part IV specifically addresses the issue of whether the same rules of informed consent which typically apply (or, as I argue, should apply) in any medical treatment context should also apply to college athletes. This Part questions whether college athletes should be treated as competent adults or whether the pressures to excel, imposed by self and others, are so great that a student athlete’s decision should not, as a matter of law,

\textsuperscript{55} See \textit{infra} notes 190-200 and accompanying text for a discussion of athletes’ sense of their own invincibility.

\textsuperscript{56} See \textit{infra} notes 187-223 and accompanying text, for a discussion of the pressures imposed upon college athletes.

\textsuperscript{57} See \textit{infra} notes 147-51, 215, 223 and accompanying text, for a discussion of the voluntariness element of consent.
be considered to be knowing and voluntary. It analyzes different types of medical treatment — preparticipation physical examinations, therapeutic procedures, and administration of drugs — and the legal doctrines relating to assumption of the risk and waivers of liability. Part IV also addresses the issue of substitute decisionmaking should college athletes be judged incompetent to make their own medical treatment and return to play decisions. The issues discussed include whether a substitute decisionmaker should be appointed for the athlete, who the decisionmaker should be, and what standard — a subjective, substituted judgement standard or an objective, reasonable person standard — should be used in making decisions for the athlete. Finally, this Part focuses on the potentially conflicting interests of the team physician and addresses the question of what responsibility the substitute decisionmaker must accept if a decision to permit the athlete to return to competition is made and the athlete is subsequently injured.

Part V discusses athletes' potential recourse should they be denied the opportunity to return to play, focusing specifically on constitutional procedural due process claims and on statutory relief pursuant to Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. Part VI concludes the Article with my own proposal advocating that we treat college athletes as we do any other competent adult in terms of medical treatment decisions, but also advocating that we make the decisionmaking context — the world of college athletics — more conducive to informed and voluntary decisionmaking.

60. A few limiting caveats are in order. First, I do not deal in this Article with issues which arise from negligence in diagnosis or treatment. For example, I am willing to assume, for the sake of argument, that an athlete suffering from a heart condition has been properly diagnosed and treated. The issue is, even given that, whether athletes can be appropriately informed about the risks posed by their conditions and by their continued playing, and whether they can make a knowing and voluntary decision to continue to play.

Second, with the exception of a few cases relating to high school students' suits to compel their school districts to allow them to play sports notwithstanding the students' physical disabilities, I intend all of the material in this Article to relate to college athletes, not to high school students or to professional athletes. Most high school students are minors and, even though they are sometimes permitted to make medical treatment decisions, that power usually resides with their parents. See, e.g., ILL. ANN. STAT. ch. 111, para. 4504 (Smith-Hurd 1978 & Supp. 1991) (minor 12 years or older may consent to treatment for venereal disease, drug addiction, alcoholism); 1991 MINN. SESS. LAW SERV. 148 (West) (minor 16 years or older may consent to hospitalization, routine diagnostic evaluation, or short term acute care); N.C. GEN. STAT. § 90-21.5 (1990) (minor may consent to treatment for venereal disease, pregnancy, abuse of controlled substances or alcohol, or emotional disturbance); OR. REV. STAT. § 109.640 (1990) (minor 15 or older may consent to hospital care, medical or surgical diagnosis, or treatment
II. THE LAW OF INFORMED CONSENT

The theory behind the doctrine of informed consent in medical decisionmaking is that competent adults possess rights of individual autonomy and self-determination and, therefore, have the right to make decisions concerning their own health care. Although the right to autonomous decisionmaking is not absolute and may in certain instances be overridden by various state interests, those state interests are generally applied narrowly, leaving the competent adult with much theoretical freedom in making health care decisions.

The legal doctrine of informed consent as it applies to medical decisionmaking includes the standard, by physician); Younts v. St. Francis Hosp. & Sch. of Nursing, Inc., 469 P.2d 330, 338 (Kan. 1970) (17 year old mature enough to understand nature and consequences of proposed medical procedure and to consent knowingly); In re E.G., 549 N.E.2d 322, 327-28 (Ill. 1990) (evidence clear and convincing that minor is mature enough to appreciate consequences of actions and mature enough to exercise judgment of adult); Cardwell v. Bechtol, 724 S.W.2d 739, 749 (Tenn. 1987) (minor aged 17 years, 7 months had capacity to consent to medical treatment). While some of the same issues relevant to college athletes are also relevant to professional athletes, the two are also quite different in many respects.

Finally, in addressing the issue of liability of colleges and universities and their employees, I recognize but do not address the issue that in some jurisdictions the institutions may be immune from suit because of principles of governmental or charitable immunity.

61. This section is a condensed and updated version of portions of an article I wrote previously, entitled Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy, 47 WASH. & LEE L. REV. 379 (1990). This discussion is included herein with the permission of the WASHINGTON & LEE LAW REVIEW.


64. With increasing frequency, the courts are treating the individual's right to make decisions concerning his or her own health care as more important than the interests advanced by the state, even if the individual's decision could result in death. For a more complete discussion of the courts' weighing of these competing interests, see infra notes 251-59 and accompanying text.
sionmaking was first announced in 1957 in dicta by the California District Court of Appeal in *Salgo v. Leland Stanford Jr. University Board of Trustees.* Since 1957, many state courts and a number of state legislatures have addressed the doctrine of informed consent to medical treatment.

Until the development of the informed consent doctrine began, unconsented-to medical procedures were treated as batteries. With the development of the doctrine, the action became one in negligence. Therefore, an action based upon the failure of a physician to secure the informed consent of a patient to medical treatment requires all of the standard elements of a negligence action — duty, breach of duty, cause in fact, legal cause, and actual injury — to be present. Most of the questions raised in informed consent cases relate to the establishment of a duty, cause in fact, or actual injury.

In terms of duty, courts have used one of two theories to impose upon physicians a duty to disclose certain information to patients, including details relating to the patient’s medical condition, the proposed treatment plan, alternatives to the proposed treatment, and the risks and

65. 317 P.2d 170 (Cal. Dist. Ct. App. 1957). *Salgo* was a medical malpractice case in which a verdict for the plaintiff was reversed due to error in the trial court’s jury instruction on the issue of *res ipsa loquitur.* Id. at 172 n.4. The California Court of Appeal also addressed the question of physicians’ duty to make certain disclosures to patients because of the likelihood that the same issue might be raised on retrial. Id. at 181.


69. In explaining the development of the informed consent doctrine, I refer to courts rather than legislatures because most of that development has occurred through the courts.
benefits inherent in the proposed treatment and in the alternatives. In a majority of jurisdictions, a physician's duty to disclose information to a patient is judged by a standard based upon practice within the medical profession — that information which a reasonable medical practitioner would disclose under the same or similar circumstances. The courts in a growing number of jurisdictions, however, have held that the physician's duty to disclose is founded on a patient-based standard. These courts define the physician's duty to disclose to include that information which is material to a patient's decision. A risk is generally defined as material "when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."

Most informed consent cases involve allegations that physicians failed to warn patients of risks associated with proposed therapeutic

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70. Although "informed consent" implies a patient's comprehending the information disclosed and actually engaging in a decisionmaking process, the courts' treatment of the doctrine has addressed almost entirely the physician's duty to disclose as opposed to a concern for the patient's understanding the information or actually making decisions. See, e.g., Canterbury v. Spence, 464 F.2d 772, 780 n.15 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).


73. See, e.g., Canterbury v. Spence, 464 F.2d at 784.

74. Id. at 787 (quoting Jon R. Waltz & Thomas W. Scheuneman, Informed Consent to Therapy, 64 Nw. U. L. Rev. 628, 640 (1970)).
treatments. Under either the physician-based or the patient-based standard of disclosure, before a patient may recover for a physician's failure to warn of a risk, the undisclosed risk must materialize and must cause harm to the patient, thereby satisfying the actual injury requirement of a negligence action. No court has created a cause of action based solely on failure to disclose without a consequent injury connected to the information not disclosed. That is, the patient's rights to autonomy and self-determination, protected in the informed consent context through the physician's duty to disclose the information necessary for the patient to make an informed decision, are not protected separate and apart from the manifestation of the undisclosed risk.

The causal connection between the undisclosed information and the patient's harm exists only where the patient would have opted against the treatment which caused the injury if the disclosure had been made. In almost all jurisdictions, causation is judged by an objective standard: regardless of what the individual patient might have done had the physician disclosed the risk, where the reasonable patient would have opted for treatment even if the risk had been disclosed, causation is not proved and the patient cannot recover against the physician. Courts excuse phy-

76. See, e.g., Canterbury v. Spence, 464 F.2d at 790.
77. See, e.g., id. at 791; Cobbs v. Grant, 502 P.2d 1, 11-12, (Cal. 1972); Wilkinson v. Vesey, 295 A.2d 676, 689-90 (R.I. 1972).

But see Scott v. Bradford, 606 P.2d at 558-59. There, rather than adopting a reasonable patient standard of causation, the court decided that the patient's right of self-determination compels a subjective standard of causation, i.e., if patients testify that they would have declined treatment had a material risk been disclosed, even if the reasonable patient would not have refused the treatment had the disclosure been properly made, then the issues of causation and plaintiffs' credibility must be left to the finder of fact. Id. at 559. Despite the Scott court's recognition of the right of patients to make decisions different from those made by "reasonable" patients under the same or similar circumstances, the court did not go further and find a cause of action based upon failure to disclose alone, absent actual injury caused by the undisclosed risk. Furthermore, like all the other informed consent cases, Scott v. Bradford was a case of physician's failure to disclose rather than a patient's failure to comprehend a potential risk.

For another variation in the causation standard, see Fain v. Smith, 479 So. 2d 1150, 1154-55 (Ala. 1985), where the court held that the causation standard is "objective," but stated that "the objective standard requires consideration by the factfinder of what a reasonable person with all of the characteristics of the plaintiff, including his idiosyncrasies and religious beliefs, would have done under the same circumstances." Id. at 1155 (emphasis added). Two dissenting justices in Fain v. Smith individually interpreted the majority's statement of causation as being subjective, rather than objective. Id. at 1163-64 (Jones, J., dissenting); id. at 1164 (Adams, J., dissenting). In a forceful opinion,
sicians from the duty to disclose where the information would not be material to the patient's decision, where the patient had already discovered the potential hazards of treatment, where the patient was unconscious or in an emergency situation and the harm from a failure to treat would be imminent and would outweigh possible harm due to the treatment, and where disclosure would defeat the therapeutic course of treatment.\textsuperscript{79}

Most of the courts which have addressed the issue of a physician's duty to disclose have stressed that the disclosure should be made in clear and uncomplicated language.\textsuperscript{80} Despite the emphasis on disclosure in language patients can understand, courts have not imposed a duty on physicians to determine that the patient actually comprehends the information disclosed.\textsuperscript{81} As I have argued earlier,\textsuperscript{82} however, I believe that to protect adequately a person's rights of self-determination and autonomy the law should impose a duty upon health care providers, not only to disclose information which patients need in order to make choices about their medical care, but also to attempt to insure that patients understand

\begin{itemize}
\item Justice Jones argued in favor of the court's adopting a "patient's perspective" standard. Justice Jones favored the term "patient's perspective" as opposed to "subjective," because he believed the term "subjective" to be "an editorial comment disfavoring its application" whereas "reference to the 'reasonable person' standard as 'objective' carries its own inference of acceptance." \textit{Id.} at 1157 n.2 (Jones, J., dissenting). Justice Jones explained that his
\end{itemize}

resolve that the "patient's perspective" standard is the proper causation standard . . . is strengthened by the result of the hypothetical "flip-side" [argument] . . . Suppose that, as in the present case, [the patient] underwent a pulmonary arteriogram and his heart was punctured. At trial, however, [the patient] concedes that he gave informed consent to the doctors for the performance of the procedure. But he then argues that the consent was invalid because the "reasonable person" would not have consented. . . .

. . . Logically, if the law allows patients to be unreasonable when they give consent, the law should allow them to be unreasonable when they withhold consent. \textit{Id.} at 1159.

\textit{See also} Leyson v. Steuermann, 705 P.2d 37, 47 n.10 (Haw. 1985) (adopting "a modified objective standard that determines the question [of causation] from the viewpoint of the actual patient acting rationally and reasonably") (emphasis added).


\textit{80.} \textit{See}, e.g., Cobbs v. Grant, 502 P.2d at 11 (The scope of a duty of reasonable disclosure "does not extend to a lengthy polysyllabic discourse on all possible complications."); Natanson v. Kline, 350 P.2d 1093, 1106 (Kan. 1960) (The physician has an obligation "to disclose and explain to the patient in language as simple as necessary the nature of the ailment, the nature of the proposed treatment, the probability of success or of alternatives, and perhaps the risks of unfortunate results and unforeseen conditions within the body.") (emphasis added).

\textit{81.} \textit{But see} IOWA CODE ANN. § 147.137(2) (West 1989) (requiring consent form to state that all questions asked by patient have been answered in "satisfactory" manner); LA. REV. STAT. ANN. § 40:1299.40 A(b) (West 1977) (same); UTAH CODE ANN. § 78-14-5(2)(e) (1989) (same).

\textit{82.} \textit{See} Jones, \textit{supra} note 49.
that information and to encourage and assist them in actually making decisions concerning their own treatment. It is this proposed standard to which I refer throughout the remainder of this Article when I discuss the doctrine of informed consent to medical treatment as it applies to college athletes.

III. COLLEGE AND UNIVERSITY RESPONSIBILITY FOR THE WELL-BEING OF STUDENTS: THE DOCTRINE OF IN LOCO PARENTIS

Until the 1960s, colleges and universities stood in an in loco parentis relationship with their students.83 The theory behind the doctrine was that colleges and universities stood in the place of students' parents and therefore could fashion and enforce the same rules relating to the mental training, moral and physical discipline, and welfare of the pupils . . . which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts [had] no more authority to interfere than they [had] to control the domestic discipline of a father in his family.84

The courts theorized not only that colleges and universities stand in the shoes of students' parents in making and enforcing such rules, but also that this was within parents' expectations when they sent their children to school.85 Prior to the decline in the applicability of the doctrine, the cases raising the issue of the relationship between college and student generally represented challenges by students who had been disciplined for violation of a college rule.86

During the 1960s the relationship of the college or university to its students began to change. The age of the college population as a whole


86. See, e.g., John B. Stetson Univ. v. Hunt, 102 So. 637 (Fla. 1924) (challenge by student suspended for misconduct); North v. Board of Trustees, 27 N.E. 54 (Ill. 1891) (challenge by student seeking reinstatement after dismissal for violating mandatory chapel attendance rule); Gott v. Berea College, 161 S.W. 204 (Ky. 1913) (challenge by restaurant owner to college rule prohibiting students from eating meals off campus); Carr v. St. John's Univ., 231 N.Y.S.2d 403 (1962) (challenge by students dismissed for participating in civil marriage ceremony).
was growing older. Those students whose ages were typical of "traditional" college students, i.e., 18-21, were no longer considered minors by the law in terms of, for example, voting, marrying, executing a will, or serving in the military. The social climate was changing, too. Students were active on college campuses, not only in relation to civil rights or anti-war protests, but also in terms of demanding more personal freedom in their behavior and standard of living on campus. As the Third Circuit Court of Appeals noted:

The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial [sic: parietal] visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties in loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will.

Students still, of course, challenge their dismissal from colleges and universities for violation of rules and regulations. Now, however, when those students argue that the college does not stand in loco parentis to them, the courts agree. Nevertheless, the courts also generally uphold the validity of the colleges' enacting and enforcing such rules, not on an in loco parentis theory, but rather on a theory that colleges and universities have the right to enact and enforce rules to maintain discipline and order on their campuses.
Unlike those students in discipline cases who traditionally argued that colleges and universities did not stand in loco parentis to them and, therefore, had no power to make and enforce rules governing their behavior, students who have been injured on college campuses or by other students or entities associated with colleges have come increasingly to argue that colleges do stand in loco parentis to them and should be held responsible for their injuries. Courts have refused to impose liability on colleges and universities for injuries occurring to students on campus or at college related functions on an in loco parentis theory, however, and instead have looked for some "special relationship" between the college and the student.

The courts have generally held that a special relationship is not created by the fact that the injured student or another student or college employee has violated a college rule resulting in the injury to the plaintiff/student or by the fact that the injury may have occurred in a college owned room or house. While the concept of foreseeability has played a role in the courts' willingness to find a special relationship between the college or university and the student, that willingness is also circumscribed. Courts have not found a "special relationship" whenever any foreseeable injury has occurred, even if it is highly foreseeable, such as students consuming alcohol and then injuring themselves or

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93. See, e.g., Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980) (action by student against college for injuries arising out of car accident following annual sophomore class picnic at which another student (the driver of the car) had become intoxicated in violation of college rule prohibiting possession or consumption of alcohol at college sponsored activities); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981) (action by student against university and dormitory advisers for injuries resulting from speed contest after alcohol consumed on university premises in violation of university rules); University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (en banc) (action by student against university for failing to protect him from injury in using trampoline owned by fraternity and located on property leased from university); Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987) (action by student against college for injuries sustained during recreational baseball practice); Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) (action by student against college for injuries suffered when she was raped on campus); Beach v. University of Utah, 726 P.2d 413 (Utah 1986) (action by student injured on university sponsored field trip when she became intoxicated and fell over a cliff).

94. See, e.g., Baldwin v. Zoradi, 176 Cal. Rptr. at 812; University of Denver v. Whitlock, 744 P.2d at 59. See generally Tia Miyamoto, Liability of Colleges and Universities for Injuries During Extracurricular Activities, 15 J.C. & U.L. 149 (1988), for a review of the theories on which a college or university may be found to have a duty to students injured while they are engaged in extracurricular activities.

95. Bradshaw v. Rawlings, 612 F.2d at 141; Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. 1987); Beach v. University of Utah, 726 P.2d at 419.


others. Rather, they have generally imposed liability only in cases of foreseeable criminal attacks against students.

The burden of the injured student athlete seeking to hold the college or university responsible for an athletic injury relating to a preexisting medical condition for which the athlete had been treated and then permitted to return to play would be to convince the court that the situation is closer to the criminal attack than to the intoxication cases. Colleges would probably argue that an athletic injury or re-injury is relatively common, just as are injuries by students who consume alcohol. The infrequency of severe injury such as death or quadriplegia, however, may move the argument of athletes who suffer those injuries closer to the rare criminal attack scenario.

There is language in a number of cases where no liability has been imposed on the college or university which could support an athlete’s claim for recovery in an injury case. For example, in Baldwin v. Zoradi, the court held that a university was not liable for injuries resulting to a student in a speed contest after students had been drinking alcohol on university premises in violation of university rules. The court said, however, “In reference to the policy of preventing future harm, we do not have here a case where university administrators collaborated with others to encourage students to imbibe with knowledge of their intention to thereupon operate a motor vehicle.”

Similarly, in Campbell v. Board of Directors of Wabash College, the court refused to impose liability on a college for injuries sustained when one student drank alcohol and drove, injuring another in an accident. In reaching its decision, the court said, inter alia:

No evidence suggests that either the College or the Fraternity provided [the student] with alcoholic beverages, that the College or Fraternity knew that [the student] ever drank alcoholic beverages or that he would be drinking on that particular night, or that the College or Fraternity knew that [the student] would drive an automobile after becoming intoxicated.

Finally, in Moore v. Student Affairs Committee of Troy State Univer-

100. Thirteen percent of all college level athletic injuries are reinjuries. Eskenazi, supra note 29, at 2.
102. Id. at 818.
104. Id. at 232.
a case involving the search of a student's room, the court stated that even though the college does not stand in loco parentis to its students, the college does have an "affirmative obligation" to make and enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process.106

Given these cases, an athlete who has been injured, cleared to return to play, and then reinjured may be able to state a cause of action against university officials. In light of Baldwin, the injured student athlete could allege and attempt to prove that university officials (for example, coaches and physicians) "collaborated" to encourage previously injured athletes to return to play with the knowledge that they could be reinjured. Relying on Campbell, the athlete could try to show that college officials provided the athlete with medical care or at least with the opportunity to return to play knowing that the athlete had been injured or had a preexisting medical condition, either of which could result in subsequent serious injury. Finally, the athlete might want to argue that "the environment consistent with the educational process," referred to by the court in Moore includes keeping students safe from serious harm no matter what its source.

There are other instances, however, involving both severe injuries107 and college athletics108 in which the courts have held the students, and not the colleges, responsible for any injuries which occurred or might occur. In Beach v. University of Utah,109 a student sued the university after she became intoxicated and disoriented while on a school field trip. As a result of her intoxication, she fell, suffering injuries which left her a quadriplegic. In finding that the university owed no duty on these facts the court said,

"colleges and universities are educational institutions, not custodial... Their purpose is to educate in a manner which will assist the graduate to perform well in the civic, community, family and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility..."

106. Id. at 729.
109. 726 P.2d 413 (Utah 1986).
for assuring their safety and the safety of others. . . . Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.\textsuperscript{110}

In \textit{University of Denver v. Whitlock},\textsuperscript{111} a student sued the university after he was rendered a quadriplegic from an accident on a trampoline owned by a university fraternity and situated on the lawn of the fraternity house which was leased from the university. In finding no duty on the part of the university, the \textit{Whitlock} court said, "By imposing a duty on the University in this case, the University would be encouraged to exercise more control over private student recreational choices, thereby effectively taking away much of the responsibility recently recognized in students for making their own decisions with respect to private entertainment and personal safety."\textsuperscript{112}

Finally, in \textit{Wright v. Columbia University},\textsuperscript{113} a student sued Columbia University pursuant to Section 504 of the Rehabilitation Act of 1973,\textsuperscript{114} seeking the opportunity to participate in Columbia's intercollegiate football program. Columbia had refused him that opportunity because he had sight in only one eye. Wright offered proof (through an expert) that there was not a substantial risk of injury to his sighted eye because of his participation in football, that he understood and accepted the risks of playing football even though his vision was impaired, and that he and his parents were willing to release Columbia from any potential liability resulting from an injury related to his sight.\textsuperscript{115} Columbia asserted that Wright should not play football because a subsequent injury could leave him sightless and that he should instead concentrate on obtaining an education.\textsuperscript{116} The court ordered Columbia to allow Wright the opportunity to play football.

These three cases, indicating that college students must (or will be permitted to) take responsibility for their own conduct, when contrasted with those imposing liability upon educational institutions or recognizing that a duty to protect students could be imposed on institutions under

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 419 (citations omitted) (footnote omitted).
\item \textsuperscript{111} 744 P.2d 54 (Colo. 1987) (en banc).
\item \textsuperscript{112} \textit{Id.} at 60.
\item \textsuperscript{113} 520 F. Supp. 789 (E.D. Pa. 1981).
\item \textsuperscript{115} Wright v. Columbia Univ., 520 F. Supp. at 791, 793.
\item \textsuperscript{116} \textit{Id.} at 794.
\end{itemize}
certain circumstances relating to foreseeability of harm, raise the issue of whether college athletes should bear responsibility for injuries which occur if they return to play following illness or injury. Linked, of course, to the question of who should bear responsibility for the subsequent injury, is that of who — the student or a surrogate — should hold the ultimate power to decide if the student returns to play. Whether the athlete is capable of making that decision — and consequently whether he or she should be held responsible for it — depends upon whether the athlete can knowingly and voluntarily (a) consent to treatment and return to play and (b) release the college or university and its employees from liability for any subsequent treatment-related or play-related injury. Even if athletes could do so in a vacuum, might the pressures they face, from themselves, their coaches, and their fans, preclude them from doing so in reality? Part IV examines these questions.

IV. COLLEGE ATHLETES AND DECISIONMAKING

A. The Context of the Decision

Decisions concerning the diagnosis and medical treatment of college athletes may arise in at least three specific contexts: preparticipation physical examinations (occurring either before play begins or before a previously injured or ill player is authorized to return to play), therapeutic treatment once a player has become ill or has been injured, and administration of drugs.

1. Diagnosis and Treatment The purpose of the physical examination administered to athletes prior to their initial participation in athletic activities is to determine whether they are fit to withstand the physical challenges of the sport.\footnote{The American Medical Association (AMA) believes that the “[m]edical evaluation goes beyond the health examination, however, to assure each athlete the best possible health guidance. Emphasis is to be placed on individual needs and capabilities with the ultimate goal of furthering the health and development of youth.” COMMITTEE ON THE MEDICAL ASPECTS OF SPORTS, AMERICAN MEDICAL ASSOCIATION, A GUIDE FOR MEDICAL EVALUATION OF CANDIDATES FOR SCHOOL SPORTS 1 (1972) [hereinafter AMA GUIDE]. According to the AMA, the objectives of the preparticipation physical examination should be to:

- Determine the health status of candidates prior to exposure to participation and competition;
- Provide appropriate medical advice to promote optimum health and fitness;
- Counsel the atypical candidate as to the sports or modification of sports which for him/her would provide suitable activity;
- Restrict from participation those whose physical limitations present undue risk.

\textit{Id.} at 3.}
nations states: "Before student-athletes accept the rigors of any organized sport, their health status should be evaluated. Such an examination should determine whether the student-athlete is prepared to engage in a particular sport." The NCAA’s Sports Medicine Handbook describes procedures relating to both medical evaluation of student athletes and maintenance of the athletes’ medical records:

1. A preparticipation medical evaluation should be required upon a student-athlete’s initial entrance into the institution’s intercollegiate athletics program. This initial evaluation should include a review of the student-athlete’s health history and a relevant physical exam.

2. Medical records should be maintained during the student-athlete’s collegiate career and should include:
   a. A record of injuries and illnesses, whether sustained during the competitive season or the off-season;
   b. Referrals for consultation or treatment;
   c. Subsequent care and clearances, and
   d. A completed yearly health status questionnaire.

3. An exit examination or evaluation at the conclusion of the student-athlete’s participation in a particular sport at that institution is also recommended. Providing there is a continuous awareness of the health status of the student-athlete, the traditional annual preparticipation physical examination of all student-athletes is not believed to be necessary.

There is little uniformity in the performance of preparticipation or return to play physicals. While major universities may have full time “sports physicians” on their staffs, many colleges and universities rely on university physicians in general or physicians from the community in which the college is located. Few team physicians are truly “experts” in “sports medicine.” Many are internists or family practitioners. The thoroughness of the physical examination, itself, also varies. The American Medical Association recommends that preparticipation physicals include a urinalysis, hemoglobin test, tuberculin test, and chest x-ray, the latter to detect cardiac problems or pulmonary disease. While certainly an examining physician (or a physician’s assistant) would check a student athlete’s heart beat and blood pressure, and may generally screen the athlete’s vision, hearing, and balance, time and expense make unlikely the performing of more complicated procedures.

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119. Id., Policy No. 2, § 3.
120. For a general discussion of preparticipation physicals and physicians’ duties in administering such examinations, see Joseph H. King, Jr., The Duty and Standard of Care for Team Physicians, 18 Hous. L. Rev. 657, 696-700 (1981).
121. AMA Guide, supra note 117, at 3.
122. For example, "[l]istening to the heart with a stethoscope is not specific enough to pick up
apparently healthy athlete who reports no prior health problems, pre-existing medical conditions, or injuries, such a general preparticipation physical examination would probably be reasonable under the circumstances. If, of course, the athlete does report a preexisting condition or if the general physical uncovers a potential problem, for example, an irregular heartbeat, the physician would be under a duty to advise the athlete of the potential problem, to perform a more complete examination relative to the condition or refer the athlete to an appropriate specialist who could perform such an examination, and to refuse to clear the athlete for play until such an examination had been performed and the athlete informed of the results.\textsuperscript{123}

Examinations following illness or injury tend to raise more complex issues. Because the athlete has been ill or injured, the physician is on notice that a general examination may not be sufficient before clearing the athlete to return to play. If, for example, an athlete has suffered a cervical injury, examination and clearance by an orthopedist and/or a

enlarged hearts — one of the leading causes of sudden death among seemingly healthy young athletes.\textsuperscript{123} Sally Squires, Before They Take the Field, Athletes Must Get Physical, \textit{WASH. POST}, Aug. 15, 1991, at B1, B3. James Glenn, the Texas A&M football player who died in September, 1991, had an enlarged heart. See supra note 45. More sophisticated procedures — exercise stress tests in which the athlete’s heart is monitored with an electrocardiogram, or echocardiography which uses sound waves to picture the beating heart — are necessary to detect enlarged hearts. See Squires, supra. Those tests can cost from a few hundred to one thousand dollars. \textit{Id.}

It is also unlikely that the circumstances surrounding many physical exams lend themselves to the counseling objective proposed by the AMA. See supra note 117. See also Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 420 (E.D. Pa. 1982) (physician performing physical examinations for high school football team sees approximately 100 students in 2 day period “during which he checks heart, lungs, ears, and nose”).

\textsuperscript{123} McCaffrey et al., supra note 45, at 181, believe that, with a physical examination as recommended by the American Academy of Pediatrics coupled with a competent screening which includes a family history, most athletes with significant cardiac disease can and should be identified and referred for accurate diagnosis and management. A family history is especially important for diagnosing a disorder like atherosclerotic coronary artery disease, which is very rare in those under 35 years of age. \textit{Id.} at 179. See also Squires, supra note 122, at B3.

McCaffrey et al., also discuss how difficult it is to make precise diagnostic decisions, even when some symptoms of cardiac disease are present. For example,

Without symptoms or signs suggestive of myocardial involvement, the diagnosis of myocarditis [inflammation of the middle muscular layer of the heart wall] is exceedingly difficult, if not impossible, to make. To restrict participation on the basis of a low-grade fever, or to recommend evaluation of such noncardiac symptoms by a cardiologist, is both impractical and unrealistic. Many athletes “play through” a cold or mild febrile illness, especially if they are highly competitive.

McCaffrey et al., supra note 45, at 181. McCaffrey et al., do recommend that an athlete who does not feel well because of a fever should be restricted, \textit{id.}, although it is hard to imagine a player who would play with a wired jaw or a stress fracture of the foot, see infra note 201 and accompanying text, agreeing to sit out a game because of a fever.
neurologist may be in order. Similarly, if an athlete has been diagnosed as having a cardiac related disorder, examination and clearance by a cardiologist should be required.

Whatever the stage at which the physical is performed, the guiding principle in determining a school's or a physician's liability should be whether the examination and subsequent disclosure of information was reasonable under the circumstances.\footnote{124} Accidents will happen notwithstanding the degree of care used. But if an athlete shows signs of illness or injury, a different type of examination may be mandated than that required for an apparently healthy athlete with no prior history of illness or injury.

In terms of diagnosis and treatment following injury or illness, the university or physician will again be held to a standard of reasonable care under the circumstances, although the physician's specialty will be one of the circumstances which dictates what conduct is reasonable.\footnote{125} What is reasonable in any given situation for a specialist in cardiology, orthopedics, or sports medicine may be different from what would be reasonable for a general internist. Each will be judged by the degree of skill, learning, and expertise of other physicians with the same or similar backgrounds.

Principles relating to disclosure of information — according to the courts the basic element of informed consent\footnote{126} — should be the same for the college athlete as they are for other patients.\footnote{127} In general, the laws of the jurisdiction in which the university is located (and the diagnosis and treatment made) will determine whether the disclosure will be judged by a reasonable physician or a reasonable patient standard and, should failure to disclose result in actual injury, whether causation will be judged by an objective or a subjective standard.\footnote{128} The information

\footnote{124. See infra notes 428, 462 and accompanying text, for further discussion of the standard of care to be applied to physicians in the sports medicine context.}

\footnote{125. See King, supra note 120, at 700, for a discussion of a physician's standard of care in diagnosing and treating athletes' injuries.}

\footnote{126. See supra notes 70-74, 81 and accompanying text, for a discussion of the law's emphasis on disclosure of information in informed consent cases.}

\footnote{127. If athletes are determined to be competent adults and able to make their own treatment decisions, the law of informed consent as it applies to competent adults should apply to athletes as well. If athletes are determined not to be competent adults, the athletes' surrogates are entitled to the same information in making a decision for the athletes which the athletes would be entitled to have if they were held to be competent. See Jones, supra note 49, at 425. For the purposes of this section of the Article, I will assume that athletes will be found to be competent adults and, therefore, the appropriate decisionmakers on issues relating to their health care.}

\footnote{128. See supra Part II of this Article for a discussion of the various standards relating to duty to disclose and causation as applied throughout the United States.}
providers should also make reasonable efforts to ensure that the athlete understands the information concerning condition, proposed treatment, and alternatives.\textsuperscript{129}

Physicians' duties in terms of informed consent issues are the same in relation to the administration of drugs to athletes for therapeutic purposes as they are for any other therapeutic treatment. Drugs also are administered to athletes, however, to enhance their performance and to mask pain. Both raise serious issues in terms of an athlete's consent. In both instances, the administration of drugs can have serious adverse side effects. The disastrous effects of the use of steroids by athletes are well known.\textsuperscript{130} The NCAA prohibits the use of such drugs and declares ineligible athletes who use them.\textsuperscript{131} Congress has now added anabolic steroids to Section III of the Controlled Substances Act,\textsuperscript{132} making distribution of anabolic steroids without a prescription a felony (punish-

\textsuperscript{129} See Jones, supra note 49, at 412-14, 416-19, for suggestions concerning the testing of patients' comprehension of information and ways to improve that comprehension.

\textsuperscript{130} Tommy Chaikin & Rick Telander, The Nightmare of Steroids, SPORTS ILLUSTRATED, Oct. 24, 1988, at 82, 90, 94, 97, 100-02 (discussing acne, hair loss, insomnia, shrunken testicles, increased blood pressure, heart murmur, liver disease, colitis, depression, anxiety, personality change, chest pains, arm numbness, chills, vision problems, lingering headaches, unsteady balance); Michael Ashcraft, Retired Pro Warns Students About Steroids, L.A. TIMES, May 11, 1990, at B6 (discussing cardiomyopathy attributed to athlete's use of steroids); David Behrens, A Workout with Steroids, NEWSDAY, June 30, 1989, Pt. II, at 2 (discussing aggression, depression, liver disease, high blood pressure); Jane E. Brody, Personal Health: Spreading Use of Steroids by Young Athletes Alarms Sports Medicine Specialists, N.Y. TIMES, Feb. 18, 1988, at B8 (citing sexual and reproductive disorders, high cholesterol); Ron Kotulak & Jon Van, College Athletes Still Ignore Steroid Risks, CHI. TRIB., Oct. 29, 1989, § 1, at 7 (citing cardiovascular disease, liver damage, reproductive problems); The Risks of Using Anabolic Steroids, N.Y. TIMES, Feb. 18, 1988, at B8 (citing heart disease, sexual and reproductive disorders, immune deficiencies, liver disorders, fetal growth problems, psychological disturbances including aggression, sexual violence, psychotic episodes, and severe depression); Steroid Use by Teen-Agers Cited, N.Y. TIMES, Sept. 8, 1990, at 42 ("more than 250,000 adolescents, mostly boys, have used steroids to build muscles and enhance athletic performance"; adverse side effects include stunted growth, mood changes, long term dependence on steroids, increased irritability, violent behavior, depression, mania, psychosis, suicide); Karen Klinger, Domestic News, UPI, Feb. 14, 1990, available in, LEXIS, Nexis Library, UPI File (discussing heart attack, stroke, psychiatric problems, withdrawal, liver damage, and sudden death). A recent study reported that 14.7 percent of all male athletes, 30 percent of all football players, and 5.9 percent of all female athletes used anabolic steroids. Douglas Lederman, Athletics Notes: Steroid Use at Colleges Is Said to Exceed Previous Estimates, CHRON. HIGHER EDUC., Dec. 19, 1990, at A28. Because these figures were derived from athletes being asked to report their opponents' use of steroids, the steroid use may be overreported. The study's authors believe, however, that a previous NCAA study reporting that 5 percent of all athletes used steroids probably underreported the actual percentage because that study was based on athletes' self-reporting. \textit{Id.}

\textsuperscript{131} NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1990-91 NCAA MANUAL §§ 18.4.1.5.1-18.4.1.5.2 & 31.2.3.1-31.2.3.5 (1990) [hereinafter 1990-91 NCAA MANUAL].

able by up to five years in prison and a fine of up to $250,000) and possession of steroids a misdemeanor (with initial penalties of up to one year in prison and a fine of up to $5,000). Pain killers also create a serious problem when administered to college athletes. Pain is a highly valuable indicator in diagnosing how serious an injury is, so administration of a pain killer could hinder an accurate diagnosis of an athlete's injury. In addition, if an athlete is administered a pain killer and sent back onto the field or court to resume play, more serious injury could occur. Just as with therapeutic drugs, athletes are entitled to know and comprehend the risks, benefits, and alternatives relative to any performance enhancing or pain killing drug prescribed for them.

2. The Decision to Play

An athlete's decision to return to play following illness or injury is often as important as an athlete's decision to play following an initial screening physical examination or to submit to therapy or to the administration of drugs. If an athlete, who decides to return to play and is subsequently injured in a way related to the preexisting condition, attempts to hold the college or university or its employees responsible for the injury, the institution will probably argue that the

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133. 21 U.S.C.A. §§ 841(b)(1)(D), 844(a) (West Supp. 1991) (distribution and possession). The House of Representatives' version of this legislation would have made it a felony for coaches and trainers to try to persuade athletes to use anabolic steroids. Steroid Bill Approved; NYSP Received Funding, NCAA NEWS, Nov. 5, 1990, at 14.

134. See, e.g., Eeva-Liisa Sainio & Pertt Sainio, Comparison of Effects of Nicotinic Acid or Tryptophan on Tryptophan 2,3-Dioxygenase in Acute & Chronic Studies, 102 TOXICOLOGY & APPLIED PHARMACOLOGY 251, 256 (1990) (nicotinic acid: glucose intolerance, jaundice, hyperuricemia); Jack Z. Yetiv, Clinical Applications of Fish Oils, 260 JAMA 665, 668 (1988) (fish oil: Vitamin A and Vitamin D toxicity, Vitamin E deficiency, enhanced bleeding); Gerald S. Couzens, The Vitamin Trap: Megadosing Dangers, NEWSDAY, June 11, 1988, Pt. II, at 5 (vitamin B-6: nerve damage, liver ailments, limb dysfunction; niacin: itchy skin, irregular heartbeat; vitamin C: kidney stones, gastrointestinal distress; vitamin D: kidney damage, joint tissue damage, weakness; vitamin E: phlebitis, depression, fatigue); Kathi Gannon, The Almighty Garlic: Can it Check Cholesterol, Too?, DRUG Topics, Sept. 4, 1989, at 39 (niacin: flushing, nausea, vomiting, increases in blood glucose and uric acid levels); Larry Husten, How to Lower Your Cholesterol, N.Y. TIMES, Oct. 9, 1988, § 6, Pt. 2, at 33 (niacin: liver and cardiac abnormalities); Jay Siwek, Hazards of Overdosing on Extra Vitamins, WASH. POST, July 10, 1990, at Z21 (vitamin A: liver damage, headaches, dizziness, leg swelling, itchy skin, hair loss, joint pains; vitamin D: elevated calcium level leading to nausea, weakness, and confusion; vitamin E: fatigue, weakness, nausea, headache; vitamin C: kidney stones; vitamin B-6: kidney stones); Richard Woodman, Extra Vitamins Could Be Health Risk Warning, Press Ass'n Newswire, Feb. 7, 1990, available in, LEXIS, Nexis Library, PANNEWS File (vitamin C: kidney stones; vitamin A: liver damage; Vitamin B-6: nerve damage, depression, fatigue).


136. See id; see also JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 8.08, at 995-96 (1979); King, supra note 120, at 699-704.
athlete assumed the risk of returning to play and, in some instances, may assert that the athlete waived any potential liability on the part of the institution. According to general tort law principles, one "who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." In terms of athletics, the risk that may be assumed includes not only that related to medical care, but also that related to the inherent dangers of the activity in which the athlete engages. In order to prevail on a defense of assumption of the risk a defendant must prove that the person alleged to have assumed the risk knew of the existence of the risk and appreciated its unreasonable character, a determination which is made

137. The NCAA takes the position that the athlete and those persons connected with the school's athletic program share the responsibility for the athlete's safety. Participation in sports requires an acceptance of risk of injury.

    Student-athletes, for their part, should comply with and understand the rules and standards that govern their sports. Coaches should acquaint the student-athlete appropriately with risks of injury and with the rules and practices they are employing to minimize the student-athlete's risk of significant injury while pursuing the many benefits of sport. The athletics trainer and team physician are responsible for the prevention of injuries (where possible) and the care of those injuries which do occur. The athletics program via the athletics administrator is responsible for providing the safest possible environment. The student-athlete and the athletics program have a mutual need for an informed awareness of the risks being accepted and for sharing the responsibility for minimizing those risks.

NCAA SPORTS MEDICINE HANDBOOK, supra note 45, at 7.


139. "An inherent risk is one that occurs during the normal play of a game or activity, as a direct result of the rules governing that game or activity." GARY NYGAARD & THOMAS H. BOONE, LAW FOR PHYSICAL EDUCATORS & COACHES 196 (2d ed. 1989).

The issue of assumption of the risk may be clouded in the context in which I consider it because I am willing to assume for purposes of this Article that the medical diagnosis and treatment of the athlete's injury have been performed without negligence. See supra note 60. Notwithstanding that nonnegligent treatment, however, negligence may occur in informing an athlete concerning the risks of returning to play. In other instances, athletes may allege that even if the risks of a return to play were explained to them and even if they did understand those risks, the colleges or universities had an absolute duty to keep the athlete from returning to play. See infra notes 197-200 and accompanying text, for a discussion of athletes' allegations that regardless of their own decisions regarding return to play, their institutions should have refused them that opportunity. For the purposes of this Article, the doctrine of assumption of the risk will be deemed applicable to these "nonnegligent" scenarios, as well as to a traditional negligence context.

based on a subjective standard,\textsuperscript{141} and "\textit{voluntarily accept[ed] the risk.}"\textsuperscript{142}

The doctrine of assumption of the risk is generally cast in one of four ways: express assumption of the risk, in which the plaintiff has expressly consented to relieve the defendant of a duty to exercise care in relation to the plaintiff and expressly agreed to chance injury from a known or possible risk; implied assumption of the risk resulting from plaintiff's action in voluntarily entering into a relationship with defendant, knowing that it involves risk; implied assumption of the risk evidenced by plaintiff's voluntarily encountering a known risk created by defendant's negligence; and "unreasonable" assumption of the risk which occurs when plaintiff does not use the care of a reasonable person under the circumstances in voluntarily encountering a known risk.\textsuperscript{143}

In terms of the knowledge element of assumption of the risk, in order for the defense to be effective the plaintiff must not only \textit{know} that the risk exists but must also \textit{appreciate} its unreasonable character.\textsuperscript{144} Both are generally questions to be determined by the finder of fact.\textsuperscript{145} Defining the "risk" which plaintiff knew and appreciated is a recurring problem in the assumption of risk defense.\textsuperscript{146}

In terms of the voluntariness element, a plaintiff's assumption of the risk is not voluntary if the defendant's tortious conduct has left the plaintiff no reasonable alternative course of conduct to avert harm to self or others or to exercise a right or privilege with which the defendant has no right to interfere.\textsuperscript{147} A plaintiff's protest against a risk and demand for

\begin{itemize}
  \item \textsuperscript{141} \textit{Restatement (Second) of Torts} § 496D cmt. c (1965); \textit{see also} Kirk v. Washington State Univ., 746 P.2d at 288.
  \item \textsuperscript{142} \textit{Restatement (Second) of Torts} § 496E(1) (1965) (emphasis added). \textit{See also} Sharp, supra note 140, at 2.
  \item \textsuperscript{143} \textit{Restatement (Second) of Torts} § 496A cmt. c (1965); \textit{see also} Kirk v. Washington State Univ., 746 P.2d at 288. Although "unreasonable implied assumption of the risk" and contributory negligence are similar in fact, they are different in theory. Assumption of the risk rests upon the voluntary consent of the plaintiff to encounter the risk and chance injury while contributory negligence rests on the plaintiff's failure to exercise reasonable care. The two defenses would intersect if the plaintiff were voluntarily to take an unreasonable risk. The defenses also differ because in an assumption of the risk defense whether the plaintiff knows, understands, and appreciates the risk is judged by a subjective standard while in a contributory negligence defense those factors are judged by an objective, reasonable person standard. \textit{Restatement (Second) of Torts} § 496A cmt. d (1965).
  \item \textsuperscript{144} \textit{Restatement (Second) of Torts} § 496D (1965). The NCAA policy on "Acceptance of Risk" states that "Any informed consent or waiver by student-athletes . . . should be based on an awareness of the risks of participating in intercollegiate sports." \textit{NCAA Sports Medicine Handbook}, supra note 45, Policy No. 1, § 4.
  \item \textsuperscript{145} \textit{Restatement (Second) of Torts} § 496D cmt. e (1965).
  \item \textsuperscript{146} Rutter v. Northeastern Beaver County Sch. Dist., 437 A.2d 1198, 1203 (Pa. 1981).
  \item \textsuperscript{147} \textit{Restatement (Second) of Torts} § 496E(2) (1965).
\end{itemize}
its removal will not necessarily preclude a defense of assumption of the 
risk if after the protest and demand the plaintiff still proceeds to confront 
the risk.\footnote{Id. at cmt. a.} Assumption of the risk may also be considered to be voluntary if a plaintiff is acting under compelling circumstances which have left no reasonable alternative, so long as the circumstances were not created by the tortious conduct of the defendant.\footnote{Id. at cmt. b.} If the tortious conduct of the defendant forces a choice of conduct upon the plaintiff but leaves a reasonable alternative open, an alternative which under the circumstances the plaintiff may reasonably be required to choose, the plaintiff's choice of the risky alternative may be judged to be voluntary.\footnote{Id. at cmt. d.} Factors relevant to determining whether an alternative is reasonable and available include the "importance of the interest, right, or privilege which the plaintiff is seeking to advance or protect, the probability and gravity of each of the alternative risks, [and] the difficulty or inconvenience of one course of conduct" rather than another.\footnote{Id.}

A waiver of liability, which is the equivalent of an express assumption of the risk, is an agreement by which the athlete would relieve the college or university or its employees of liability for injuries or illnesses suffered by the athlete while playing. A waiver represents a conflict between contract law, under which competent parties have the right to make any agreement they choose as long as it is not illegal or does not violate public policy, and tort law, which attempts to hold persons responsible for the injuries they cause.\footnote{GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 397 (1988); HERB APPENZELLER, SPORTS AND LAW: CONTEMPORARY ISSUES, § 2.3(C), at 34-36 (1985). For a discussion of waivers, in the context of high school athletes with preexisting medical conditions such as cardiomyopathy, see Andrew Manno, A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools from Liability for Injuries to Athletes with High Medical Risks, 79 Ky. L.J. 867 (1990-91).} In order to be legally effective, waivers or express assumptions of the risk must not violate public policy or result from fraud, misrepresentation, or duress.\footnote{WONG, supra note 152, at 397; see also Winterstein v. Wilcom, 293 A.2d 821 (Md. Ct. Spec. App. 1972) (detailing the various grounds upon which express assumptions of the risk will be held to be invalid); APPENZELLER, supra note 152, § 2.3(C), at 35.} Waivers of liability must be the product of equal bargaining power between the parties and "the language of the waiver must be clear, detailed, and specific."\footnote{WONG, supra note 152, at 397; APPENZELLER, supra note 152, § 2.3(C), at 35.} Waivers or express assumptions of the risk are valid only in releasing a
defendant from liability for negligence related to the particular conduct in which the defendant engages vis-a-vis the plaintiff; they are not effective in relation to more culpable conduct such as recklessness or intentional torts.\footnote{155}

The elements supporting a waiver of liability are the same as those necessary for assumption of the risk in general: knowledge and appreciation of the risk and voluntary choice to encounter the risk.\footnote{156} Because one entering into a waiver of liability must know of and appreciate the risks involved in the activity undertaken, the waiver represents a "method of alerting participants to the potential of catastrophic injury as well as to the serious risks involved in various physical activities."\footnote{157} Two sports law scholars suggest that waivers should estimate the physio-

\footnote{155. \textit{Wong, supra} note 152, at 397; \textit{see also} \textit{Winterstein v. Wilcom}, 293 A.2d at 824; \textit{Appenzeller, supra} note 152, § 2.3(C), at 35.}

\footnote{156. Assuming that the knowledge and voluntariness elements of a waiver could be met in the case of the college athlete (but \textit{see infra} notes 157-223 and accompanying text for a discussion of the pressures on college athletes which might negate the voluntariness element), arguments could still be raised concerning the overall validity of the waiver. The athlete might argue that the bargaining relationship between the college and the athlete is not equal, although were the college to agree to continue the athlete's scholarship regardless of his or her physical ability to play, the inequality in the relationship would be mitigated. \textit{See infra} note 278 for a discussion of current NCAA policy concerning continuation of athletic scholarships despite player ineligibility due to illness or injury. The law generally prohibits exculpatory agreements relating to transactions involving the public interest. It is not clear, however, that engaging in intercollegiate athletics satisfies the "public interest" elements which would negate a waiver of liability. \textit{See}, e.g., \textit{Winterstein v. Wilcom}, 293 A.2d at 824. \textit{See also} \textit{Tunkl v. Regents of Univ. of Cal.}, 383 P.2d 441, 445-46 (Cal. 1963) (setting forth nine factors, some or all of which define a matter of "public interest" in the context of a waiver of liability). Until recently, \textit{see infra} note 468 and accompanying text, college athletics have not been judged "a business of a type generally thought suitable for public regulation" and college athletics, no matter how interesting to the public at large, is not "a service of great importance to the public, which is often a matter of practical necessity for some members of the public." \textit{Tunkl}, 383 P.2d at 445 (emphasis added). This is true notwithstanding the fact that some athletes will argue athletics is a "practical necessity" if they are to receive a college education. But \textit{see infra} note 416 and accompanying text for a discussion of the graduation rates of college athletes. The college or university does not "hold[] [itself] out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." \textit{Tunkl}, 383 P.2d at 445. Finally, because college sports programs do not seem to meet an "essential" standard, as would services provided by public utilities or common carriers, other factors which could vitiate the waiver of liability will not do so in the college athletics context. For example, even though the college may present the college athlete desiring to return to play with a standard, nonnegotiable waiver form and even though if the athlete returns to play he or she will do so under the control of college employees, the athlete need not accept the college's terms but rather may choose not to play again. \textit{See id.} at 445-46. Athletes may well claim, however, that their scholarships are not the only interest they risk losing if they do not agree to the college's waiver terms. Some may well lose opportunities to engage in professional sports following their college careers. \textit{See infra} notes 273-78 and accompanying text for a discussion of athletes' property interest in future professional careers.}

logical demands of the activity, including a description of cardiorespiratory stress associated with the activity; request medical certification; encourage safe performance; emphasize major standard warnings, major unique inherent risks of the activity, and other common risks of the activity; explain any inherent safety rules or protocol, equipment recommendations and use, and necessary etiquette; solicit and encourage questions; summarize that the athlete knows, understands, and appreciates the risks of the activity; and be signed, dated, and kept on record. The authors give the following as a sample “appropriate” warning:

I understand that the dangers and risks of playing or practicing to play tackle football include, but are not limited to, death, serious neck and spinal injuries which may result in complete or partial paralysis, brain damage, serious injury to virtually all internal organs, serious injury to virtually all bones, joints, ligaments, muscles, tendons, and other aspects of the muscular skeletal system, and serious injury or impairment to other aspects of my body and general health and well-being.

The authors add that such a statement might “become a preamble for all activities, because all activities contain inherent risks.”

This warning is certainly specific and thorough. Whether it is effective in adequately warning the healthy, seemingly invincible young athlete of the dangers associated with athletic activities is another question. The football warning bears a remarkable resemblance to the general “informed consent” warnings required to be signed by patients before surgery. For example, a typical anesthesia consent form requires patients to acknowledge that they are aware of the “more common or unusually serious possible risks which may accompany the anesthesia,” including adverse drug reactions, brain damage, cardiac arrest, nerve injury, disturbance of cardiac rhythm, respiratory problems, injury to teeth or dental work, damage to arteries and veins, sore throat, hoarseness, headache, minor pain and discomfort, and awareness under anesthesia. While clearly disclosing information to athletes and patients, such warnings probably do little to aid their understanding of and appreciation for the risks they are “agreeing” to encounter.

Issues relating to informing adequately a college athlete about medical care and a subsequent return to play following illness or injury should

158. **Nygaard & Boone, supra** note 139, at 208-10.
159. *Id.* at 206.
160. *Id.* (emphasis added).
161. Consent form on file with author.
be no different from the informed consent issues relevant to any competent adult patient agreeing to undergo diagnosis and treatment and then returning to life's activities. That is not to say that there are no problems with transmission and comprehension of the necessary information. The information may be complex; athletes, just as patients, will be of varying degrees of intelligence and they may be overcome by anxiety or feelings of denial that prevent them from "hearing" or remembering the information conveyed.\textsuperscript{162}

Just as with medical patients, however, there are ways to improve the athlete's comprehension of information.\textsuperscript{163} For example, the team physician or athletic representative could provide information in writing as well as orally concerning medical conditions, treatments, risks, and alternatives, as well as information associated with return to play decisions.\textsuperscript{164} Conversations between physicians or school officials and athletes could be tape recorded so the athlete could hear as many times as necessary the information and the warnings. Physicians or college officials could test an athlete's comprehension of the information provided by requiring the athletes to write in their own words what they understand the information conveyed to mean. Athletes could be accompanied during such conferences with physicians or school officials by another adult of their choice who may help them frame questions or later help to refresh their recollections concerning the information provided. Just as with medical patients in general, none of these suggestions is guaranteed to insure that the athlete knows and understands all the information necessary for informed decisionmaking about medical treatment and return to play. In all probability, however, a combination of these techniques will enable the athlete to comprehend the information better than will a general conversation with a physician or school official and an all-purpose, catch-all waiver form.

Equally problematic to the question of whether athletes know and appreciate the information concerning medical treatment and return to play is whether, because of age and pressures from within and without, they can voluntarily choose to accept the risks associated with treatment and play.

\textsuperscript{162} See Jones, \textit{supra} note 49, at 409-12 for a discussion of factors which may inhibit a patient's understanding of information necessary to make an informed decision concerning medical care.

\textsuperscript{163} See \textit{id.} at 412-14, 416-19 for a discussion of suggestions to improve patients' understanding of information necessary for informed decisionmaking.

\textsuperscript{164} Ideally, the team physician or trainer would also advise the athlete on basic health issues such as good nutrition and proper conditioning.
B. The Decisionmaker: Athlete or Surrogate?

1. The Argument for the Athlete as Decisionmaker  Unlike prior times when the doctrine of in loco parentis was one of the principles regulating the college/student relationship, educational institutions and society in general, with the support of the law, regard college-age students as adults with the same rights and responsibilities that attend all adults. College students or college-age students are entitled to vote, marry, enlist in the military, and engage in many other "adult" activities without the consent of a parent or guardian. Outside the context of college athletics, college-age students are certainly accorded the status of competent adults in terms of making health care decisions. The treatment accorded college students, including athletes, in these contexts supports the position that college athletes should be treated as competent adults in terms of decisions relating to medical treatment and return to play. That is not, however, the only reason for doing so.

One of the goals of the educational process is to help the student mature into a responsible person who will make positive contributions to society. To authorize someone other than the athlete to make decisions in the medical care and return to play context would impact adversely on the student's autonomy. As the Baldwin v. Zoradi Court said,

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165. See supra Part III of this Article for a discussion of the doctrine of in loco parentis as it relates to colleges and students.

166. See, e.g., Beach v. University of Utah, 726 P.2d 413, 419 n.5 (Utah 1986) ("Neither attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker."); see also Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980); University of Denver v. Whitlock, 744 P.2d 54, 61 (Colo. 1987) (en banc); Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986).

167. See Bradshaw v. Rawlings, 612 F.2d at 139, for an illustrative list of "adult" activities in which college students may freely participate without the permission of another adult.

168. For example, Living Will or Health Care Proxy Statutes commonly provide that any person 18 years of age or older, if of sound mind and not acting under the undue influence of another, is competent to execute an advance health care directive indicating how medical treatment decisions should be made if the person subsequently becomes incompetent. See, e.g., IND. CODE ANN. §§ 16-8-12-1, 16-8-12-2, 16-8-12-6 (Burns 1991) (proxy); MD. HEALTH - GEN. CODE ANN. § 5-602 (1990) (living will) (incorporating by reference MD. EST. & TRUST CODE ANN. § 4-101, permitting anyone 18 years or older to execute a will to dispose of property); MASS. GEN. LAWS. ANN. ch. 201D, § 2 (West Supp. 1991) (proxy); N.Y. PUB. HEALTH LAW §§ 2980(1), 2981(2) (McKinney Supp. 1991) (proxy).

169. See GEORGE W. SCHUBERT ET AL., SPORTS LAW 256 (1986) ("The choice to play injured rather than sit out the remainder of the season to fully recover is the athlete's choice, not that of the team, coach, or medical professional . . . . Under no circumstances should the physician, trainer or therapist choose for the patient . . . .").

in the context of refusing to impose duties on educational institutions in relation to students and alcohol, infringing on the students' autonomy would not be "in the best interests of society. . . . The transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education — the maturation of the students. Only by giving them responsibilities can students grow into responsible adulthood."\textsuperscript{171}

At least two courts have held in the context of students with physical disabilities that the students or the students and their parents are the appropriate decisionmakers when deciding whether the students should be permitted to engage in contact sports.\textsuperscript{172} In \textit{Wright v. Columbia University}, the court entered a temporary restraining order allowing a student with sight in only one eye to play college football. In doing so, the court stated that Wright not only had presented expert evidence that football did not pose a substantial risk of injury to his sight, but also he had testified that he seriously considered and appreciated the risks incident to playing football with impaired vision and he willingly accepted those risks.\textsuperscript{173} The court found Wright, who had been an outstanding high school athlete despite his impaired vision, to be mature and capable.\textsuperscript{174} The court also found that Wright and his parents were willing to release Columbia from any liability should he suffer injury to his sight while playing football\textsuperscript{175} and that the Columbia coaching staff supported his request to play.\textsuperscript{176} While calling Columbia’s concern for the student’s sight “laudable,” the court nevertheless found that the results of such concern were inconsistent with the protection afforded Wright by Section

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\item \textsuperscript{171} Baldwin v. Zoradi, 176 Cal. Rptr. at 818. See also University of Denver v. Whitlock, 744 P.2d at 62 (“[A conclusion that a special relationship exist[s] between [the student athlete] and the University sufficient to warrant the imposition of liability for nonfeasance would directly contravene the competing social policy of fostering an education environment of student autonomy and independence.”).
\item \textsuperscript{173} See also Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Pa. 1982), where the court entered a preliminary injunction to permit a high school student with only one kidney to play football. While Grube was also a Section 504 case, the court did not discuss the student’s decisionmaking rights, but found instead that the school district had failed to prove that the student’s medical condition disqualified him from participation. \textit{Id.} at 424.
\item \textsuperscript{174} Wright had maintained a “B” average at Columbia as a first year student.
\item \textsuperscript{175} Id. at 791.
\item \textsuperscript{176} Id.
\end{itemize}
Poole v. South Plainfield Board of Education\(^ {178}\) involved a former high school student with only one kidney who sued for damages because he had been denied the opportunity to take part in the school’s interscholastic wrestling program. At the time Poole wanted to wrestle, he clearly was a minor and his parents were the primary decisionmakers for such matters. The court found that Poole’s decision to wrestle was protected by Section 504.\(^ {179}\) Even though injury to the healthy kidney would have lead to “grave consequences,” the court said, so might other injuries which could have affected Poole or any other member of the wrestling team.\(^ {180}\) As did the student and his parents in \textit{Wright}, Poole and his parents had consulted experts — their family doctor, a specialist in sports medicine, and the wrestling coach at Lehigh University, a traditional wrestling powerhouse — about the types and frequencies of injuries encountered by wrestlers.\(^ {181}\) Poole’s parents had also offered to waive any potential liability of the school district should their son be injured wrestling.\(^ {182}\) In characterizing the rights and responsibilities of the parties in \textit{Poole}, the court said:

This is a young man who, with his parents’ support and approval, wishes to live an active life despite a congenital defect. The Board’s responsibility is to see that he does not pursue this course in a foolish manner. They therefore have a duty to alert Richard and his parents to the dangers involved and to require them to deal with the matter rationally.

\ldots

Whatever duty the Board may have had towards Richard was satisfied once it became clear that the Pooles knew of the danger involved and rationally reached a decision to encourage their son’s participation in interscholastic wrestling.\(^ {183}\)

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177. \textit{Id.} at 794.
179. \textit{Id.} at 951.
180. \textit{Id.} at 953.
181. \textit{Id.} at 954.
182. \textit{Id.} at 952.
183. \textit{Id.} at 954. The Second Circuit rejected a Section 504 claim brought by two junior high school students who wanted to engage in interscholastic athletic competition despite vision problems. Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). Even though both students' parents supported their children's request, the court held that public school officials could exercise their \textit{paens patriae} power over the students and “protect[] [their] well-being.” \textit{Id.} at 300. In a subsequent suit, the New York Supreme Court, Appellate Division, granted Kampmeier's request to participate in athletic competition. Kampmeier v. Harris, 411 N.Y.S.2d 744 (N.Y. App. Div. 1978). The court based its decision on N.Y. EDUC. LAW § 4409 (McKinney 1981) (repealed 1986) which provided that a student denied the opportunity “to participate in an athletic program by reason of a physical impairment” could bring a special proceeding to enjoin the school district's action, and that
There are strong arguments, then, for allowing athletes to make their own decisions concerning medical treatment and return to play. In almost all other contexts they are treated as adults, with the right to make decisions about the most important issues affecting their lives. Furthermore, the exercising of such rights and responsibilities is something that society wants not only to protect but also to encourage. The question remains, however, whether the pressures upon college athletes are so great that the law should carve out an exception to their autonomy. That is, should the law say that within the narrow context of decisions relating to some or all illnesses or injuries and to decisions

the student's petition should be granted if the court "is satisfied that it is in the best interest of the student to participate in an athletic program and that it is reasonably safe for him to do so." The supreme court, while having found that the statute's requirements had been met, nevertheless had denied plaintiff relief because the statute also provided that the school district would be immune from liability "for any injury sustained by any student participating pursuant to an order granted under [Section 4409]." 411 N.Y.S.2d at 746. The appellate division held that the legislative grant of immunity was not to be considered in determining "the best interest of the student." Id. at 746. The court did not address the issue of the student's or her parent's decisionmaking authority.

184. The one area in which persons aged 18-20 are generally not treated as those aged 21 or older is in the purchase and consumption of alcohol. That restriction, however, is imposed for public safety as well as for individual safety reasons. All states prohibit persons under the age of 21 from using alcohol. Felicity Barringer, With Teens and Alcohol, It's Just Say When, N.Y. TIMES, June 23, 1991, § 4, at 1. For representative statutes regulating the sale or delivery to or use of alcohol by persons under the age of 21, see MASS. GEN. LAWS ANN. ch. 138, § 34A (West 1991) (purchasing, procuring); OHIO REV. CODE ANN. § 4301.21(A) (Anderson 1990) (selling); TENN. CODE ANN. § 1-3-113(L) (1990) (purchasing, possessing, transporting, consuming); id. at § 57-4-203(b)(1), (2)(A) (1990) (selling, furnishing; purchasing, receiving); VA. CODE ANN. § 4-62(A), (B) (1990) (selling; purchasing or possessing). The Tennessee Code provides specifically that "Notwithstanding any laws to the contrary, any person who is eighteen (18) years of age or older shall have the same rights, duties, and responsibilities as a person who is twenty-one (21) years of age" except as to the possession and use of alcohol. TENN. CODE ANN. § 1-3-113(a) (1990) (emphasis added).

185. There are those who argue that regardless of decisions to return to play following most illnesses or injuries, there are some that are so serious the athlete should be forbidden ever to return to play. See, e.g., Hirsch, supra note 135, at 73 (some neurologists believe that migraine headaches may represent unique convulsive disorders and, therefore, seriously question whether a person who suffers predictable recurrent migraine headaches should participate in heavy contact sports like boxing; persons who have suffered three major concussions should be indefinitely excluded from sports); McCaffrey et al., supra note 45, at 178 (athletes with some types of cardiac disorders (for example, hypertrophic cardiomyopathy) should be restricted from all strenuous sports, while those with other types (for example, coronary artery abnormalities) may, once the abnormalities are corrected, return to full athletic activity under medical supervision). The American Medical Association guidelines identify conditions which its drafters believe should disqualify athletes from sports participation. See AMA GUIDE, supra note 117. Those guidelines relate not only to cardiovascular and neurological conditions, but also to conditions of the eyes, ears, respiratory system, liver, skin, spleen, hernia, musculoskeletal system, kidneys, and genitals. Id. The guidelines also distinguish among levels of acceptable participation for contact, noncontact endurance, and other sports. The AMA guidelines have been approved by the New York Department of Education and have been used to disqualify athletes seeking to participate in interscholastic sports there. See Colombo v. Sewanhaka Cent. High
relating to return to play following such illness or injury, the athlete should be declared incompetent to make such decisions and a surrogate named to make those decisions on the athlete's behalf? 186

2. *The Argument for a Surrogate Decisionmaker* One legitimate reason exists for appointing a surrogate to make decisions for college athletes concerning medical treatment and return to play. The pressures on college athletes, especially those in revenue producing sports at Division I universities, are so great that any decision the athlete makes must be suspect as not being truly voluntary. The pressures on the athlete come from within and from without.

It is not uncommon for athletes to "play hurt." Some do it for the love of the game. 187 Others because "much of [the] athlete's life has been dedicated to fulfilling an athletic dream" 188 or perhaps a more personal dream. As one columnist wrote after the death of Hank Gathers,

> What comes across consistently and clearly, however, from close friends from grade school to college was that Gathers had determined early that basketball would be his route to fame and that he worked feverishly to follow that road.

Last year, Gathers, when asked how basketball fit into his scheme of things, said: "I saw basketball as a way of getting out of the neighborhood. I used to come home from basketball practice after my freshman year in high school at about 9 or 10 o'clock at night. I'd look up at tall buildings and I'd say to myself: 'I've got to get out of here. I'm tired of this place. There's got to be more to life than this place right here.' " 189

For many, there is surely a feeling of immortality and invincibility. 190 For example, in February, 1990, Joseph Rhett, while a 20 year old, 6 foot, 8 inch forward for the University of South Carolina basketball team, was diagnosed, after twice passing out, as having a variation of

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186. See *infra* notes 241-49 and accompanying text for a discussion of the standards which might be used by a surrogate in making such decisions.


189. Rhoden, *supra* note 1, at D27.

190. See, e.g., *id.* at D27 (noting that Hank Gathers "encouraged the notion of his invincibility").
arrythmia. After acquiring a second medical opinion, the university allowed Rhett to return to play, wearing a circular foam pad on his chest over the place where the pacemaker was implanted. Two weeks after the pacemaker was implanted into Rhett, Hank Gathers died. Rhett considered leaving basketball because Gathers' condition "was the same situation related to the heart. . . . It scared me a little bit. But basically I felt — and the doctors told me — that his situation was different from mine. He was on medication at the time." Rhett admits that his condition changed his life, but not enough to make him give up basketball:

As far as the effect it's had on my life, I realize that life is more important. It's made me pay more attention to people. On the court, I think it's made me play more aggressively, to prove to people that I can play basketball.

. . . .

Life is more important, but this is something I love to do. . . . [Y]ou can't live your life in fear. If something happens, it happens.

Athletes themselves admit, frequently after suffering injury, that they believed themselves to be invincible and that someone else should have protected them from their own decisions. According to Terry Cummings, a forward for the San Antonio Spurs professional basketball team who plays despite a heart problem, "Athletes . . . don't like the 'no' word. It is the word that means: You can't play. . . . To a young, strong, and presumably healthy athlete enjoying celebrity status, who is making a difference on his team, and with a glowing future, it is a word to be avoided."

Marc Buoniconti knew that he had suffered a neck injury but returned to football. He maintains that "he was cleared to play despite a

192. *Id.*
193. *Id.*
194. *Id.* at 43.
195. *Id.*
196. *Id.* (emphasis added). Rhett's mother concurred in his decision:

Mary Rhett said that after her son received medical clearance to play this fall, she told him to look beyond Gathers's death. "Sure Gathers's death shook him up, and things like that still bother your mind," she said. "But that happens in life. Things came along that try to defeat you."

"A lot of people come up to me and say, 'If it was my son, I wouldn't let him play.' But I have no problem with it. We can't live our lives in fear. Nobody's life is tragedy-free; none of us is promised tomorrow, or this afternoon. You've got to have courage, otherwise you just sit around in life and just exist. Joe's doing the best he can do."

*Id.*

severe neck problem, the seriousness of which was never made clear to him." 198 Following the accident which left him a quadriplegic, he stated, "'What I've always said is that a young college player will always want to play. It's up to the doctors and trainers to stand between the athlete and the field.'" 199 Mark Tingstad, in explaining why he returned to football after being told that he had a problem with his neck and back which could result in permanent, severe injury said, "'When you're an athlete and you're involved in sports with a physical activity, you think you're impervious, you're talented and you think nothing can happen to you.'" 200

In addition to athletes' feelings of invincibility which may lead them to play hurt or to return to play following injury, media attention may encourage them to do so, as well. During the 1990 NCAA intercollegiate men's basketball tournament, an article in Sports Illustrated reported:

There was UNLV's Greg Anthony, his jaw wired so tightly shut that migraine pain shot through his head, who helped push the No. 1-seeded Runnin' Rebels into the semifinals in the West. Dale Davis led Clemson back from 19 points in arrears to beat LaSalle and take a place in the East Regional semis, this despite a stress fracture in his left foot. 201

If personal dreams, feelings of invincibility, and media attention are not enough to give highly rated college athletes incentive to return to play too soon or to return when they never should because of serious

198. Id. § 8, at 1-2.
199. Id. § 8, at 1.
200. Id. § 8, at 2. Others tend to agree with the assessments of Buoniconti and Tingstad. Recently, there have been allegations that Cliff Gustafson, baseball coach at the University of Texas, overuses his pitchers to improve his team's won-loss record. Todd Van Poppel was a high school baseball star pitcher highly sought after by both professional and college baseball teams. As of late spring, 1990, Van Poppel was planning to turn down professional offers and attend the University of Texas. Concerned over Gustafson's reputation for overusing his pitchers, Van Poppel's father discussed the matter with Gustafson, and later said,

Gustafson's answer was that nobody ever made Dressendorfer [a University of Texas pitcher whose pitching became ineffective because of tendinitis allegedly caused by overuse] pitch. . . . He said he always asks his pitchers if they're O.K. to pitch. He asked Dressendorfer, and he said he could pitch. But that's weak. It shouldn't be the kids' decision.

Phil Rogers, The Class of '90: To Earn or to Learn, Sports Illustrated, June 4, 1990, at 54, 60. Todd Van Poppel was himself hit by a batted ball while pitching in a high school baseball game. Although injured he stayed in the game three more innings. "'I should have come out of that game right away,' he said later. 'I thought my hand was O.K., and I wanted to win. But I'm a kid, and nothing like that ever happened to me before.' " Id. at 60. Van Poppel ultimately accepted an offer to play for the Oakland Athletics. Murray Chass, Reeling Padres Transform from Contenders to Rebuilders, N.Y. Times, July 22, 1990, § 8, at 3.

illness or injury, the lure of professional sports contracts is an incentive. Those college football and basketball players drafted by professional teams could secure contracts paying them millions of dollars over a several year period. In Gathers' case he is reported to have broken down, sobbing in the locker room following his December collapse. When comforted by a friend, Gathers reportedly said, "You don't understand. I just blew the NBA." Gathers was also reported to be depressed because he had been told by Los Angeles Clippers Coach Don Casey that he would be chosen somewhere between tenth and fifteenth in the 1990 NBA draft. Gathers had counted on being taken among the top nine players, which would have meant more money for his family. According to one sports writer, "He decided to work even harder in an effort to reach that select group. Whether he also further reduced his Inderol [sic] dosage — and whether, in any event, this had any bearing on his death — is uncertain." Ironically, if Gathers had left basketball after his initial collapse in December, 1989, he probably could have collected the proceeds from a $1 million disability policy he had taken out with Lloyd's of London the previous spring when he decided to stay at Loyola Marymount for his senior year. The policy was designed to compensate him should his career end because of injury; it did not cover death.

All of the internal pressures affecting athletes' desire — or need — to play while hurt can only be exacerbated by the pressures from outside

202. During the 1989-90 NBA season, player salaries averaged $900,000, up from $750,000 the year before. Sam Goldaper, N.B.A. Has Money to Burn in Lean Time, N.Y. TIMES, Oct. 28, 1990, § 8, at S11. Three dozen players earned more than $2 million per season. Id. Derrick Coleman, the number one pick of the N.B.A. draft commanded a five year, $15 million contract, and Bo Kimball, Hank Gathers' teammate at Loyola Marymount, the number eight draft pick, signed a four year contract worth $7.25 million. Id. The salary situation is virtually the same in professional football. In the 1990 National Football League draft, Jeff George, a junior leaving school one year early, was drafted number one by the Indianapolis Colts and signed to a six year contract worth $15 million, making him, at that time, the third highest paid player in the NFL. Douglas S. Looney, Suddenly No. 1, SPORTS ILLUSTRATED, April 30, 1990, at 50, 51. The number six pick in the draft, Mark Carrier, was signed by the Chicago Bears to a $3.5 million, five year contract. Peter King, Inside the NFL Draft, SPORTS ILLUSTRATED, April 30, 1990, at 56, 57. Currently, average annual player salaries for four professional team sports are $900,000 (basketball), $594,000 (baseball), $304,000 (football), and $211,000 (hockey). Stat of the Day, WASH. POST, Aug. 3, 1991, at D2.

203. Smith, Death of a Dream, supra note 1, at 11.  
204. Id.  
205. Id. at 12.  
206. Id.  
207. Id.  
208. Id. at 11.
Successful revenue producing athletic programs are important to universities as a whole. Colleges and universities earn huge sums based upon post season tournament play. And, television coverage has become an increasingly important source of college sports revenue. For example, the NCAA has entered into a $1 billion contract with CBS in return for granting CBS rights to broadcast the NCAA basketball tournament over seven years. Much of that money will go to individual colleges and universities. Notre Dame University, traditionally one of the nation's football powerhouses, signed a $38 million contract with NBC giving that network the exclusive right to televise Notre Dame's home football games over the following five years. The more successful a school's football or basketball program, the more television

209. Tommy Chaikin, a former college football player who suffered severe side effects from using anabolic steroids reported that although he accepted responsibility for his steroid use, part of the trouble comes from things outside of me — the pressures of college football, the attitudes of overzealous coaches and our just-take-a-pill-to-cure-anything society.

... I was young and felt nothing bad could happen to me. ... [C]ollege athletes feel tremendous pressure to succeed. Some guys have parents who are pushing them real hard. Other guys are just very competitive and have great pride. Nobody wants to sit on the bench and be a failure.

Chaikin, supra note 130, at 85, 88.

210. The Universities of Michigan and Illinois, Duke University, and Seton Hall University each earned approximately $1.23 million as the four finalists in the 1989 NCAA basketball tournament. Martin J. Greenberg, College Coaches at the Bargaining Table — Employment Contracts, THE SPORTS LAWYER, Fall 1989, at 1 (citing Patrick McManamon, PALM BEACH POST, April 30, 1989, at 8C). The Big Ten Conference and the Big East Conference earned $4.5 million and $3.7 million, respectively, for their teams' participation in that tournament. Id. at 1-2. Twenty-four College Football Association teams earned a combined $33 million for post-season bowl appearances in 1989. Id. at 2.

211. Wolff, supra note 201, at 26. See also Willian C. Rhoden, $1 Billion Just Isn't What it Used to Be, N.Y. TIMES, June 22, 1990, at B8.

212. Douglas Lederman, NCAA Budget Panel Backs Plan for Sharing TV Money, CHRON. HIGHER EDUC., July 18, 1990, at A38. See also Douglas Lederman, Athletics Notes: NCAA Panel Backs Scheme for Dividing $1-Billion TV Bonanza, CHRON. HIGHER EDUC., Sept. 5, 1990, at A38. In the first year of the contract, $64 million was to be distributed to Division I colleges and conferences based on formulas rewarding colleges for the breadth of their sports programs and rewarding conferences for the performance of their members in basketball tournaments for the six previous years; $8 million was to be distributed to Division I colleges for academic support for athletes; $45 million was to be used to support a range of NCAA programs including increased funding for Division II and III championships, catastrophic injury insurance for all NCAA athletes, and a fund for needy Division I athletes. Id. For a detailed breakdown of NCAA payments to Division I colleges and universities from the television contract money during the 1990-91 academic year, see N.C.A.A. Committee Proposes Plan for Basketball Revenue, N.Y. TIMES, May 24, 1990, at D24; N.C.A.A. Payments to All Division I Colleges Based on Breadth of Sports Programs, CHRON. HIGHER EDUC., Sept. 25, 1991, at A44.

exposure the team receives and, accordingly, the more money it makes. A recent report indicated that the nation's major college football conferences, inspired by contracts such as that between Notre Dame and NBC, are "raiding" other conferences and attempting to draw nonconference schools into "super-conferences," giving those conferences and those schools a larger network television audience and more television revenue. Widespread television coverage also enhances an institution's ability to recruit prized high school athletes.

Coaches, individually, may pressure their star athletes to "play hurt" or to return to play too soon following illness or injury. Coaches, too, feel pressure from their institutions to develop highly successful (in terms of won-loss record) revenue producing sports programs, and many reap great personal benefits from these programs.

214. William C. Rhoden, Big College Football Leagues Are Trying to Get Bigger Still, N.Y. TIMES, June 23, 1990, at 1. This report predicted that there would eventually be formed three major football conferences to coincide with the three major television networks, CBS, ABC, and ESPN, which regularly televise college football games. Id.

215. See SHARP, supra note 140, at 12.

216. WONG, supra note 152, at 13. The Job Related Almanac lists NCAA basketball coach as the 15th most stressful job out of 260 ranked. Greenberg, supra note 210, at 1 (citing BASKETBALL WKLY., May 2, 1989, at 4). At the beginning of the 1988-89 college basketball season, 39 of the NCAA's 294 Division I schools (13.4 percent) had new head coaches. The previous year, 66 of the Division I schools (22.8 percent) had new coaches. During the 1980's, there were 384 coaching changes in Division I schools. Id.


The trial court found that Tarkanian as head basketball coach, is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled 'THE JERRY TARKANIAN SHOW,' and appearing on a television program bearing the same name. That compensation was "entirely contingent on [Tarkanian's] continued status as the Head Basketball Coach at UNLV." As a tenured professor alone, he would have earned about $53,000 a year, the court found.

Id. (citations omitted).

By the time he announced his retirement from the head coaching position at UNLV, to be effective
Finally, college athletes — and their parents — may be subject to pressure from athletic "boosters." Following Hank Gathers' death, his brother, Derrick, testified in a deposition that Hank had received as much as $50,000 from Albert Gersten, a Loyola Marymount booster for whose father the college's sports arena is named.\footnote{218} Derrick Gathers and his mother, Lucille, also testified that Gersten had helped to subsidize a $1,050 per month apartment and a car for Hank when Hank had discussed leaving Loyola Marymount for the NBA following his junior year.\footnote{219} Finally, Lucille Gathers testified that while Hank was attending Loyola Marymount on a full basketball scholarship, holding no outside employment, he gave her a living room set, a watch, a VCR, and $2,000 cash. Gersten was the source of the gifts.\footnote{220}

The "trickle down" effect as it affects college athletes is real: colleges pressure coaches to produce winning programs, athletes to perform, doctors to heal injuries quickly;\footnote{221} coaches pressure athletes and doctors; at the end of the 1991-92 basketball season, Tarkanian was earning $203,976 per year from the university, making him Nevada's highest paid state employee. See William C. Rhoden, A Final U.N.L.V. Season is Reported for Tarkanian, N.Y. TIMES, June 7, 1991, at B12. Coaching "packages" such as that described by the Supreme Court in Tarkanian may amount to 50-75 percent of a coach's overall compensation. Greenberg, supra note 210, at 3. For example, in one year Bobby Cremins of Georgia Tech is reported to have earned a university salary of $95,000, but overall compensation of $320,000; Hugh Durham of Georgia, $75,000 and $225,000; Lute Olson of Arizona, $130,000 and $400,000; and Norm Sloan of Florida, $99,000 and $200,000. Id. at 2. A primary source of that outside income is the sneaker contract. Gerald Eskenazi, Once a Canvas Shoe, Now a Big-Time Player, N.Y. TIMES, Mar. 11, 1990, § 1, at 1, 26 (more than 100 college coaches receive fees from athletic shoe companies ranging from $5,000 to "six figure[s]," including John Thompson of Georgetown University, reportedly the highest paid at $200,000 per year, and Jim Valvano, formerly of North Carolina State University, $150,000 per year). Rick Pitino, basketball coach at the University of Kentucky, earns an annual salary of $100,000 from the university, yet the job is "actually worth more than three times that amount, enhanced in part by Pitino's six-figure sneaker deal." Id. at 26. Eskenazi quotes an agent who has negotiated deals with sneaker companies for both coaches and players as saying, "[s]o before a coach even comes to the school, he already has a television or radio deal, and his sneaker contract . . . . This way, the university can tell the faculty it isn't paying all this money to the coach. But the university — through the athletic department — actually negotiated his contract." Id. See also Steven G. Poskanzer, Spotlight on the Coaching Box: The Role of the Athletic Coach Within the Academic Institution, 16 J.C. & U.L. 1, 2-3, 6-7, 15, 18-20 (1989) for further discussion of coaches' compensation packages and pressures placed upon coaches to win.

\footnote{218} Smith, A Bitter Legacy, supra note 11, at 63, 68, 70; Marianne Lavelle, From Court to Court, NAT'L L.J., Mar. 4, 1991, at 1, 24.

\footnote{219} Smith, A Bitter Legacy, supra note 11, at 68, 70.

\footnote{220} Lavelle, supra note 218, at 24. If these allegations prove true, Loyola Marymount could be forced to forfeit every basketball game from the 1989-90 season and to return the $800,000 the college collected when the team advanced to the Final Eight of the NCAA Tournament. Smith, A Bitter Legacy, supra note 11, at 70.

\footnote{221} See infra notes 228-37 and accompanying text for a discussion of the role of the physician in treatment and return to play decisions.
other players, wanting their teams to be successful, pressure peers to "play hurt"; injured players, themselves, apprehensive that they will lose their spot in the starting lineup or their stage to perform for the professional scouts, play when hurt and urge physicians to do whatever is necessary to help them perform. 222 "It is ... debatable as to whether or not the usual disciplinary authority of the coach, the pressure of school spirit, the probable odium attached to a refusal to play, both by ... fellow-players and ... school mates, might not ... rob" 223 an athlete of volition in terms of decisions relating to return to play after illness or injury.

Perhaps a physician can disclose to an athlete relevant information about the athlete's medical condition, suggested treatment, and the benefits, risks, and alternatives, not only to the proposed treatment but also to a return to play. Perhaps, too, an athlete can comprehend that information and appreciate the risks involved in returning to play in a manner sufficient to make an informed decision. Still, the concern is legitimate that the pressures on the athlete are so great that the "voluntariness" of any decision to return to play is suspect. In resolving the question, however, of whether a surrogate would be a better decisionmaker than an athlete, even given the problems with the athlete as decisionmaker, it is important to consider the advantages and disadvantages attached to those who could serve as a surrogate and the standards by which a surrogate would decide whether the athlete could return to play. 224

C. The Surrogate as Decisionmaker

1. Who Should Be the Surrogate? The logical choices of a surrogate decisionmaker for a college athlete would be the athlete's parent(s), coach, physician, or a specially appointed "athlete advocate."

An athlete's parents or guardians would clearly be the most obvious choice to act as surrogate decisionmaker in terms of health care decisions and return to play. In most instances they know their children and have their children's best interests in mind more than any other person. Throughout the child's life, the parents have acted as surrogate deci-


223. Martini v. Olyphant Borough Sch. Dist., 83 Pa. D. & C. 206, 211 (1952). Although Martini involved a high school football player, the court's language is surely applicable to many college athletes as well.

224. See Section VI, infra, for a proposed resolution to the question of whether the athlete or a surrogate should make the ultimate decision concerning return to play.
sionmakers so it is only natural that they continue to do so. The difficulty, of course, with allowing parents to act as surrogate decisionmakers is that they might vicariously be affected by some of the same pressures affecting the athlete — for example, the desire to see the child succeed or the lure of financial remuneration if the child is a professional prospect.225 Once again, then, the decision may not be entirely "voluntary," even if made by the athletes' parents.

Coaches are candidates to be substitute decisionmakers because they, too, usually know their athletes well and have the athletes' best interests at heart. Some coaches and athletes have almost a parent-child relationship. Coaches are inappropriate as substitute decisionmakers, however, because of the inherent conflict of interest present when they need their star athletes to play and play at peak performance226 in order to enhance the team's chances of winning and, accordingly, the coach's reputation and all that is associated with that reputation.227

The third logical substitute decisionmaker would be the physician treating the athlete.228 Despite the physician's ethical obligations in

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225. See Altman, Physicians Under New Scrutiny, supra note 188, at C3, for an indication that some pressure on team physicians comes from athletes' parents. See also Chaikin, supra note 130, at 88; Lavelle, supra note 218, at 24; Smith, A Bitter Legacy, supra note 11, at 68, 70. Smith also reports that following Gathers' death, bad feelings developed between the Gathers family and Bo Kimble, Gathers' friend and teammate, because the Gathers family needed money, wanted to sign a movie deal for $70,000, but Kimble refused to sign the necessary documents to allow the deal to go forward. Id. at 66.

226. See Altman, Physicians Under New Scrutiny, supra note 188, at C3. See also Altman, Doctors Negligent, supra note 4, at 43, reporting that Paul Westhead, Hank Gathers' basketball coach allegedly asked Gathers' cardiologist to reduce Gathers' medication because it was making him sluggish and interfering with his performance on the court.

227. See supra notes 216-17 and accompanying text for a discussion of pressures on coaches that in turn lead to pressures on college athletes.

228. The NCAA Sports Medicine Handbook provides that during NCAA championship competition:

The student-athlete's team physician [or, in the absence of a team physician, the NCAA tournament physician] shall examine the injured party and make a recommendation to the student-athlete, to his or her coach, and to the chair of the governing sports committee (or a designated representative) as to the advisability of continued participation or disqualification.

NCAA SPORTS MEDICINE HANDBOOK, supra note 45, Policy No. 5 (emphasis added); see also 1990-91 NCAA MANUAL, supra note 131, § 31.1.7. Although the policy frames the physician's evaluation of the student as a "recommendation," the policy further provides that "[t]he chair of the governing sports committee (or a designated representative) shall be responsible for the administrative enforcement of the medical recommendation if it involves disqualification." NCAA SPORTS MEDICINE HANDBOOK, supra note 45, Policy No. 5; see also 1990-91 NCAA MANUAL, supra note 131, § 31.1.7, (indicating that a "recommendation" of disqualification is, in reality, a decision to disqualify). Finally, the policy provides that "when a student-athlete is removed or withheld from a competition or practice because of injury or illness, clearance for that individual to return to activity
treating athletes as patients, several problems are present when the physician is the surrogate decisionmaker. The first is the physician's status and his or her relationship with the athlete. While in theory the physician has a physician-patient relationship with the athlete, as with any other patient, the realities of the physician's employment situation may indicate otherwise. Generally, the athlete has not chosen any particular physician. Either the physician is an employee of the college or university or more likely, especially for smaller institutions, the physician is an independent contractor hired for a limited time to perform preparticipation physicals, attend home games, and accept referrals. This type of "as is solely the responsibility of the team physician or that physician's designated representative." NCAA SPORTS MEDICINE HANDBOOK, supra note 45, Policy No. 5.

Sports law commentators are of a divided opinion on the question of whether physicians or athletes should be the final decisionmaker on the issue of an ill or injured athlete's return to play. See, e.g., King, supra note 120, at 698-700.

Athletes, who because of age or mental capacity are not legally capable of giving valid consent, should be afforded the same protection as nonathletes. They should not be approved for participation when similar activities would be contraindicated for nonathletes. Athletes legally capable of consenting should not be authorized by a team physician to participate in a sport in at least the following situations. First, when there are significant risks of harm from participation, the athlete should not be approved by the team physician for participation irrespective of what the athlete may ostensibly want. Secondly, when there is a question as to the athlete's lucidity or capacity for sound judgment, the physician should not approve participation when a similar level of activity would be contraindicated for a nonathlete.

The foregoing compromise may strike some as excessive medical infringement on an athlete's autonomy. But it must be remembered that it is the primary responsibility of the team physician to safeguard the health of the patient. Moreover, even if the athlete is indeed a free person, it does not follow that the team physician should abdicate professional responsibilities to promote health by condoning the taking of unnecessary serious risks.

Id. at 698-700. See also NYGAARD & BOONE, supra note 139, at 341 ("The physician representing the school should have the authority to disqualify any athlete from participating and should not be overruled by any other physician. The institution must give the physician and other members of the sports medicine team total support for any medical decisions that are made."). But see Charles V. Russell, Legal and Ethical Conflicts Arising from the Team Physician's Dual Obligations to the Athlete and Management, 10 SETON HALL LEGIS. J. 299, 318 (1987) (disagreeing with King, supra, and arguing that certain factors make athletes unique, justifying different treatment of athletes and nonathletes with same or similar injuries; factors include athletes' physiology and degree of cardiovascular and musculoskeletal conditioning, athletes' knowledge about their own bodies and their ability to determine the magnitude of risk associated with athletic participation, and athletes' experiential background in recovering from previous injuries); SCHUBERT, supra note 169, at 256 ("The choice to play injured rather than sit out the remainder of the season to fully recover is the athlete's choice, not that of the team, coach, or medical professional.... Under no circumstances should the physician, trainer or therapist choose for the patient....").

229. The physician is an independent contractor if he or she is not under the control of the fee paying institution. BERRY & WONG, supra note 140, § 4.13-1 at 305; WEISTART & LOWELL, supra
needed” relationship may not in many instances provide physicians with the information — medical or otherwise — they may acquire and use in making recommendations for patients when they work with patients on a long term basis.\textsuperscript{230} And, since few team physicians are “sports medicine specialists,” they may not understand the psychology of the athlete “determined to play at all costs.”\textsuperscript{231}

A second problem which may arise were the physician to be the surrogate decisionmaker is the conflict of interest between the college or university which pays the physician’s fee and the athlete receiving the care.\textsuperscript{232} College or university officials through, for example, coaches, athletic directors, or trainers, could pressure physicians to prescribe specific treatments or return athletes to play before they are ready because they want their star athletes in action in order to improve the team’s performance and, accordingly, the school’s reputation and revenue producing opportunities.\textsuperscript{233} Physicians are subject to pressures from others — families,\textsuperscript{234} boosters,\textsuperscript{235} and athletes, themselves,\textsuperscript{236} — to treat athletes quickly and return them to play. And, physicians, themselves, are often fans of the team and want the team to succeed.\textsuperscript{237}

Overall, then, despite their professional obligations to their patients, team physicians may not know the athletes well, may have at least the appearance of divided loyalties between those who pay their salaries and those whom they serve, and may be subject to pressures from a number of sources, including the patients, to treat athletes and return them to play expeditiously, rather than effectively.

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\textsuperscript{230} In many instances, the physician will not become involved with the athlete until after an injury has occurred. Pitt, \textit{supra} note 222, at 587.
\textsuperscript{231} Altman, \textit{Physicians Under New Scrutiny, supra} note 188, at C3.
\textsuperscript{232} WONG, \textit{ supra} note 152, at 380; RAYMOND E. YASSER, TORTS AND SPORTS 51-52 (1985); Russell, \textit{ supra} note 228, at 303, 316-17.
\textsuperscript{233} See \textit{supra} notes 210-14 and accompanying text for a discussion of colleges’ and universities’ efforts to produce revenue through major athletic competition.
\textsuperscript{234} Altman, \textit{Physicians Under New Scrutiny, supra} note 188, at C3.
\textsuperscript{235} Id.
\textsuperscript{236} Id.; see also James H. Davis, “Fixing” the Standard of Care: Motivated Athletes and Medical Malpractice, 12 AM. J. TRIAL ADVOC. 215, 217-19 (1988); Russell, \textit{ supra} note 228, at 318. In fact, many players will “shop around” until they find a physician who will clear them to return to play. Altman, \textit{Physicians Under New Scrutiny, supra} note 188, at C3. See also Altman, \textit{Doctor’s Warning, supra} note 20, at C3.
\textsuperscript{237} BERNIE PARRISH, THEY CALL IT A GAME 74-77 (1971).
\end{flushleft}
One powerful incentive for the physician not to treat the athlete expeditiously rather than effectively would, of course, be the threat of a malpractice action against the physician if the athlete were to suffer subsequent injury or illness which could be connected to the physician's treatment of the athlete. That incentive could, however, cause the physician to treat the athlete too conservatively or to make decisions concerning return to play based on fear of liability rather than on the medical condition, capabilities, and best interests of the athlete. The team physician does not appear to be an appropriate substitute decisionmaker.

The final possible substitute decisionmaker would be an "athlete advocate" employed by the university to work with athletes and to help protect their interests. In theory, the concept of the advocate sounds good. In the health care and return to play context, the advocate could help athletes understand their conditions and the various risks, benefits, and alternatives associated with treatment and return to play. The advocate could gather all information relevant to the decisions being made — medical information concerning the athlete's condition and proposed treatment, the risks of a return to play, the athlete's wishes — and could make the decision which would best serve the athlete's interests.

In reality, however, the advocate is not necessarily any better equipped or any less pressured than the athletes themselves, or any of the other potential surrogates. No one knows the athlete as well as the athlete does. No one understands the medical information as well as the physician. Although the advocate, by definition, must work with athletes

238. Even if the athletes do not possess decisionmaking power, it is in the athletes' best interests to understand their medical condition and proposed treatment regimen. Medical patients who understand their conditions and therapies are more cooperative in their own care, leading to faster, more effective recovery and fewer malpractice actions against treating physicians. George J. Annas, Avoiding Malpractice Suits Through the Use of Informed Consent, 1977 LEGAL MED. ANN. 219, 226-27 (and sources cited therein); Lawrence D. Egbert et al., Reduction of Postoperative Pain by Encouragement and Instruction of Patients, 270 NEW ENG. J. MED. 825, 825-27 (1964); Joel F. Handler, Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community, 35 U.C.L.A. L. REV. 999, 1005-08 (1988). For further discussion of the effects of disclosure and non-disclosure of information on factors such as patient compliance and recovery, see also 1 PRESIDENT'S COMMISSION REPORT, supra note 61, at 99-102. 119; Charles W. Lidz et al., Barriers to Informed Consent, 99 ANNALS INTERNAL MED. 539, 540 (1983); Hyman B. Muss et al., Written Informed Consent in Patients with Breast Cancer, 43 CANCER 1549, 1555-56 (1979); Don A. Rockwell & Frances Pepitone-Rockwell, The Emotional Impact of Surgery and the Value of Informed Consent, 63 MED. CLINICS OF N. AM. 1341, 1342, 1345-46, 1348, 1349 (1979); Barbara Stanley et al., The Elderly Patient and Informed Consent, 252 JAMA 1302, 1305-06 (Sept. 14, 1984); John F. Wilson, Behavioral Preparation for Surgery: Benefit or Harm?, 4 J. BEHAV. MED. 79, 96-97 (1981).

239. See infra notes 241-49 and accompanying text for a discussion of the standards which could be employed by surrogates in making these decisions.
free from pressures imposed by the employer (the university) or by any of the university's employees (coaches, athletic directors or trainers), academic advisors or tutors in relatively the same position have been pressured or punished in the past for causing athletes to become ineligible for play.  

Ideally, any of these persons chosen as a surrogate decisionmaker for ill or injured athletes would enter into a consultative process with the others. Parents, coaches, physicians, advocates, all with the same theoretical goal of serving the athlete's best interests, should share information and concerns in an attempt to reach the most appropriate result. They should also, of course, consult with the athlete.

Assuming that a surrogate is appointed to make decisions for the athlete concerning medical care and return to play, by what standard should the surrogate be guided?

2. What Should Be the Standard? Surrogate decisionmakers have traditionally been authorized to apply one of two standards, one subjective, the other objective, in making decisions for those unable to make decisions for themselves. Both standards are problematic when applied to the college athlete presumed competent for every decisionmaking scenario except that concerning medical treatment and return to play.

A subjective, substituted judgment standard is frequently applied in surrogate decisionmaking situations, particularly if there is evidence of the decision the incompetent would make if competent to decide. In fact, the purpose behind the substituted judgment standard is to effectuate the decision the incompetent would have made if competent. Factors to be considered by the substitute decisionmaker include the incompetent's preferences (expressed while competent) concerning the decision to be made; the incompetent's religious beliefs; the impact of any decision on the incompetent's family; the probability of adverse side effects of any treatment chosen; the consequences if a decision is made to decline treatment (or return to play); the prognosis with a particular treatment (or a decision to return to play).

These factors could certainly all be ascertained and weighed in the

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surrogate's attempt to decide what treatment and play decisions the athlete would make if competent to do so, but such a weighing process would be unnecessary. Most instances of incompetency in which the substituted judgment approach has been followed have involved cases in which incompetents were either physically or mentally incapable of communicating their preferences to the surrogates. In the case of the college athlete that is clearly not true. The athletes are capable of expressing their precise wishes concerning return to play. It is rather because we do not trust the athlete's decisionmaking abilities that we have turned to a surrogate decisionmaker. In that case, perhaps an objective, reasonable person approach to substitute decisionmaking would be appropriate.

The purpose behind the objective substitute decisionmaking standard is to serve the best interests of the incompetent, based not on what the incompetent would have wanted, but rather on what the reasonable person acting under the same or similar circumstances would have chosen. The objective approach is basically a weighing of the benefits and burdens associated with the various alternatives available to the decisionmaker. Applying the best interests standard to the college athlete is problematic, however, because the objective standard is generally held to be appropriate where the surrogate is unable to determine what the incompetent's preferences would have been. That is clearly not the case with college athletes who can tell surrogates exactly what they want. The objective standard is further problematic in instances where the "incompetent's" wishes are known. The purpose behind substitute decision-making is, in part, to recognize that incompetents, like those who are competent, have rights of self-determination and autonomy that deserve to be exercised, by others, if not by the person himself or herself.

There is something incongruous about saying we will allow a substitute

244. See, e.g., In re Conroy, 486 A.2d 1209 (N.J. 1985) (elderly patient in near comatose condition unable to communicate with surrogate decisionmaker).


246. See Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d at 430 (rejecting an objective approach to substitute decisionmaking). See also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research: Deciding to Forego Life-Sustaining Treatment 136 (1983).

247. In re Conroy, 486 A.2d at 1232.

248. Id. at 1232.

249. But see Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2852 (1990) (rejecting the argument that those who are incompetent have the same right to autonomous decisionmaking as those who are competent precisely because those who are incompetent cannot "make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right").
decisionmaker to exercise a college athlete's right of self-determination and then ignoring the express wishes of the athlete.

The true difficulty with college athletes and decisionmaking is, of course, not that the athletes are incompetent, but that we do not trust the decision they might make. In the health care context, health care providers and institutions frequently have disagreed with decisions that competent adults have made.\footnote{250} Traditionally, the law has recognized four "compelling state interests" that could be advanced against competent adults' decisions concerning their own medical care: preserving life, preventing suicide, protecting the interests of innocent third parties, and preserving the integrity of the medical profession.\footnote{251} With the exception of protecting the interests of innocent third parties, generally minor children who will be left dependent if their parent or guardian should die,\footnote{252} the courts have come to give precedence to the rights of competent adults to make decisions concerning their own bodies and their own health care, even if such decisions would result in death.\footnote{253} Those decisions, however, might be distinguishable from the situation of the relatively healthy\footnote{254} college athlete. In those cases where courts have found a competent adult's medical treatment decision sufficiently important to override the state's or the medical profession's interest in preserving life, the patients have generally been near death or suffering from terminal or intolerable physical conditions.\footnote{255} The continued exceptions to these de-
cisions, however, are the cases in which patients who are Jehovah’s Witnesses refuse blood transfusions.\textsuperscript{256} There, even though the patients are often not suffering from terminal or intolerable conditions, the courts have supported the patients’ wishes to decline treatment, even in the face of death.\textsuperscript{257}

One of the questions for the law, then, will be to determine whether the state’s overriding interest in the preservation of life would prohibit a college athlete from effectuating a decision\textsuperscript{258} which could lead to permanent injury or death, or whether the athlete cases will be treated similarly to the Jehovah’s Witnesses cases in which the competent adult’s decision will be respected notwithstanding the possible outcome of the decision.\textsuperscript{259}

The final question in relation to the surrogate decisionmaker is whether the surrogate should be held responsible if the athlete is injured subsequent to the surrogate’s decision to allow the athlete to return to play.

3. \textit{Liability of the Surrogate} Three possibilities exist for imposing liability on the surrogate if a medical treatment or return to play decision results in subsequent injury to the athlete: the surrogate could be immune from liability for injuries resulting from any decision; the surrogate could be held strictly liable for any such injuries; or the surrogate could be judged by an objective standard and be held liable for subsequent injuries only if he or she failed to exercise reasonable care in making the decision.

While a decision to hold a surrogate immune from liability could induce more persons to be willing to be surrogates and could facilitate their decisionmaking, immunity may remove the incentive necessary to exercise great care in making the decision. While we would hope that the surrogate, regardless of the standard employed to make the decision, would act only in the best interests of the athlete, immunity from liability may make the outside pressures from the athlete, the athlete’s family, the college or university and its employees and supporters, harder to resist.

Strict liability, of course, raises the opposite problem. If a surrogate


\textsuperscript{257} See cases cited supra note 256.

\textsuperscript{258} Or having a decision effectuated if it were to be made by a surrogate.

\textsuperscript{259} The Jehovah’s Witnesses cases, although based in part on religious principles and First Amendment rights, are not distinguishable on that basis. If competent adults have the right to have treatment decisions effectuated, they possess that right regardless of their religious belief or nonbelief.
were to be held liable for subsequent injury to an athlete even though the surrogate used all due care in making the decision, few persons would choose to be surrogates and those who did might be very reluctant ever to authorize an athlete to return to play. The logical solution to the question of surrogate liability, then, would be to hold the surrogate to a reasonable person standard. That standard would encourage a surrogate to use care in gathering information concerning the athlete's medical condition, athletic activities, and other matters relevant to the decision, in discussing that information in a thoughtful manner with others — parents, school officials, and the athlete — who could aid in the decision-making process, and in reaching a decision that would serve the athlete's health and athletic interest. The standard would not be so strict, however, that it would discourage the surrogate from ever authorizing the athlete to return to play.

Before offering a proposal to answer the questions of who should be the ultimate decisionmaker when an ill or injured athlete needs medical treatment and wants to return to play, and under what circumstances, if any, should an athlete be denied the opportunity to compete, I will address the issue of the athlete's recourse if he or she or the surrogate decides that a return to play is appropriate and the college or university says "No."

V. Athletes' Recourse When Schools Resist a Return to Play

The college athlete denied the opportunity to return to play following an illness or injury could proceed to seek reinstatement on two theories supported by federal law: a right to play based on the Fourteenth Amendment to the Constitution\(^260\) and a right to be free from discrimination based on Section 504 of the Rehabilitation Act of 1973\(^261\) and/or the Americans with Disabilities Act of 1990.\(^262\) Athletes might also have

\(^{260}\) U.S. Const. amend. XIV, § 1. A number of cases brought by athletes challenging their exclusion from intercollegiate sports programs have been based on Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). See, e.g., Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972). In the Section 1983 cases, the athletes have alleged that their college or university, usually in conjunction with the NCAA, has taken action depriving them of rights secured by the United States Constitution. See infra notes 264-71 and accompanying text for a discussion of the state actor requirement of § 1983 as it is applied to colleges and universities and the NCAA and infra notes 272-84 and accompanying text for a discussion of property and liberty interests claimed by college athletes in relation to their playing intercollegiate sports.


state law remedies available to them, but for the purpose of this Article, I will focus on the athletes' potential federal remedies.

A. A Constitutional Right to Participate

Those athletes who have claimed a constitutional right to participate in intercollegiate athletics generally confront two difficult issues. The first is whether the defendant college or university or the NCAA, in precluding the athletes from participating, is acting under color of state law. The second is whether the athletes' interest in participating in intercollegiate athletics rises to the level of a constitutionally protected interest.

If a student athlete is denied the opportunity to participate by a state college or university, the state actor question is clear: the provisions of Section 1983 apply. If the college or university is a private entity, Section 1983 will not apply without implication of another state actor.

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263. See, e.g., Kampmeier v. Harris, 411 N.Y.S.2d 744 (N.Y. App. Div. 1978) (child with vision in only one eye denied opportunity to participate in interscholastic athletic program, despite assertion of right to participate pursuant to Section 504 of the Rehabilitation Act of 1973, Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977), later granted that opportunity pursuant to state statute).

264. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988) (emphasis added). Athletes have pursued § 1983 actions both in an attempt to enjoin a college or university from precluding their participation in athletic competition and in damages actions following such preclusion. See, e.g., Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (injunctive relief); Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987) (damages); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972) (injunctive relief). The Supreme Court has clearly stated that the “under color of law” requirement of a § 1983 action is to be treated the same as the “state action” requirement of the Fourteenth Amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1966).

265. Assuming, of course, that the athlete's desire to participate is a constitutionally protected interest. See infra notes 272-84 for a discussion of the protectable nature of the athlete's interest.

266. Before the state actor status of the NCAA was ultimately decided by the United States Supreme Court in NCAA v. Tarkanian, 488 U.S. 179 (1988), and some courts were holding the NCAA to be a state actor, it was unclear whether a private college following NCAA regulations would itself be considered a state actor because of its NCAA membership and compliance with NCAA regulations. See Parish v. NCAA, 506 F.2d 1028, 1032 n.10 (5th Cir. 1975). At least two authors argued that private colleges should have been so considered. Alex M. Johnson & James F. Ritter, The Legality of Testing Student-Athletes for Drugs and the Unique Issue of Consent, 66 OR. L. REV. 895, 915 (1987). Johnson and Ritter argued that:

The NCAA's primary purpose is to ensure uniformity among member schools with respect to the rules and regulations which govern intercollegiate athletics. This uniform-
Until 1982, the federal courts tended to hold that the NCAA was a state actor. Since 1982, when the United States Supreme Court decided a trilogy of state action cases, the courts have held the NCAA not to be a state actor. Finally in 1988, the United States Supreme Court itself

Id. (citations omitted).

267. See, e.g., Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (holding based on substantial and pervasive entanglement through state institutions' dominant membership and participation in NCAA — one half of NCAA members are state or federally supported; public institutions provide majority of NCAA's capital; majority of members on NCAA governing council and committees are state members). See also Parish v. NCAA, 506 F.2d 1028. Parish was decided on the basis of facts indicating that:

[S]tate-supported educational institutions and their members and officers play a substantial, although admittedly not pervasive, role in the NCAA's program. State participation in or support of nominally private activity is a well recognized basis for a finding of state action. [State and federal governments are interested in] all aspects of this country's educational system. . . . [and the college athletic system] is now beyond the effective reach of any one state. . . . [T]he NCAA by taking upon itself the role of coordinator and overseer of college athletics . . . is performing a traditional governmental function. . . . [S]tates should not be able to avoid the restrictions placed upon them by the Constitution by banding together to form or to support a "private" organization to which they have relinquished some portion of their governmental power.

Id. at 1032-33 (citations and footnotes omitted).

The Parish court found it to be irrelevant that public and private educational institutions join the NCAA "voluntarily." Id. at 1032 n.10. See also Regents of Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1159 (D. Minn. 1976) (holding based on "pervasive influence" exercised on NCAA affairs by numerous state supported university members), rev'd on other grounds, 560 F.2d 352 (8th Cir. 1977); Colorado Seminary v. NCAA, 417 F. Supp. 885, 894 n.4 (D. Colo. 1976) (holding based on state entanglement theory); Rodney K. Smith, Eligibility and Disciplinary Rules in Amateur Athletics, in LAW OF PROFESSIONAL AND AMATEUR SPORTS § 11.03(5)(a) at 11-19 (Gary A. Uberstine ed., 1988).

268. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In all three cases, the Court examined the relationship between private institutions or persons and the state to determine whether the extent of the private actors' involvement with the state made them state actors. For an example of the application of the Court's 1982 state action cases in the context of college athletes, see infra note 269. See also Smith, supra note 267, at § 11.03[5][a]; Wong, supra note 152 at 142-43; Johnson & Ritter, supra note 266, at 909-16.

269. See, e.g., Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984) ("no precise formula to determine whether otherwise private conduct constitutes 'state action'"; question is whether "conduct is fairly attributable to the state"; fact that NCAA was providing a public service in overseeing nation's intercollegiate athletic programs, providing order for conduct of programs, and enforcing uniform rules of eligibility not enough to constitute state action; regulation of athletics is not function "traditionally exclusively reserved to the state"; NCAA's status as private actor also not altered because half of its members are public institutions and half of its resources come from public institutions; it is still a voluntary association of public and private institutions; if the state in regulating or
held the NCAA not to be a state actor. 270 While it is true that the deci-


Following the Court’s decision in Tarkanian, Congress and several state legislatures have considered legislation which would declare the NCAA to be a “state actor” and would require the NCAA to afford “due process” in investigating allegations of wrongdoing by colleges and universities and in imposing penalties if such wrongdoings were proved. See Douglas Lederman, Athletics Notes: Bill Introduced in Congress Would Require NCAA to Provide Due Process, Chron. Higher Educ., May 15, 1991, at A34; Tarkanian, at Hearing, is Critical of N.C.A.A., N.Y. Times, June 20, 1991, at B15. The State of Nebraska has enacted legislation, the Nebraska Collegiate Athletic Association Procedures Act, requiring that:

Every stage and facet of all proceedings of a collegiate athletic association, college, or university that may result in the imposition of a penalty for violation of such association’s rule or legislation shall comply with due process of law as guaranteed by the Constitution of Nebraska and the laws of Nebraska.

1990 Neb. Laws 397, § 3. The Act further provides that “No collegiate athletic association shall impose a penalty on any college or university for violation of such association’s rule or legislation . . . ” id. at § 4, or “for failure to take disciplinary action against an employee or student for violation of such association’s rule or legislation . . . ,” id. at § 5, unless the due process requirements of the Act are met. The Act makes any penalties imposed by any collegiate athletic association subject to judicial review, id. at § 9, and it provides legal remedies to any college or university or any college or university student or employee “aggrieved” by a collegiate athletic association’s violations of the Act, id. at §§ 6, 7, 8.

The legislatures of Florida and Illinois have adopted legislation which is even more specific than the Nebraska law in terms of the due process rights to be accorded educational institutions and athletes subject to investigation and sanction by college athletic associations. 1991 Fla. Sess. Law Serv. ch. 91-260 (West); 1991 Ill. Legis. Serv. ch. 144 (West). The statutes provide, for example, that no penalty may be imposed without a formal hearing; that findings must be made in writing and supported by clear and convincing evidence; that persons or institutions charged with misconduct are entitled to have counsel present, to question and cross-examine witnesses, and to present a defense; and that hearings shall be public unless the party charged objects. 1991 Fla. Sess. Law Serv. ch. 91-260, § 4(1), (2), (4), & (8) (West); 1991 Ill. Legis. Serv. P.A. 87-462, para. 2904, § 4(a), (b), (d) & (h) (West). Both statutes also provide that findings made pursuant to a hearing and penalties imposed on an institution or an individual shall be reviewable in circuit court. 1991 Fla. Sess. Law Serv. ch. 91-260, §§ 4(11) & 5(3) (West); 1991 Ill. Legis. Serv. P.A. 87-462, para. 2904, § 4(j) &
sion related to the NCAA's threatened sanction of a state university if it refused to suspend one of its coaches, there is no reason to believe that the court would not reach the same decision were the case more directly related to an athlete.271

Assuming that the defendant institution in any action brought by an athlete is held to be a state actor, the athlete must still prevail on the question of whether participation in intercollegiate athletics is a constitutionally protected interest.272 The courts have split on that question.

para. 2905, § 5(c) (West). Under either statute, an athletic association, as defined in the statute, which violates the terms of the act may be subject to both money damages and equitable remedies. 1991 Fla. Sess. Law Serv. ch. 91-260, § 9 (West); 1991 Ill. Legis. Serv. P.A. 87-462, para. 2909, § 9 (West).


271. The NCAA does not deal directly with athletes or athletic personnel. Rather, it imposes its rules and regulations affecting athletes and personnel on member institutions, and sanctions the institutions rather than the individuals if its rules are violated. NCAA v. Tarkanian, 488 U.S. at 183-84. See also BERRY & WONG, supra note 140, § 1.22-2 at 15. For example, if an athlete is academically ineligible to play according to NCAA eligibility rules but the school permits the athlete to play, the NCAA will sanction the school, not the athlete. Likewise, were there to be developed an NCAA policy concerning return of athletes to play after illness or injury and the member institution did not impose that rule upon its athletes, allowing them to return to play regardless of the NCAA rule, the institution, rather than the athlete would suffer sanctions.

272. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569 (1972). In terms of property interests the Supreme Court has said:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Id. at 577.

The Court defined "liberty" broadly — not just as freedom from restraint, but also as the ability to contract, to engage in an occupation, to acquire knowledge, to marry, to raise children, to worship God. "'and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.'" Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The Court in Roth held that renewal of a one year teaching contract did not implicate liberty or property interests. In addressing the liberty question, the Court found that the nonrenewal would not damage Roth's reputation or standing in the community, nor would it impose a stigma or disability foreclosing him from the freedom to take advantage of other employment opportunities. Id. at 573. On the
Some courts have found that because participation in intercollegiate athletics may lead to a professional sports career and because such participation is an important part of a college athlete's overall educational experience, the right to participate is a protected property interest.\textsuperscript{273} Other courts have found that an athlete's future professional sports opportunities\textsuperscript{274} are "too speculative" to create a property interest in the athlete's continued participation in intercollegiate sports.\textsuperscript{275} Even if the "professional prospects" argument alone were to be accepted by the courts, it would apply in only a limited number of circumstances.\textsuperscript{276} Apparently no court has had to decide whether the loss of an athletic scholarship would constitute a protectable property interest, because in all the cases brought by athletes declared ineligible to participate, for whatever property claim, the Court found Roth had no entitlement, as the Court had defined it, to a renewable contract. \textit{Id.} at 578.


\textsuperscript{274} Including the asserted rights to appear in post season tournament play or to appear on television to enhance those prospects.

\textsuperscript{275}See, e.g., Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976). Statistics support these courts' conclusions. Only 8 percent of the college athletes who participate in major collegiate football and basketball programs are drafted by professional teams each year and only 2 percent ever sign professional contracts. Edward Hill, \textit{Pressures on the Black College Athlete,} \textit{N.Y. Times,} Aug. 7, 1983, § 5, at 2. In real numbers, of the thousands of college basketball players eligible to be drafted by the NBA each year, a maximum of 54 will be drafted and only 35-40 rookies will remain on active rosters. Charles Grantham, \textit{It's Time to Give College Players a Cut,} \textit{N.Y. Times,} March 18, 1990, § 8, at 10. The average professional career for athletes is four years. Ira Berkow, \textit{The Buses that Haul in Players,} \textit{N.Y. Times,} Dec. 29, 1990, § 1, at 41.

\textit{See also} Hysaw v. Washburn University of Topeka, 690 F. Supp. 940 (D. Kan. 1987) (no claim of entitlement based on contract theory because players' scholarships remained in effect despite their disqualification); Williams v. Hamilton, 497 F. Supp. 641 (D.N.H. 1980) (no claim of entitlement arising under state law to confer property right in opportunity to participate in intercollegiate soccer).

\textsuperscript{276} Professional opportunities are available for a small number of male college athletes in football, basketball, baseball, ice hockey, and to a limited extent, golf and tennis. Professional opportunities for women are even more limited, primarily to tennis and golf. Furthermore, athletes in nonteam sports like tennis and golf are not dependent upon a professional league draft. Rather, they play their way into the professional sport. While intercollegiate competitions and coaching may sharpen their skills, they may attempt to play on the pro circuits whenever they choose. Indeed, some tennis professionals have not yet finished junior high school! In 1990, Jennifer Capriati at age 14 became the youngest player ever seeded at Wimbledon, only weeks after playing into the semifinals at the French Open. Robin Finn, \textit{No Easy Path Over This Grass,} \textit{N.Y. Times,} June 24, 1990, § 8, at 2. Although she lost in the quarterfinals at Wimbledon to 21 year old Steffi Graf, Capriati won 42 matches and 1 tournament in 1990. George Vecsey, \textit{Capriati Comes Up Big Against a Sizable Foe,} \textit{N.Y. Times,} July 2, 1991, at B9.
reason, the athletes have not been deprived of their scholarships despite their lack of eligibility. It is unlikely that college athletes on scholarship would be deprived of their scholarships were they to suffer a career ending injury or illness. While most of the eligibility cases have addressed the constitutional question in terms of whether the opportunity to participate is a "property" interest, at least some authors would ad-

277. See, e.g., Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1348, 1353 (9th Cir. 1981); Parish v. NCAA, 506 F.2d at 1034 n.17; Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 944 (D. Kan. 1987). The athletes in Colorado Seminary argued that because they were scholarship athletes (as opposed to "walk-ons") they had a "right" to play. The court rejected that argument as well. Colorado Seminary v. NCAA, 417 F. Supp. at 895 n.5.

278. The NCAA prohibits the awarding of financial aid to student athletes for more than one academic year at a time. 1990-91 NCAA MANUAL, supra note 131 § 15.3.3.1. While an institution may not assure an athletic prospect that it will automatically continue the financial aid past the one-year period if the athlete is injured and unable to compete, "an institutional representative may inform the prospect of the regular institutional policy related to renewal or continuation of aid past the one-year period for recipients who became ill or injured during their participation." Id. § 15.3.3.1.2. A staff member may also "inform a prospect that the athletics department will recommend to the financial aid authority that the prospect's financial aid be renewed each year for a period of four years and may indicate that the authority always has followed the athletics department's recommendations in the past." Id. § 15.3.3.1.1. The prospect must also be informed, however, that renewal of the athletic scholarship will not be automatic. Id.

The NCAA regulates the number of athletic grants-in-aid to be utilized by each sport at each Division I and Division II institution. (Division III institutions may not award athletes financial aid based on athletic ability. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1991-92 NCAA GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 11 (1991)). The NCAA provides incentive to colleges and universities to continue financial aid for athletes who are precluded from playing because of illness or injury by providing that if the player apparently never again will be able to participate in intercollegiate athletics [he or she] shall not be considered a counter beginning with the academic year following the incapacitating injury or illness.

Id. § 15.5.1.4. A counter is an individual who is receiving institutional financial aid that is countable against the aid limitations established in a sport by the institution's membership division. Id. § 15.02.2.

In my research for this article I have found no case references to an athlete's losing his or her financial aid despite ineligibility for illness or other reasons. See, e.g., Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1348; Parish v. NCAA, 506 F.2d 1028, 1034 n.17; Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 944. See also Altman, Doctor's Warning, supra note 20, at C3 (Tony Penny would have continued to receive his athletic scholarship at Central Connecticut State University had his heart disease prevented him from returning to play). I did find media references to athletes who lost their athletic scholarships because of their criminal activity. See, e.g., Douglas Lederman, Issues About Preferential Treatment of Athletes Raised on 2 Campuses Following Crime by a Basketball Star, CHRON. HIGHER EDUC., Sept. 18, 1991, at A41; Douglas Lederman, Court Orders 2nd Hearing for U. of Washington Athlete, CHRON. HIGHER EDUC., Sept. 18, 1991, at A41, A42.

Representative Tom McMillen (D-MD) has introduced a bill in Congress which would prohibit colleges and universities from withdrawing athletic scholarships during an athlete's enrollment at the institution (for a period of up to 5 years), unless an athlete fails to perform at an academically successful level, violates the institution's rules, or is convicted of a felony or drunk driving. A Bill to Change the NCAA, CHRON. HIGHER EDUC., July 31, 1991, at A24.
dress it as a "liberty" interest. Schubert, Smith, and Trentadue argue that the courts' reluctance to view participation in athletics as a liberty interest could change

given the rise in popularity and importance of sporting activity as a form of expression, the desire or interest of many athletes in participating in sports as a means of obtaining a scholarship for educational purposes, or... the desire of athletes to use participation at the collegiate level as a stepping stone to a professional contract or coaching position.

Similarly, Buss regards an athlete's potential professional career as a protected liberty interest. The issue, as Buss defines it, is not the statistical chances that any given athlete will have a professional career, but rather the opportunity for that athlete to succeed professionally.

If the Supreme Court's liberty interest analysis from Roth were applied to the college athlete context, the important question would be whether denying athletes the opportunity to engage in intercollegiate athletics because of a preexisting medical condition would harm their reputation or impose a stigma or disability that would foreclose their freedom to take advantage of other employment opportunities. Even if such opportunities were foreclosed, it might be hard to determine whether they were foreclosed by the college's decision to preclude the athlete from playing or by the athlete's preexisting medical condition.

Finally, if colleges and universities were found to be state actors, and college athletes found to possess protectable property or liberty interests, the athletes' challenges to their ineligibility would presumably be based either on the substance of the decision denying them the opportunity to participate or the procedure through which the decision was reached. A challenge to the substance of the institution's decision would be analogous to the medical treatment scenario in which a patient

279. See, e.g., SCHUBERT ET AL., supra note 169, at 67; Buss, supra note 273, at 11-14.
280. SCHUBERT ET AL., supra note 169, at 67. But see Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. at 945 (finding no liberty interest in continued opportunity to play football despite contention of players that former coach dissuaded coach at another college from recruiting them to play there).
282. Id. at 12-13. For more detailed discussion of whether a college athlete's desire to participate in intercollegiate sports is a protectable property or liberty interest, see BERRY & WONG, supra note 140, § 1.32-2, at 60; WEISTART & LOWELL, supra note 136, at 20-25, 93-107; WONG, supra note 152, 154-55; Frank J. Remington, NCAA Rule Enforcement Procedures, in LAW OF PROFESSIONAL AND AMATEUR SPORTS § 12.10(2), at 12-12-15 to 12-16 (Gary A. Uberstine ed., 1988).
284. See infra notes 312, 331, 428-31 and accompanying text for further discussion concerning this uncertainty.
chooses a specific type of treatment or no treatment at all and the health care provider seeks to override that decision. The patient's — and here the athlete's — right to self-determination and autonomy are not absolute and may be overridden by a compelling interest advanced by the state actor. 285

If the challenge is to the procedure by which the institution reached its decision to preclude the athlete from further play, standard procedural due process rules would apply. 286 The athlete would be entitled to notice of the institution's intent to make a decision on the athlete's eligibility and to a meaningful opportunity to be heard on that issue. 287 The athlete would not necessarily be entitled, however, to a full adversarial hearing on the question. Rather, in determining “what process is due” in any given situation, the court would apply a balancing test, weighing

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail. 288

If the law entitles athletes to procedural due process protection, by definition the right to play will constitute a protected property or liberty interest and, therefore, be judged to be of great individual importance. 289 The institution's interest may also be judged to be great, because the school may not want to jeopardize its students' health or lives or its own reputation by allowing an athlete to risk greater harm by returning to play. 290 The institution would also have some administrative interests in

285. See supra notes 250-59 and accompanying text for a discussion of patients' rights to self-determination and autonomy and competing state interests. I leave further discussion of this issue to the substantive discussion of my proposal infra Part VI.

286. Federal regulations implementing Section 504 of the Rehabilitation Act in the postsecondary education context do not contain procedural standards. In the elementary and secondary education context, however, the regulations do provide procedural safeguards in identifying, evaluating, and placing handicapped persons. 34 C.F.R. § 104.36 (1990); 45 C.F.R. § 84.36 (1990). Those standards include a requirement of notice to the person's parents or guardian and an opportunity for the parent or guardian to examine relevant records. The regulations also provide for an impartial hearing with the opportunity to participate by the parents or guardian, representation by counsel, and a review process. 34 C.F.R. § 104.36 (1990); 45 C.F.R. § 84.36 (1990).


289. See supra notes 272-84 and accompanying text for a discussion of the property and liberty interests which may attach to the athlete's desire to participate in intercollegiate competition.

290. See infra note 425 and accompanying text for further discussion of the institution's interest in refusing a request by a previously ill or injured athlete to return to play.
keeping hearing requirements to a minimum, but administrative convenience is not an acceptable reason for overriding a fundamental right.291

The consideration of whether additional procedures will enhance the accuracy of the decisionmaking process will be important in determining how much process is due the athlete who desires to return to play. At a minimum, athletes would probably be entitled to a statement explaining the institution's decision and at least a summary of the evidence upon which the institution based its decision.292 Athletes would probably also be given the opportunity to gather and present evidence, including reports from their own medical experts, to support the request to return to play.293 The institution and the athlete may disagree over whether the athlete should be afforded an actual hearing before an impartial decisionmaker where the athlete would be represented by legal counsel. They may also disagree over whether the athlete would be given the opportunity to cross-examine the sources of the information upon which the institution based its decision.

Whether the athlete would be entitled to the trappings of a full adversarial hearing would depend on the court's determination of how important such a hearing would be to the accuracy of the institution's decision, and how administratively burdensome it would be to the institution.294 In making the determination as to accuracy, a comparison to the Supreme Court's decision in Mathews v. Eldridge295 seems appropriate. The issue before the Court in Mathews was whether the due process clause of the Fifth Amendment required an evidentiary hearing prior to termination of a claimant's Social Security Disability benefits. The question of continued eligibility for benefits in the Social Security context, like the determination in the student-athlete context, was based on a medical assessment of the worker's physical or mental condition.

This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. Goldberg

293. See id.
294. For more extensive discussion of the procedural due process protections accorded college athletes, albeit primarily in the disciplinary context, see Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 608 (D. Minn. 1972); Schubert et al., supra note 169, at 70-73; Smith, supra note 267, § 11.03[7][b] at 11-39 to 11-42; Weistart & Lowell, supra note 136, § 1.28, at 96-106.
noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision."

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," concerning a subject whom they have personally examined. In Richardson [v. Perales] the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker is substantially less in this context than in Goldberg.296

The Mathews Court acknowledged that factors other than medical diagnosis might be important to the decisionmaker's determination of whether the worker could engage in substantial or gainful employment, but stated that such information was "amenable to effective written presentation."298

Colleges may well argue that information offered by athletes relevant to the question of whether they should be permitted to play notwithstanding the status of their health is similarly "amenable to effective written [as opposed to oral] presentation." That information would presumably relate to the athlete's medical condition; his or her athletic history, including how long the athlete had engaged in this or a similar sport since having this condition; the documented experience of others, especially athletes in a same or similar sport, with the same condition; this athlete's history of recovery from other illnesses or injuries; the athlete's treatment and conditioning plans; and his or her understanding of the nature of the condition and the risks of a return to play. While much

296. Id. at 343-45 (footnote and citations omitted). In Goldberg v. Kelly, the Court decided that because credibility and veracity were issues before the decisionmaker in a termination of welfare rights case, the claimants' due process rights entitled them to an oral, as opposed to written, presentation of evidence, and to the opportunity to confront and cross-examine the witnesses against them. 397 U.S. 254, 268-70. The Court also held that the claimants were entitled to retain counsel (though counsel need not be provided for them) and that they were entitled to an impartial decisionmaker. Id. at 270-71.

297. Mathews v. Eldridge, 424 U.S. at 344 n.28 (factors included worker's age, educational level, work experience). See also Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (showing of reasonable probability of harm to handicapped employee by position sought "cannot be based merely on employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports"); determination to be based on person's medical history and work history).

of that information would be amenable to written presentation, some, especially that relating to the athlete's understanding of his or her medical condition and the risks of returning to play, would be more appropriately presented orally, with a chance for questions and elaboration.

In terms of the administrative burdens of more formal proceedings, the athlete's argument is probably strong. Cases involving colleges or universities refusing an athlete the right to compete for medical reasons are small in number. Furthermore, since the athlete's scholarship may be continued regardless of the institution's decision concerning return to play, no extra cost or savings will be implicated.

A college athlete who has been denied the opportunity to return to play following illness or injury by a college or university may challenge the institution's decision on constitutional grounds. Problems, however, relating to whether the institution is a state actor, whether the athlete has a constitutionally protected interest in returning to play, and whether the institution's procedure and decision violate procedural due process principles make it far from certain that the athlete will prevail on such a claim. An action brought pursuant to Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990 may be more likely to provide the athlete with relief.

B. A Statutory Right to Participate

1. Section 504 of the Rehabilitation Act of 1973 provides that:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

Section 706(8)(B) of the Act defines "individual with handicaps" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impair-

299. For example, information on the athlete's medical diagnosis or the documented experience of others similarly situated.

300. See supra note 278 for a discussion of NCAA policy and illustrative cases concerning continuation of athletic scholarships despite player ineligibility.


304. Id.
For purposes of Section 504 "the term 'program or activity' means all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance."306

Federal agencies have adopted regulations effectuating Section 504. For example, both the Department of Education307 and the Department of Health and Human Services308 have enacted regulations designed to implement Section 504 as it applies, inter alia, to postsecondary education. Both sets of regulations state generally that "[a] recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of the handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service."309 More specifically, in terms of athletic activities, both sets of regulations provide that:

No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.310

Finally, the regulations state in terms of athletic opportunities that:

In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate [sic] on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.311

There can be little doubt that an athlete who has suffered a serious injury or illness and is precluded from playing because of that condition is an "individual with handicaps" as defined by Section 504 and its im-

306. 29 U.S.C.A. § 794(b)(2)(A) (1988) (emphasis added). This section of the statute was added in 1988, Pub. L. 100-259, § 4(2), to clarify that all parts of the institution are bound by the terms of the statute if any part of the institution receives federal financial assistance, rather than only those departments or areas that receive federal assistance directly.
308. 45 C.F.R. §§ 84.1-.10; 84.41-.47 (1990).
310. 34 C.F.R. § 104.43(a) (1990); 45 C.F.R. § 84.43(a) (1990) (emphasis added).
According to the terms of Section 504 and its implementing regulations, an "individual with handicaps" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C.A. § 706(8)(B) (West Supp. 1991); see also 34 C.F.R. § 104.3(j)(1) (1990); 45 C.F.R. § 84.3(j)(1) (1990).

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; . . .

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment. 34 C.F.R. § 104.3(j)(2) (1990); 45 C.F.R. § 84.3(j)(2) (1990) (emphasis added).

Section 504 and the regulations do not include "playing" on the list of "major life activities" used in defining "handicapped person." Nevertheless, athletes could argue that "playing" is analogous to "working" and, therefore, that they do satisfy the "substantial limitation" definition of "handicapped person." Athletes, however, have generally failed in their claims for workers' compensation due to athletic related injuries. See, e.g., State Compensation Ins. Fund v. Industrial Comm'n, 314 P.2d 288 (Colo. 1957) (eligibility for workers' compensation arises out of employer-employee contractual relationship; although student on athletic scholarship earned 70 cents per hour working on college farm 20 hours per week, no evidence to establish that at time student athlete was killed in a football game he was under contract for hire to play football or even that playing football was related to his employment by the college); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (eligibility for workers' compensation arises out of employer-employee contractual relationship; in determining whether that relationship exists, primary consideration is intent that contract of employment existed; NCAA prohibits college athletes from taking "pay" for athletic performance and Internal Revenue Service does not tax athletic scholarships as income); cf. Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169 (Cal. Dist. Ct. App. 1963) (although court said not all student athletes are institutional employees, court found on specific facts of case college and football player in employer/employee relationship, allowing suit for death benefits after student killed in plane crash on way home from away game); University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) (workers' compensation claim allowed where court found tie between performance on football team and players' eligibility for paying jobs on campus).

Furthermore, even if the athlete's condition does not substantially limit a "major life activity" as defined by the statute and regulation, the college's refusal to allow the athlete to return to play would constitute "regarding [the athlete] as having an impairment" (treating the athlete as if such a limitation existed), therefore satisfying the third definition of "individual with handicaps."

A Department of Health, Education, and Welfare interpretation issued in 1978 does address the question of minors (elementary and secondary school students) who have lost an organ, limb, or appendage and wish to participate in contact sports. 43 Fed. Reg. 36,035 (1978). The interpretation provides that "Students who have lost an organ, limb, or appendage but who are otherwise qualified,
whether it is the preexisting condition or the fear of future injury that creates the handicapping condition. Only the rare college or university does not receive any federal assistance. The question that would arise, then, in terms of the athlete who desires to return to play and the institution that refuses that request, is whether the athlete is "an otherwise qualified individual" and is therefore entitled by Section 504 to return.

Any analysis of the phrase "an otherwise qualified person" must begin with the United States Supreme Court's decision in Southeastern Community College v. Davis. There, in a case involving a hearing disabled applicant's challenge to a college's nursing program requirements, the Court defined "an otherwise qualified person" as "one who is able to meet all of a program's requirements in spite of his handicap." In so holding, the Court acknowledged that Section 504 "does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition." Id. (emphasis added). The discussion following the interpretation emphasizes that "A recipient cannot assume that such a child is too great a risk for physical injury or illness if permitted to participate in contact sports." Id. (emphasis added). Although the interpretation is written in language applicable to elementary and secondary school students, the "coverage" section of the interpretation provides that "This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance." Id.

Clearly, then, this policy interpretation should apply to those college athletes who lose an organ, limb, or appendage and want to engage in contact sports. The interpretation does not, however, address questions relating to other types of injuries (e.g., neurological or musculoskeletal) or illness (e.g., cardiomyopathy). It also leaves open for interpretation the question of "otherwise qualified." See infra notes 314-31, 352-70 for a discussion of the term "otherwise qualified."

314. The regulations implementing Section 504 use the term "qualified handicapped person" rather than "otherwise qualified individual."

The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.


315. 442 U.S. 397 (1979). This analysis focuses primarily on "otherwise qualified handicapped individual" in the education context. See infra notes 352-70 and accompanying text for a discussion of the concept in the context of employment.

316. Southeastern Community College v. Davis, 442 U.S. at 406 (emphasis added). In adopting this definition of "otherwise qualified," the Court rejected a definition which would have included "those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap." Id.
disabled persons to participate.”

It only requires, the Court said, that students not be excluded from participating in the federally funded program because they are handicapped.

Although the Court made clear that Section 504, unlike Section 501 and Section 503 of the Rehabilitation Act, is concerned with antidiscrimination rather than with affirmative action, it also nevertheless indicated that Section 504 might require educational institutions to make some “accommodation” for handicapped individuals. While not setting forth a precise standard for determining what that accommodation might entail, the Court said that an institution’s refusal to put in place technological advances which would not impose “undue financial and administrative burdens” on the institution might be judged to be “unreasonable and discriminatory.” The Court also stated, however, that an institution need not make “substantial modifications,” and that Southeastern Community College’s unwillingness to make “major adjustments” in its nursing program did not “reflect[] any animus against handicapped individuals.”

The Court further clarified its accommodation requirement in Alexander v. Choate, when it said that “while a grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones.” If Southeastern Community College v. Davis and Alexander v. Choate are read together, it appears that “otherwise qualified individual” does not mean “‘one who is able to meet all of a program’s requirements

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317. Id. at 405.
318. Id.
321. Southeastern Community College v. Davis, 442 U.S. at 410-11. Sections 501 and 503 relate, respectively, to federal employment and federal contractors and contain specific affirmative action requirements.
322. Id. at 413.
323. Id. at 412-13.
324. Id. at 410, 413.
325. Id. at 413.
327. Id. at 300.
in spite of his handicap[.]" but rather one who is able to do so once the federal assistance recipient has made "reasonable accommodation" for the handicapped individual.

The regulations implementing Section 504, as promulgated by the Departments of Education and Health and Human Services, define "qualified handicapped person" to mean "With respect to postsecondary . . . services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." The appendices to the regulations further state that "The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question."

Any college or university wishing to preclude an athlete previously ill or injured from returning to play and wishing to avoid a charge of discrimination pursuant to Section 504 may be expected to argue that the athlete is not "otherwise qualified" to take part in intercollegiate activities because his or her physical condition prevents him or her from meeting all of the program's requirements even with any reasonable accommodation the institution could make. Because athletes must pass physical examinations before being cleared to play, the handicapping condition in these cases will relate to the fear that the athletes, having once passed such examinations, will suffer further injury if they return to play.

While in the employment context there is substantial precedent concerning the term "otherwise qualified" and the requirement of "reasonable accommodation," there is little precedent to aid in addressing these issues in the education/athletic context. While at least four courts have addressed the question of whether an educational institution might violate Section 504 were it to preclude an athlete with a disability from

329. 34 C.F.R. § 104.3(k)(3) (1990); 45 C.F.R. § 84.3(k)(3) (1990).
331. The physical examination could be considered a "technical standard . . . essential to the participation . . . in question," which the athlete must pass in order to be a "qualified handicapped person." 34 C.F.R. § 104.3(k)(3) (1990); 34 C.F.R. pt.104, app. A at 403 (1990); 45 C.F.R. § 84.3(k)(3) (1990); 45 C.F.R. pt. 84, app. A at 362 (1990). I would require that the physical examination be related to the performance of the sport and be consistent with the activity and safe performance. Cf. 29 C.F.R. § 32.14(b) (1990) (setting forth job qualification requirements in employment context).
332. See infra notes 352-70 and accompanying text.
participating in the institution's athletic program, only one of those cases dealt with a college athlete. The student athletes prevailed in three of the cases, but all of the cases are limited in terms of what they add to the analysis of the issues raised here.

In *Grube v. Bethlehem Area School District*, in an action for injunctive relief, the court found no "substantial harm" was likely to result to a seventeen year old student with only one kidney who wanted to play football. The court held, therefore, that Grube was likely to prevail on the merits of his Section 504 claim were the case to go to trial. The other elements for granting a preliminary injunction having been met, the court granted the injunction permitting Grube to play.

In *Wright v. Columbia University*, Columbia had refused a college sophomore with sight in only one eye the opportunity to play football, arguing that participation in contact sports could put him at risk of losing his sight entirely. While such motives were "laudable," the court wrote, they "derogate from the rights secured to plaintiff under Section 504, which prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person." Upon hearing the evidence presented on behalf of Wright, including the testimony of an expert witness that playing football created no "substantial risk" to Wright's remaining sight, the court entered a temporary restraining order allowing Wright to play.

In *Poole v. South Plainfield Board of Education*, the court denied a motion for summary judgment by the Board of Education in an action for damages brought by a former high school student who had been precluded from taking part in the school's wrestling program because he had only one kidney. In determining whether Poole should have been permitted to wrestle, the court noted that while an injury to his healthy kidney could have had "grave consequences," so might other injuries.

337. *Id.* at 425.
338. *Id.*
339. 520 F. Supp. at 789.
340. *Id.* at 794.
341. *Id.* at 791, 793.
that could have affected him or other members of the wrestling squad.343 "Life has risks[,]" the court said, and "[t]he purpose of § 504 . . . is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."344

Although the decisions in Grube, Wright, and Poole all lend support to the claims of the athlete with a preexisting health condition who seeks to return to play, the results of the cases are not entirely satisfactory in analyzing the issue. One important distinguishing fact is that in all three cases the athletes had already had successful athletic careers, without the feared injuries, after developing their conditions. In the case of athletes like Hank Gathers or Marc Buoniconti that is not necessarily the case. Certainly Buoniconti sought to return to play without prior experience with the condition. It is unclear how long before his first collapse Gathers had played basketball while affected with cardiomyopathy. Second, the conditions affecting Grube, Wright, and Poole would not be fatal, or permanently crippling, even if the worst case scenario occurred.345 Third, for some types of heart disease or some neurological disorders, stronger evidence than was presented in any of these cases might exist concerning the likelihood and severity of potential injury.346 Finally, while the courts' language in both Wright and Poole concerning Section 504's protection of the students' rights to make autonomous decisions free from the "paternal[ism]" of the institutions347 indicates that in the student athlete context autonomy may be absolute, the Wright court also considered as part of its analysis that there was no "substantial risk" to the student from his requested athletic participation.348

It is possible, of course, that a court considering the case of a student athlete with cardiomyopathy or a risk of severe neurological impair-

343. Id. at 953.
344. Id. at 953-54.
345. Even if Grube or Poole had suffered damage to his remaining kidney, each could survive long term on kidney dialysis and subsequent kidney transplant. While those situations, as well as Wright's potential blindness, are serious disorders, they are not as debilitating as total paralysis or death.
346. Almost all of these cases are decided on a motion for injunctive relief. The evidence produced at such hearings may not be as complete as that which would be offered if preliminary relief were to be denied and the case were to go on for trial. See supra note 185 and accompanying text and infra notes 445-56 and accompanying text for discussions concerning the likelihood of catastrophic injury or death's occurring if persons with certain conditions engage in contact sports.
ment seeking relief pursuant to Section 504 could adopt the absolutist aspect of the courts' decisions in *Wright* and *Poole* and declare that the decision is one for the athlete and not for the institution to make. 349 There is clear precedent in the employment context, however, allowing employers, despite Section 504, to deny positions to employees who are at risk to themselves because of the combined effects of their preexisting medical conditions and the requirements of their jobs. 350 Such authority is persuasive in the college athlete context as well.

In order to prevail in an action brought pursuant to the Rehabilitation Act of 1973, claimants must prove that 1) they are “handicapped individuals” under the Act; 2) they are “otherwise qualified” for the position; 3) they were excluded from the position solely by reason of the handicap; and 4) the program or activity in question receives federal financial assistance. 351 In the employment context, Equal Employment Opportunity Commission (EEOC) regulations relating to the Rehabilitation Act of 1973 define “qualified handicapped person” as one “who, with or without reasonable accommodation, can perform the essential functions of the position without endangering the health and safety of the individual or others....” 352 Labor Department regulations further provide that “to the extent job qualifications tend to exclude handicapped individuals because of their handicap, they [must be] related to the performance of the job and [be] consistent with business necessity and safe performance.” 353 An accommodation is “reasonable” unless it “would impose an undue hardship on the operation of [the employer’s] program.” 354 Factors important in determining whether an accommodation would impose an undue burden on the employer include the size of the program in terms of number of employees, number and type of facilities, and the size of the budget; the type of operation, includ-
ing composition and structure of the work force; and the nature and cost of the accommodation. The courts have adhered closely to the regulations in analyzing claims brought by persons alleging loss of employment opportunities in violation of the Rehabilitation Act of 1973.

Pursuant to the EEOC regulations, the courts clearly permit em-

355. Id. at § 1613.704(c) (1990).
356. See, e.g., Chiari v. League City, 920 F.2d 311, 315 (5th Cir. 1991) (in determining if a claimant is "otherwise qualified," court must consider whether the claimant could perform the essential functions of the job and, if not, whether any reasonable accommodation could be made by the employer to help the claimant perform those functions); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) (same); Strathie v. Department of Transp., 716 F.2d 227, 230, 232 (3d Cir. 1983) (accommodation is unreasonable if it would necessitate modifying essential nature of program or if it would impose undue burdens, such as extensive costs, on the recipient of federal funds; court cautioned against overly broad definition of "essential nature" of the program which could, by definition, exclude many or most handicapped persons); Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982) (business necessity requirement of job qualification that could serve to exclude handicapped persons from employment must be narrowly construed; not to be "confused with mere expediency"); Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981) (physical criteria used to justify exclusion from employment must be "job related," that is, "that persons who suffer from the handicap plaintiff suffers and who are, therefore, unable to meet the challenged standards, cannot safely and efficiently perform the essential functions of the position in question"); if question of reasonable accommodation raised, employer must show accommodation which would enable applicant to perform essential functions of job adequately and safely would impose undue burden on employer).

357. 29 C.F.R. § 1613.702(f) (1990) (" 'Qualified handicapped person' means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . .") (emphasis added). The definition of "qualified handicapped person" relating to employment in the regulations issued by the Departments of Education and Health and Human Services do not include a reference to the safety of the individual or others. (" 'Qualified handicapped person' means: (1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; . . . ." 34 C.F.R. § 104.3(k)(1) (1990); 45 C.F.R. § 84.3(k)(1) (1990)). Although the EEOC regulations were developed pursuant to Section 501 of the Rehabilitation Act, which requires affirmative action on the part of federal employers in employing handicapped persons and the Education and Health and Human Services regulations were developed pursuant to Section 504 which prohibits discrimination against handicapped persons by federal financial aid recipients, but does not require affirmative action, see Southeastern Community College v. Davis, 442 U.S. 397, 410-11 (1979), that difference alone would not seem to justify the difference in including harm to individuals or others within the definition of "qualified handicapped person" in one set of regulations and not in the others. The Department of Health and Human Services (DHHS) regulations predated the EEOC regulations by almost a year. The source of the DHHS (then Department of Health, Education, and Welfare) regulations was 42 Fed. Reg. 22,677 (1977). The source of the EEOC regulations was 43 Fed. Reg. 12,295 (1978). For further discussion of the rule making history of these regulations, see infra notes 412-13.

While recognizing the difference in terms of "risk of harm to self" posed by the different sets of regulations, the Chiari court nevertheless indicated that the "personal safety requirement" applicable to Section 501 based regulations should be applicable to Section 504 based regulations as well. Chiari v. League City, 920 F.2d 311, 316. In reaching that conclusion, the court relied on the Mantolete court's description of the Section 501 and Section 504 definitions as being similar except to the extent that the former imposed an affirmative action requirement on employers while the
ployers to consider risk of harm to the handicapped applicant from the employment in question. The courts have not used any single standard, however, in determining how serious or how imminent a risk of harm must be before an employer is permitted to refuse an applicant employment because of it. Several courts have indicated that a "significant risk" or a "substantial likelihood" of personal injury could justify the exclusion of a handicapped person from a federally assisted program. The courts have not made clear whether that risk can be satisfied by a possibility of its occurrence or must rise to a probability of occurrence. In *Doe v. New York University*, the court held that the university could take into account "any appreciable risk" that such harm could occur, and that the risk need not amount to a 50 percent probability of occurrence.

latter did not. *Id.* at 317 (citing *Mantolete v. Bolger*, 767 F.2d at 1421). The *Chiari* court concluded, therefore, that "under section 504, an individual is not qualified for a job if there is a genuine or substantial risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk." *Id.* at 317. The majority opinion in *Mantolete* did not address the precise question of whether the personal safety requirement of Section 501 would also apply to Section 504 cases (*Mantolete* itself was a Section 501 case), but Judge Rafeedie, in concurrence, wrote to "make clear" that the court's decision applied only to Section 501 cases and that whether such requirements applied to Section 504 cases involving private employers was still an open question. *Mantolete v. Bolger*, 767 F.2d at 1425 (Rafeedie, J., concurring).


359. *Chiari v. League City*, 920 F.2d at 316, 317 (affirming district court's decision granting summary judgment to defendant city in Section 504 action brought by construction inspector fired because of physical limitations due to Parkinson's Disease; court decided "significant risk of personal injury" can disqualify a handicapped individual from a job if the employer cannot eliminate the risk and "under section 504, an individual is not qualified for a job if there is a genuine substantial risk he or she could be injured . . . and the employer cannot modify the job to eliminate that risk.").

360. *Bey v. Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982) (ruling in favor of defendant United States Postal Service on Section 501 claim brought by applicant denied position because of hypertension; court found "substantial likelihood" applicant's hypertension coupled with position's "rigorous physical requirements" could cause him damage from heart attack, stroke, or organ failure). See also *Doe v. New York Univ.*, 666 F.2d 761, 777 (2d Cir. 1981) (reversing entry of preliminary injunction against defendant university on Section 504 claim brought by student seeking readmission to medical school; court identified "crucial question" in determining whether student was "otherwise qualified" to be readmitted as whether there was a substantial risk that her mental disturbance would recur, resulting in behavior harmful to herself or others).

361. 666 F.2d 761 (2d Cir. 1981).

362. *Id.* at 777.

363. 767 F.2d 1416, 1425 (9th Cir. 1985) (remanding the district court decision on Section 501 claim brought by applicant with epilepsy who was denied employment with the United States Postal
ever, stated that an "elevated risk of injury, without more," would not justify a refusal to hire an otherwise qualified handicapped person.\textsuperscript{364} Rather, the court held, "The question is whether, in light of the individual’s work history and medical history, employment of that individual would pose a \textit{reasonable probability} of substantial harm."\textsuperscript{365}

The other question courts have considered in determining whether risk to the individual is sufficient reason to justify refusing employment to a handicapped person is how "imminent" the risk of injury must be. If the risk of injury is immediate, employers are justified in refusing employment to handicapped employees.\textsuperscript{366} But what if the employee is capable of performing today without risk, yet could face risk of personal injury in either the short term or long term future?

The court in \textit{Bentivegna v. United States Department of Labor}\textsuperscript{367} cautioned against allowing "remote concerns" for a handicapped employee's long term health to justify a decision not to hire the employee: "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since \textit{almost all handicapped persons are at greater risk from work-}

\footnotesize{Service for consideration of whether plaintiff was "qualified handicapped individual" in light of standard articulated by the court, and if so, whether reasonable accommodation could be made to enable her to perform the job she sought).}

\textsuperscript{364} \textit{Id.} at 1422.

\textsuperscript{365} \textit{Id.} (emphasis added). A number of state courts have addressed the risk of personal injury question pursuant to state law. \textit{See, e.g., Sterling Transit Co. v. Fair Employment Practice Comm’n, 175 Cal. Rptr. 548, 551-52 (Cal. Ct. App. 1981) (finding in favor of employee whose low back scoliosis made him susceptible to back injury in job which required heavy lifting, because employer’s evidence showed no more than ‘possibility’ employee might endanger health ‘sometime in the future,’ a conjecture insufficient to justify refusing employment to handicapped person protected by state equal employment opportunity law); Montgomery Ward & Co. v. Bureau of Labor, 600 P.2d 452, 453 (Or. Ct. App. 1979) (affirming Department order that employer discriminated against person with history of heart attack and cardiac problems applying to be heavy appliance salesperson; test is whether employee can perform job without risk of incapacitating himself or herself); Bucyrus-Erie Co. v. State Dept’ of Indus., 280 N.W.2d 142, 149-50 (Wisc. Ct. App. 1979) (affirming Department decision in favor of employee with back problems; ability to perform job efficiently includes “ability to perform without a materially enhanced risk of death, or serious injury to the employee or others in the future”; employer must establish reasonable probability that because of employee’s physical condition, the position sought would be hazardous to the employee’s health and safety); Chicago & North Western R.R. v. Labor & Indus. Review Comm’n, 283 N.W.2d 603, 608 (Wis. Ct. App. 1979) (upholding Commission ruling in favor of employee because employer may have shown possibility but not reasonable probability that employee’s epilepsy would pose health or safety hazard to him in position as welder; court acknowledged that if possibility became actuality it would be disastrous, but said that foresight deals with reasonable probabilities).}

\textsuperscript{366} \textit{See, e.g., E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103 n.16 (D. Haw. 1980).}

\textsuperscript{367} 694 F.2d 619 (9th Cir. 1982).
related injuries.” The Bentivegna court did not hold, however, that a “non-imminent risk of injury” could never justify denying employment to a handicapped applicant, but indicated that any such condition should be “more directly tied to increased risk of injury” and “be consistent with business necessity and safe performance” of the job.  

2. The Americans with Disabilities Act of 1990 The Americans with Disabilities Act of 1990 (ADA) may well provide college athletes with a preexisting medical condition, who desire to return to play in the face of institutional refusal, a remedy as strong as, if not stronger than, that provided by Section 504 of the Rehabilitation Act. The ADA is modeled on the Rehabilitation Act, yet extends further in its coverage. While the Rehabilitation Act applies, in terms of employers, to federal employers and federal contractors and, in terms of antidiscrimination in general, to entities receiving federal financial assistance, the ADA applies to employers “engag[ing] in an industry affecting commerce” with fifteen or more employees; “public entities,” referring to

368. Id. at 622 (emphasis added).
369. Id. at 623 n.3.

The decision of the Assistant Secretary can be read as holding that risk of future injury because of a physical or mental condition can never be the basis for rejecting a qualified handicapped individual, irrespective of the likelihood of injury, the seriousness of the possible injury or the imminence of the injury. Such a holding is clearly contrary to the law. If, for example, it was determined that if a particular person were given a particular job, he would have a 90% chance of suffering a heart attack within one month, that clearly would be a valid reason for denying that individual the job, notwithstanding his status as a qualified handicapped individual. [It might be that such a condition would prevent the individual from being capable of performing the job and thus would remove him from the category of qualified handicapped individual.] A job requirement that screened out such an individual would be consistent both with business necessity and the safe performance of the job. Yet, it could be argued that the individual had a current capacity to perform the job, and thus was a qualified handicapped individual.

The Court has no doubt that in some cases a job requirement that screens out qualified handicapped individuals on the basis of possible future injury, could be both consistent with business necessity and the safe performance of the job.

State and local governments, including those that do not receive Federal financial assistance, and "public accommodations," including, "if the operations of such entities affect commerce," "undergraduate, or postgraduate private school[s], or other place[s] of education."

College athletes playing for public colleges and universities would be protected against discrimination pursuant to the public services provisions of the ADA and those playing for private institutions by the public accommodations provisions. Both contain general sections prohibiting discrimination against persons with disabilities. As with


"Commerce" is defined as "travel, trade, traffic, commerce, transportation, or communication — (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country." 42 U.S.C.A. § 12181(1) (West Supp. 1991). This definition is the same as that established by Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations. 56 Fed. Reg. 35,547 (1991). As the comments accompanying the Department of Justice regulations which implement the public accommodations section of the ADA note, "[b]ecause of the integrated nature of the national economy, the ADA and this final rule will have extremely broad application."


380. The public services provision states that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132 (West Supp. 1991).

"[Q]ualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.


The public accommodation provision of the ADA states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C.A. § 12182(a) (West Supp. 1991). The statute further provides:

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.


(i) [imposing or applying] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and
Section 504 of the Rehabilitation Act, the relevant question in ADA actions brought by college athletes against colleges and universities who precluded them from play will be whether the institution may assert potential harm to the athlete as a defense to the discrimination claim.

Neither the statutory sections relating to public services nor the regulations implementing those sections of the statute address the question of risk of harm to an individual with a disability who seeks to participate in a public entity's services or programs. The Department of Justice commentary accompanying the regulations, however, states that

equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) [failing] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) [failing] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . . .


if the "essential eligibility requirements" provision of Section 12131(2)\textsuperscript{383} raises "questions of safety," the principles established in the regulations implementing the public accommodations section\textsuperscript{384} of the statute will apply.\textsuperscript{385} The regulations implementing the public accommodations sections of the ADA do specifically address the question of risk, but only risk to others, not risk to the disabled individual.\textsuperscript{386} Furthermore, the Justice Department commentary on the regulations provides that "[a] public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part."\textsuperscript{387} Even were the college or university allowed to claim risk of injury to the athlete as a valid reason to preclude him or her from athletic participation, such preclusion would be permissible only if the institution's making reasonable modifications to its practices or procedures,\textsuperscript{388} or providing "auxiliary aids or services,"\textsuperscript{389} to enable the athlete to participate would "fundamentally alter the nature"\textsuperscript{390} of the athletic activity, or would result in an undue burden to the institution.\textsuperscript{391}


\textsuperscript{386} Section 36.208 of the regulations provides:

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.


\textsuperscript{390} 42 U.S.C.A. § 12182(b)(2)(A)(iii) (West Supp. 1991). Although the regulations and the commentary interpreting the regulations treat "auxiliary aids and services" almost entirely in terms of communication, the statute itself is not so limited. 56 Fed. Reg. 35,597 (1991) (to be codified at 28 C.F.R. § 36.303); 56 Fed. Reg. 35,565-35,568 (1991). An athlete could argue, therefore, under the express terms of 42 U.S.C.A. § 12182(b)(2)(A)(iii), that a college or university should be required to supply him or her with protective equipment, such as a flak jacket or protective eyewear, unless to do so would fundamentally alter the nature of the sport or impose an undue burden on the institution.

While these provisions would seem to provide colleges and universities with no defense to a discrimination action brought by a previously ill or injured college athlete denied the opportunity to return to play, another section, at least as it is interpreted by the Justice Department, may provide a defense. That section states that "A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities." While the language of that regulation also sounds like a "risk to others" criterion, the Justice Department's interpretation of the rule may suggest otherwise:

A public accommodation may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities, if the criteria are necessary for the safe operation of the public accommodation. Examples of safety qualifications that would be justifiable in appropriate circumstances would include height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

While it may be argued that the swimming proficiency requirement is necessary to the safety of all occupants in the raft, the amusement park height requirement would seem geared to the safety of the person desiring to go on the ride. Given the overall purposes of the ADA, receipt of services or the participation in programs or activities provided by a public entity.


392. No defense other than an inability to make reasonable modifications or provide auxiliary aids or services.

393. 56 Fed. Reg. 35,596 (1991) (to be codified at 28 C.F.R. § 36.301(b)).

394. Id.


396. If someone who could not swim were to fall out of the raft, the guide's attention would be diverted from the operation of the raft (and hence the safety of others in the raft) while trying to save the person who could not swim.

397. Again, though, even if the institution could prevail on this argument it would be required to make reasonable modifications to its programs or to provide auxiliary aids or services to the athlete unless to do so would fundamentally alter the nature of the program or would cause the institution an undue hardship. 42 U.S.C.A. §§ 12131(2), 12182(b)(2)(A)(ii), (iii) (West Supp. 1991).

398. The purposes of the ADA include providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1), (2) (West Supp. 1991). Equally applicable to the "risk to self" question are Congress' findings that "individuals with disabilities continually encounter various forms of discrim-
and the strong objection by disabled persons and their advocates to any provisions relating to risk of injury to the disabled themselves. This language may constitute scant support for a college or university's argument that it should have a right to prevent certain athletes from exacerbating their preexisting conditions.

Colleges and universities charged with discrimination under the ADA may seek to draw an analogy to the employment provisions of the statute similar to that which they might draw in the Rehabilitation Act context. Even though much of the ADA and its implementing regulations relating to employment are modeled after the Rehabilitation Act of 1973 and its implementing regulations relating to employment, there are important differences between the two. For the purposes of analyzing the question of whether risk to an employee himself or herself is sufficient reason for allowing an employer to refuse to employ a handicapped or disabled individual, the differences in the definitions of "qualified handicapped person," under the Rehabilitation Act, and "qualified individual with a disability," under the ADA, are significant. While the Rehabilitation Act regulations define "qualified handicapped person" as one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others," the ADA provision contains no mention of risk to anyone in its definition of "qualified individual with a disability." The ADA does make a "dis-

405. The ADA defines "qualified individual with a disability" [as] an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential . . . .
rect threat to the health or safety of other individuals in the workplace” a defense to a charge of employment discrimination under the Act. The regulations implementing the employment provisions of the ADA add threat to the individual himself or herself as part of the defense to a charge of employment discrimination.

The regulatory provisions allowing threat to the individual to be a defense to an allegation of employment discrimination attempt to circumscribe that defense much more tightly than has been done in the Rehabilitation Act regulations. For example, the ADA regulations specifically provide that:

The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining

406. 42 U.S.C.A. § 12113(b) (West Supp. 1991) (emphasis added). Specifically, the ADA provision on defenses to a charge of employment discrimination states:

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

407. The regulation states:

It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation . . . .
whether an individual would pose a direct threat, the factors to be considered include:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.\textsuperscript{408}

In essence, the drafters of the ADA regulations have included within the regulations the interpretations the courts have been asked to make pursuant to the Rehabilitation Act.\textsuperscript{409} For example, the interpretative guidelines accompanying the regulations indicate that an employer may assert risk to the individual only if "performing the particular functions of a job would result in a \textit{high probability of substantial harm} to the individual."\textsuperscript{410} Such an assessment must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment... cannot be used by an employer to disqualify an individual... with a disability.\textsuperscript{411}

The college or university attempting to draw an analogy from the college athletics context to the employment context for the purposes of using risk to the individual as a defense to a charge of discrimination faces two problems. First, the ADA itself and the regulations implementing it are inconsistent. In passing the statute Congress \textit{did not} include risk of harm to the individual as a defense to a charge of discrimination. That provision was added to the regulations only by the EEOC. Therefore, litigation may arise even in the pure employment context concerning whether risk to the individual is a permissible factor for an employer to consider in denying a disabled person a job. Second, the Justice Department, drafting regulations to implement the public services and public accommodations sections of the ADA, chose not to add harm to the individual to the statutory definition of "direct threat." It could be

\textsuperscript{408} 56 Fed. Reg. 35,736 (1991) (to be codified at 29 C.F.R. § 1630.2(r)) (emphasis added).

\textsuperscript{409} See, e.g., Chiari v. League City, 920 F.2d at 316-17 (significant risk of personal injury); Mantolette v. Bolger, 767 F.2d at 1422 (reasonable probability of substantial harm); Strathie v. Department of Transp., 716 F.2d 227, 231-32 (3d Cir. 1983) (essential nature of program); Bentivegna v. United States Dept of Labor, 694 F.2d 619, 621, 623 n.3 (9th Cir. 1982) (requirement to "be consistent with business necessity and safe performance" (quoting 29 C.F.R. § 32.14(b) (1982)) and should be "more directly tied to increased risk of injury"); Bey v. Bolger, 540 F. Supp. 910, 926 (E.D. Pa. 1982) (substantial likelihood of injury); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1104 (D. Haw. 1980) (risk of future injury).


\textsuperscript{411} Id.
argued that the difference between the EEOC and Justice Department regulations merely tracks the historical differences between the EEOC and the Departments of Health and Human Services and Education regulations concerning the Rehabilitation Act. If that is the case, the Justice Department used as a model the first set of regulations adopted to implement the Rehabilitation Act,412 regulations which clearly predated the EEOC's regulations implementing the Rehabilitation Act.413 In any event, colleges and universities have no direct authority either under the ADA or its implementing regulations to refuse an athlete the opportunity to return to play based on a risk of future injury to himself or herself.

Section 504 of the Rehabilitation Act of 1973 and the public services and public accommodations provisions of the Americans with Disabilities Act appear to provide college athletes with their best remedy if a college or university prohibits them from playing because of a preexisting illness or injury. Should, however, the autonomy language in some Section 504/college athlete cases and the silence of the Education, Health and Human Services, and Justice Departments' regulations on the risk to personal safety be read to provide college athletes with an absolute right to participate in intercollegiate competition? Or, should an institution's concern for its athletes' safety and for its own integrity allow colleges (and courts) to draw an analogy to those employment-related regulations which permit concern for personal safety to be a factor in determining whether one is "qualified" to participate in an activity or service covered by the Acts?

When the issue is whether a college athlete, previously diagnosed as ill or injured, wishes to return to competition, the ultimate questions become who should make that decision and who should bear responsibility for any adverse consequences resulting from that decision? The final section of this Article proposes an answer to those questions.

412. The comments accompanying the regulations implementing the public services portion of the ADA indicate that the first regulations implementing Section 504 were issued in 1977 by the former Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services). 56 Fed. Reg. 35,694 (1991). In 1978, pursuant to an Executive Order, HEW "issued its coordination regulation for federally assisted programs, which served as the model for regulations issued by the other Federal agencies that administer grant programs." Id. HEW's coordination authority and the coordination regulation were transferred to the Justice Department in 1980. Id.

413. The source of 29 C.F.R. § 1613.702(f) including risk to the health or safety of the individual within the definition of "qualified handicapped person" was 43 Fed. Reg. 12,295 (1978).
VI. THE DECISIONMAKER AND THE DECISION: A PROPOSAL

As the analysis in Part IV illustrated, there are a number of reasons why a surrogate decisionmaker is not preferable and probably would be no more effective than the college athlete in making decisions concerning the athlete's medical treatment and return to play. Each possible surrogate is subject to pressures similar to those affecting the athlete. No surrogate can know the athlete as well as the athlete knows himself or herself. And, the traditional principles applicable to substitute decisionmaking are generally inapposite to the situation affecting the college athlete judged competent for all other purposes except that of medical decisionmaking. These are not the only reasons, however, why surrogate decisionmakers should not be authorized to make treatment and return to play decisions for athletes.

For almost all purposes, college students and their peers not attending college are treated as competent adults. College athletes should be treated no differently. There is no other instance in which the law singles out any group of students for special, parentalistic\(^4\) treatment. Even given the pressures on athletes to play, the law should not create an exception. In the past, special treatment — *i.e.*, less demanding admissions standards,\(^4\) less rigorous course loads and majors, homogeneous living environments — have done athletes no favor. The athletes have often

\(^4\) I use the word *parentalistic* rather than *paternalistic* for reasons I outlined in an earlier article:

As I use these words, I mean to convey a policy or practice of regulation by one person (or entity) of another, based on the belief that the authority figure, rather than the individual affected, can better determine what is in the best interests of the individual affected and can better make decisions for and protect that individual. While, historically, *paternalism* may not have been inaccurate, given that most perceived authority figures in either the public or private realm were (white) men, the meaning to be conveyed has always connoted the relationship between a parent-figure and a child-figure. Therefore, *parentalism* is both accurate (in terms of the meaning I wish to convey) and gender-neutral.


\(^4\) According to a survey conducted by the *Chronicle of Higher Education*, football players and male basketball players in schools with "big time" sports programs are more than six times as likely as other students as likely as other students to receive special treatment in the admissions process. Douglas Lederman, *Special Admissions Treatment for Athletes Widespread at Big-Time-Sports Colleges*, CHRON. HIGHER EDUC., May 1, 1991, at A1. Twenty-seven percent of the football and male basketball players and 18 percent of all athletes admitted to Division I-A schools for the Fall, 1989 semester were "special-authority admissions" ("students who [were] accepted even though they failed to meet the college's regular standards"), compared to 4 percent of all first year students at those schools. *Id.* Thirteen of 73 colleges reported that the proportion of athletes admitted under special standards was at least ten times the number of special admissions for other students. *Id.* at A31.
left colleges and universities uneducated and poorly equipped to deal with life's realities.\textsuperscript{416} Athletes will not be well served in terms of matu-

\textsuperscript{416} See, e.g., Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990) (dismissing suit by a Creighton University basketball player based on educational malpractice claim). In Ross, a student athlete alleged that Creighton University failed to provide him with an education, instead only maintaining his basketball eligibility. The cause of action was rejected by the court, although it was undisputed that before Ross entered Creighton he had scored nine points out of a possible 36 on the American College Test (the average student at Creighton scored 23.2 points), he was advised to register for courses such as ceramics, marksmanship, and the theories of basketball, track and field, and football, and after four years he had earned only 96 of the 128 credits required to graduate, maintaining a "D" average. His reading skills were those of a seventh-grader and his overall language skills those of a fourth-grader. \textit{Id. See also} Denson v. Steubenville Bd. of Educ., No. 85-J-31, 1986 WL 8239 (Ohio Ct. App. July 29, 1986) (rejecting claim of educational malpractice brought by former student upon allegation that school system promoted him each year because he was a good athlete and without teaching him to read or write). For a discussion of courts' failure to recognize a cause of action for educational malpractice, see generally Catherine D. McBride, \textit{Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students}, U. ILL. L. REV. 475 (1990). \textit{See also} Edmund J. Sherman, \textit{Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University}, 11 LOY. ENT. L.J. 657 (1991) (analyzing educational malpractice in college athletics context and arguing that judicial adoption of an educational malpractice cause of action for college athletes would motivate NCAA to protect student athletes' right to an education).

According to an Associated Press survey, two-thirds of the college athletes drafted in Spring, 1990 by the professional football and basketball leagues failed to graduate from college. Douglas Lederman, \textit{Athletics Notes: Low Graduation Rate Found for Pros' Draftees}, CHRON. HIGHER EDUC., Aug. 1, 1990, at A30. Of the 54 athletes drafted by the National Basketball Association, 26 received their degrees. \textit{Id.} Of the 331 players drafted by the National Football League, 127 received their degrees. \textit{Id.} Of the 204 football players who did not receive their degrees, 82 were within one semester of doing so. Scouting and spring training camp activities, however, encourage college athletes to cut short their academic careers during the spring term. \textit{Id.}

A \textit{Chronicle of Higher Education} survey reported, however, that recruited athletes in NCAA Division I schools graduate at a higher rate (56 percent within 5 years of their 1984 enrollment date) than students who were not athletes (48 percent). Douglas Lederman, \textit{College Athletes Graduate at Higher Rates Than Other Students, but Men's Basketball Players Lag Far Behind, a Survey Finds}, CHRON. HIGHER EDUC., March 27, 1991, at A1. Two-thirds of all women athletes had graduated within 5 years of their enrollment date, although only 47 percent of the football players and only 39 percent of the male basketball players had done so. \textit{Id.} At Division I-A schools, those at the highest level of competition, the graduation rates for athletes were lower than in Division I schools overall \textemdash; 51.1 percent for all athletes, 42 percent for football players, and 32 percent for male basketball players, as compared to 50.3 percent for all students. \textit{Id.} Even though overall the graduation rates for athletes are higher than those for students in general, more than 30 Division I schools (including 21 of the 96 Division I-A schools) graduated fewer than one-third of their athletes within five years of their enrollment. \textit{Id.} at A38. The general graduation rates for Division I-AA schools were generally skewed by "academically elite" institutions like the Ivy League schools. Such "elite" universities make up one-third of the total schools in Division I-AA and have a graduation rate of 90 percent. \textit{Id.} Women athletes also pulled up the graduation rates of athletes in general. \textit{Id.} Some college administrators have criticized the results of this survey, noting that it is no longer the norm for students to graduate in four or five years, especially in urban areas where students are employed and often commute long distances to class. Douglas Lederman, \textit{College Officials Worry that Graduation-Rate Data May Be Misread and Misused}, CHRON. HIGHER EDUC., March 27, 1991 at A38.
ration, living skills, or personal dignity and integrity if they are treated as incompetents for the purposes of making decisions concerning medical care and return to play. College athletes should have the same rights and bear the same responsibilities concerning those decisions as any other competent adult would have and bear.417

Believing that a college athlete should have the same rights and responsibilities as any other competent adult concerning these decisions does not mean, however, that changes could not be made in college athletics to make the atmosphere more conducive to appropriate decision-making. In terms of the disclosure of information, those responsible for making such disclosures (physicians, athletic trainers, and other health care providers) must give the athlete clear, understandable information concerning the athlete's medical condition, proposed treatment, and the risks, benefits, and alternatives associated with that treatment, and concerning the risks of a return to play.418 The information should be conveyed not once, but several times, over a period of time. If possible, the disclosure should be accompanied by brochures, videotapes, or other means of communication which would aid the athlete in understanding the medical condition and the various alternatives available, including the alternative of leaving the sport entirely. The athlete should be encouraged to bring a family member or friend to the disclosure sessions to provide support and to help frame questions and clarify information. The athlete must be encouraged to ask questions about any issue relating to the condition, treatment, or return to play. The information provider should test the athlete's comprehension of the information in an effective...
manner and if the athlete appears not to have understood the information provided and the ramifications of various decisions he or she might make, the information giver must reinform the athlete, perhaps with additional information or perhaps in different words. In the general health law context, health care providers claim that it is difficult to provide information about conditions, treatments, and alternatives in a way which is understandable and in a way which will adequately alert the patient to the ramifications of certain decisions the patient might make. In the college athlete context, information providers may find it even more difficult to provide information concerning risks of return to play. Because of athletes' belief in their invincibility and immortality, they may not take seriously the risk of returning to play following, for example, a diagnosis of heart disease or a cervical injury. Athletes may simply refuse to "hear" such information, denying that it could happen to them.\textsuperscript{419} That failure to "hear" does not mean that such information should not be provided to athletes. Indeed, it means that the information should be provided seriously and in detail. Athletes should be required to view videotapes or read about athletes like Hank Gathers and Marc Buoniconti. They should be required to learn about life with heart disease or quadriplegia. This all sounds quite dramatic and in fact may scare the athletes, some to the extent that they choose not to return to play.\textsuperscript{420} Others will continue to deny that anything like quadriplegia or death could happen to them and will return to play, perhaps when they should not. But some may give the matter of further injury or illness serious, informed thought and make a decision to return to play or not based in part on that information. In addition to providing the information concerning medical condition and treatment and return to play in a manner conducive to comprehension and informed decisionmaking, colleges and universities should

\textsuperscript{419} See \textit{supra} notes 190-200 and accompanying text for a discussion of athletes and their feelings of invincibility. 

\textsuperscript{420} "Therapeutic privilege" is a defense to an action brought against a physician for failure to inform a patient adequately concerning the patient's medical condition and proposed treatment. Canterbury v. Spence, 464 F.2d 772, 788-89 (D.C. 1972); Cobbs v. Grant, 502 P.2d 1, 12 (Cal. 1972); Natanson v. Kline, 350 P.2d 1093, 1103 (Kan. 1960); Wilkinson v. Vesey, 295 A.2d 676, 689 (R.I. 1972). The defense of therapeutic privilege may be invoked, however, only where disclosure would impact adversely on the patient's overall condition and care; it may not be invoked simply because the physician fears that if adequate disclosure is made the patient, because of fear or other reasons, will decline the suggested therapy. Likewise, information concerning the possible adverse results of a return to play following illness or injury may not be withheld from an athlete merely because the athlete may be risk averse and choose not to play again. In fact, there is probably no reason which would support a failure to disclose such information to the athlete. See cases cited \textit{supra}. 
provide an atmosphere for decisionmaking in which the athlete will feel comfortable choosing not to return to play. Probably little can be done to relieve the pressures to achieve athletes impose on themselves. The drive to be the best, the desire to build a better life through athletic achievement will probably remain. It is also unlikely that the lure of professional contracts with the attendant remuneration will change, although perhaps college athletes should be reminded of how few are ever chosen to play in professional leagues.\textsuperscript{421} None of this means, however, that the college or university and its employees cannot modify the college-generated, external pressures on the athlete. The NCAA should require, and colleges and universities should make clear, that if a scholarship athlete becomes medically ineligible to play, the athlete will retain his or her scholarship.\textsuperscript{422} Furthermore, the college or university should make available, either through the university or through independent contractors, psychological support services to help athletes deal with the disappointment and depression accompanying the illness or injury and the inability to return to play, and counselling concerning an active life (and career) apart from the sports to which the athletes had dedicated themselves.

Finally, and most difficult, colleges and universities, their supporters, and society at large, must decrease their emphasis on winning at all costs. The theory of amateur athletics is healthy enjoyment of the sport rather than winning or losing.\textsuperscript{423} The reality, however, is quite different. Almost everyone who is interested in sports, from Little League through professional football, has favorite teams and favorite athletes. We like our athletes to excel and our teams to win. When they do not, we clamor for the trade of a player, the replacement of a coach. The same is true for college athletics, especially football and basketball. From late August until early April, college football and basketball fill the sports pages of our newspapers and the screens of our televisions. We have loyalties as alumni/ae of colleges and universities, as residents of states or cities, or

\textsuperscript{421} See \textit{supra} notes 275-76 for a discussion of how few college athletes are drafted by professional sports teams and how few of those actually sign professional contracts.

\textsuperscript{422} See \textit{supra} note 278 for a discussion of current NCAA policy and illustrative cases concerning continuation of athletic scholarships despite player ineligibility.

\textsuperscript{423} The NCAA's principle of amateurism states: "Student-athletes shall be amateurs in an intercollegiate sport and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation. . . ." 1990-91 NCAA MANUAL, \textit{supra} note 131 § 2.6. The Olympic Creed provides that "[t]he most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well." 20 \textit{ENCYCLOPEDIA AMERICANA} 719 (1990).
simply as "fans." For many people, part of their personal success is based on their favorite college teams' won-loss record, bowl appearances, and tournament results. And college athletes know all of this. As fans, we mourn the loss of a Hank Gathers or the injury to a Marc Buoniconti. We do it, I hope, out of concern and compassion for the athlete as a person rather than out of loss for the "team." Nevertheless, a change of attitude from one of pride in winning and disappointment in losing to love of the game for the game, respect for the participants as persons rather than as running backs or point guards, concern for both their physical and academic health, might make an athlete's decision of whether to return to play easier and more voluntary.

I am not naive enough to think that changes in the pressures on college athletes — internal or external — will occur soon, if they ever occur at all. And that leaves me with the final dilemma: what of the college athlete who knowingly and voluntarily decides to return to play in the face of serious injury or death?

According to the proposal I have made, the athlete, as a competent, autonomous adult has the right to make that decision. That does not mean, however, that the college or university should always be obligated to facilitate that decision. The major obstacles, of course, to a college's refusing to allow a previously ill or injured player to return to play

424. Following Hank Gathers' death, his neighborhood priest said, "'a lot of us lived vicariously through Hank . . . . We were all desperately hoping he would make it. Not too many come through this environment and do.'" Smith, A Bitter Legacy, supra note 11, at 66.

425. See, e.g., Bucyrus-Erie Co. v. State Dep't of Indus., 280 N.W.2d 142, 149 (Wis. 1979) (legislature, in proscribing discrimination against physically handicapped individuals, did not intend to force employers into position of facilitating handicapped individuals' further injury or aggravation of original handicap). Generally, courts have held in the health care context that patients have no right to demand certain types of treatment even though they have made informed choices as autonomous adults to elect such treatment, see, e.g., People v. Privitera, 591 P.2d 919 (Cal. 1979) (criminal prosecution of health care providers who prescribed and distributed laetrile to cancer patients who had knowingly and voluntarily sought such treatment), and that health care institutions have no obligation to participate in effectuating certain decisions made by patients if to do so would violates the institution's mission. See Webster v. Reproductive Health Serv., 492 U.S. 490 (1989) (states may prohibit the use of public employees and public facilities to perform or assist in performing abortions not necessary to save a woman's life); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986) (hospital not required to terminate patient's nutrition and hydration at guardian's request even though request is legally permissible). Under limited circumstances, I would grant colleges and universities a similar privilege. But see Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (public hospital may be required to permit patient to remain until death following removal of life support systems); In re Requena, 517 A.2d 886 (N.J. Super. Ct. Ch. Div. 1986), aff'd, In re Requena, 517 A.2d 869 (N.J. Super. Ct. App. Div. 1986) (under certain circumstances private hospital may be required to permit patient to remain until death following removal of life support systems even though another health care facility is available and willing to admit patient while she dies).
are Section 504 of the Rehabilitation Act of 1973\textsuperscript{426} and the Americans with Disabilities Act of 1990.\textsuperscript{427} If the college authorized physician, acting reasonably under the circumstances,\textsuperscript{428} determines that an athlete with a preexisting injury or illness is not fit to return to play,\textsuperscript{429} that athlete may well not be "qualified."\textsuperscript{430} Therefore, denial of further opportunity to play, at least while the athlete is "symptomatic,"\textsuperscript{431} would

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\item Physicians making clearance decisions may well be subject to suit, both by athletes for whom clearance is refused, see text accompanying supra note 24, and by those who are cleared to return to play and then suffer injury, see text accompanying supra notes 15, 16 & 31. In order to prevent physicians from being overly cautious (strictly liable) or not cautious enough (immune from liability), physicians' decisions to clear or not clear athletes for a return to play should be judged by a reasonable medical practitioner (or specialist) standard.
\item The NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports has affirm[ed] the right of an institution to require joint approval from the physician most familiar with the student-athlete's condition and the institution's specific athletics program in question (and parental consent in the case of a minor), before permitting any impaired student-athlete to participate. Conversely, atypical conditions (handicaps) will be rightful reason for medical disqualification of a student-athlete by the institution only when those atypical conditions present unusual risk of further damage or disability to the individual and/or other participants.
\item NCAA SPORTS MEDICINE HANDBOOK, supra note 45, Policy No. 3.
\item The athlete would clearly be considered to be a "handicapped person" or an "individual with a disability" pursuant to the statutory and regulatory definitions of those terms. 29 U.S.C.A. § 706(8)(B) (West Supp. 1991); 34 C.F.R. § 104.3(j) (1990); 45 C.F.R. § 84.3(j) (1990); 42 U.S.C.A. § 12102(2) (West Supp. 1991); 56 Fed. Reg. 35,593 (1991) (to be codified at 28 C.F.R. § 36.104); 56 Fed. Reg. 35,717 (1991) (to be codified at 28 C.F.R. § 35.104). See supra notes 312, 314, 329-31, 380 and accompanying text, for a more detailed discussion of the definitions of "individual with handicaps" or "individual with a disability" as they apply to an athlete with a preexisting condition.
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\item The athlete who fails to pass a physical examination would, at least on a threshold level, not be a "qualified handicapped person," because he or she could not meet the Section 504 regulations' "technical standards requisite to ... participation in the recipient's ... activity." 34 C.F.R. § 104.3(k)(3); 45 C.F.R. § 84.3(k)(3). That athlete also would not be a "qualified individual with a disability" pursuant to the public services sections of the ADA because the athlete who fails the physical could not meet "the essential eligibility requirements for the ... participation in programs or activities provided by a public entity." 42 U.S.C.A. § 12131(2) (West Supp. 1991). And, the athlete who fails the physical would probably not be found to be discriminated against pursuant to the ADA's public accommodations provision because passing the physical may be considered an appropriate eligibility criterion "necessary for the provision of the ... services, ... privileges, [or] advantages ... being offered." 42 U.S.C.A. § 12182(b)(2)(A)(i) (West Supp. 1991).
\item I choose the characterization "symptomatic" to describe the athlete who is not cleared for play in order to distinguish between an athlete whose current physical condition would preclude playing (based on a failed physical examination) and an athlete whose medical condition is "under control" but whose future health is in doubt. For example, I would characterize a basketball player suffering from an as yet uncontrolled arrhythmia as being symptomatic and unable to pass a physical exam required for basketball participation. Once the condition is controlled by medication the player would be able to pass a physical, but the effect of strenuous activity on his or her future health would be unclear. Similarly, a football player who suffers a musculoskeletal injury and is in traction
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Refusal of the physician to clear the athlete to return to play out of fear of personal injury to the athlete would raise two questions. First, is the fear of risk of personal injury to athletes themselves sufficient justification to allow a physician and, consequently, the institution to refuse an athlete the opportunity to return to play? Second, even if, at the threshold level, an athlete does not meet the strict regulatory definition of "qualified handicapped person"\(^{432}\) or "qualified individual with a disability"\(^{433}\) is the institution able to make reasonable accommodation which would permit the athlete to return to play?\(^{434}\) The two questions are intertwined.

Unlike the Section 504 EEOC regulations relating to employment,\(^ {435}\) the Section 504 Education and Health and Human Services regulations relating to employment\(^ {436}\) and to postsecondary education,\(^ {437}\) do not contain any provision indicating that safety concerns are a part of the regulations' definition of "qualified handicapped person." Similarly, the ADA regulations relating to public services and public accommodations do not specifically mention the safety of the individual affected as a factor to be considered in whether a disabled person may be denied services.\(^ {438}\)

Of four courts which have considered Section 504 claims by athletes with preexisting medical conditions,\(^ {439}\) only one found that the preexisting in-

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\(^{432}\) 34 C.F.R. § 104.3(k)(3) (1990); 45 C.F.R. § 84.3(k)(3) (1990).


\(^{434}\) Case law, beginning with Southeastern Community College v. Davis, established that reasonable accommodation must be made by the institution in order to enable the handicapped person to take part in the program. 442 U.S. 397, 411-13 (1979). See also Alexander v. Choate, 469 U.S. 287, 300 (1985). This requirement is explicit in the ADA. 42 U.S.C.A. §§ 12131(2) & 12182(b)(2)(A)(ii) (West Supp. 1991).


jury made the student not qualified to engage in athletics. The other three courts did not specifically address the question of whether any risk of personal injury would ever serve to disqualify athletes from Section 504 coverage. And, two of the courts used such strong “personal autonomy” language in describing the rights of the athletes to participate that those decisions could be construed as indicating that decisions to play always lie with the athletes and that any institution attempting to block such a decision would violate Section 504. There are good reasons, however, not to read those cases in such an absolute manner and instead to promote a policy which, under limited circumstances, would permit institutions to refuse athletes the opportunity to return to play notwithstanding their personal decisions.

In both Grube and Wright, the courts indicated that there was no substantial risk of injury to the athletes from continued participation in athletics. Such an acknowledgement can be read to imply that if there were a substantial risk of injury, that risk would become relevant in deciding whether an athlete with a preexisting injury could return to play. In Grube and Poole, the court discussed the protective equipment which could be worn by the athletes to prevent exacerbation of their pre-existing conditions. Again, by implication, these cases can be read to indicate that if reasonable accommodation through the use of safety equipment can protect an athlete from further injury, that accommodation is an appropriate consideration in deciding whether an institution violates Section 504 in refusing an athlete permission to play.

I would incorporate into the definition of “qualified handicapped or disabled person” for purposes of participation in postsecondary athletic events the requirement that participation by the previously ill or injured athlete not pose a substantial risk of irreversible serious bodily injury or death to the athlete. I would also require that any criteria used to disqualify a student athlete from participation be related to the athlete’s expected performance and be consistent with skills necessary for safe performance. As part of the qualified handicapped or disabled person

445. Cf. 29 C.F.R. § 32.14(b) (1990) (“to the extent job qualifications tend to exclude handicapped individuals because of their handicap, they [shall be] related to the performance of the job and [be] consistent with business necessity and safe performance.”).
standard, I would enforce the reasonable accommodation requirement set forth in *Southeastern Community College v. Davis* and *Alexander v. Choate.* Finally, for any scholarship athlete denied the opportunity to continue to play because of illness or injury, I would require the college to honor its scholarship commitment to the student throughout what would have been the student's eligibility period.

Bearing in mind that Section 504 and the ADA exist to provide disabled individuals with the widest array of opportunities possible, I would urge that my standard be strictly construed. I would not allow disqualification for any potential illness or injury which could be substantially prevented through "reasonable accommodation." The Section 504 regulations in the employment context provide appropriate guidelines for determining what constitutes "reasonable accommodation," and whether the accommodation would constitute an undue hardship to the institution. Those standards, modified to meet the college athletic context, would include acquiring or modifying equipment, while considering the overall size of the program, including the number of participants, the number and type of facilities, and the size of the budget; the type of operation, including the composition and structure of the activity and team; and the nature and cost of the accommodation needed.

On the question of substantial likelihood of harm to the athlete, as the degree of seriousness of harm increases, the probability of occurrence could diminish and an athlete could still be found "unqualified" to compete. All conditions would be judged on a case-by-case basis rather than according to some blanket standard like the AMA Guidelines. For example, an athlete with hypertrophic cardiomyopathy who had experienced ventricular tachycardia and was denied the opportunity to return to play basketball would not be able to prevail on a Section 504 or ADA claim against the institution. While the athlete would clearly be handicapped or disabled, he or she would not be otherwise qualified to play basketball, both because of the substantial likelihood that he or she

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449. See *supra* notes 117 & 185 and accompanying text for an explanation and discussion of the AMA guidelines.

450. See 29 U.S.C.A. § 706(8)(B) (West Supp. 1991); 34 C.F.R. § 104.3(j) (1990); 45 C.F.R.
could suffer serious injury or death if he or she engaged in strenuous athletic activity\textsuperscript{451} and because no reasonable accommodation could be made to prevent that occurrence.\textsuperscript{452} Not all heart disease, however, would disqualify an athlete from participation. An athlete who had had coronary artery abnormalities which had been corrected would be permitted to play.\textsuperscript{453} Athletes with mitral valve prolapse or dysrhythmia may or may not be allowed to play, or may be allowed to participate in some activities but not others, depending on the symptoms accompanying the disorder.\textsuperscript{454}

Other conditions would be judged the same way.\textsuperscript{455} If an athlete suffers an injury like that suffered by Mark Tingstad, and expert medical opinion cautions that if the athlete is injured again paralysis could result, the institution is justified in denying the athlete the opportunity to play and to reinjure himself or herself. There would seem to be no reasonable accommodation which could be made to prevent an appreciable risk of paralysis from occurring through participation in a contact sport. For other conditions, although there exists an appreciable risk of injury due to further play — kidney dysfunction, blindness, injury to a hearing impaired athlete who is not aware of a body or an object coming his or her way — reasonable accommodations — flak jackets, protective eyewear, hearing aids — may aid the athletes in preventing injury.\textsuperscript{456} Inevitably

\textsuperscript{451} McCaffrey et al., \textit{supra} note 45, at 178.

\textsuperscript{452} Even if the university were to provide a defibrillator and personnel trained to use it at court side, that equipment would not be effective in preventing the injury before it happened, as would, for example, a flak jacket worn by a field hockey player to protect her against kidney injury.

Furthermore, an institution could probably successfully claim that the expense of a defibrillator and personnel trained to use it would pose an undue financial hardship on the university, therefore making its purchase "unreasonable." While some schools maintain a defibrillator in their training rooms, it is not considered standard equipment. Almond & Hudson, \textit{supra} note 13. According to Chip Schaefer, head trainer at Loyola Marymount University, the university purchased its defibrillator primarily because of Hank Gathers. \textit{Id.} He noted, however, that the university plans to keep the equipment because it can be used not only for players but also for spectators. \textit{Id.}

\textsuperscript{453} McCaffrey et al., \textit{supra} note 45, at 178.

\textsuperscript{454} \textit{Id.} at 180-81.

\textsuperscript{455} The EEOC regulations implementing the ADA provide that whether an individual "poses a ‘direct threat’ shall be based on an individualized assessment of the individual's \textit{present ability} to safely perform the essential functions of the job." 56 Fed. Reg. 35,735-35,736 (1991) (to be codified at 29 C.F.R. \textsection 1630.2(r)) (emphasis added). The regulations cite as appropriate factors for making that assessment "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." \textit{Id.} These factors would be equally appropriate for determining a college athlete's ability to perform safely.

\textsuperscript{456} Some question may arise as to the responsibility of the institution to pay for the protective
there will be cases where athletes return to play and then suffer serious injury or death related to the preexisting illness or injury. Some of those athletes or their representatives will sue the physicians and the colleges. Whether or not an action for that injury would lie may depend on the reason the athletes were permitted to return to play.

If the institution permitted the athlete to return to play because of a good faith, nonnegligent application of Section 504 or the ADA, the institution should not be liable. An analogous situation arose in *International Union, UAW v. Johnson Controls, Inc.*[^457] There, the Court indicated in dicta that because Title VII bans sex-specific fetal protection policies, if the employer fully informs a woman of a workplace hazard to

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her fetus and does not otherwise act negligently "the basis for holding an
employer liable [for damage to the fetus] seems remote at best."458
Furthermore, the Court said, were state tort law to conflict with Title VII,
Title VII would preempt state law.459 The same result should apply in
the Section 504-ADA/student athlete context. If the educational institu-
tion and its employees fully inform the athletes of their medical condi-
tions and the risks of returning to play and otherwise act without
negligence, the athletes should not be able to hold the institution liable in
tort.460

The key to an institution's liability, then, is whether the institution
or its employees acted negligently. In most instances, negligence in diag-
nosis aside, the issue will be whether the institution and its employees
sufficiently informed461 the athletes about their medical condition and
the risks of returning to play, and adequately supported them in making
the decisions concerning treatment and play. Liability on the part of the
institution and its employees should be judged by a reasonableness
standard.462

458. Id. at 1208.
459. Id. at 1209.
460. The resolution of the liability question should be no different simply because Title VII does
not, but Section 504 does permit employers to take into account risk to an individual employee's
safety when making an employment decision. See supra notes 350, 352, 357-70. Section 504 requires
that recipients of federal financial assistance not discriminate against handicapped individuals. It
does not require recipients to prohibit those individuals from taking part in the program, even at risk to
themselves, should the individuals choose to do so. Presumably, the same will be true pursuant to the
ADA.
461. My reference to "sufficiently informed" includes not only disclosing information in a man-
er designed to inform the athlete of his or her medical condition, treatment, and risks, benefits, and
alternatives attendant to them, but also testing the athlete's comprehension of that information to
ensure that the athlete understands the information necessary for informed decisionmaking.
462. Davis argues that highly motivated college athletes are not like other medical patients.
They believe pain is to be endured; they opt for radical treatment to keep them playing in the pres-
ent, overlooking future consequences; they view their opportunities to perform and excel as limited;
and, they fear that being sidelined will adversely impact their economic well-being. All of these
factors influence what they look for in medical care. Therefore, it would be unfair to hold physicians
treating them to the standard of care traditionally used to judge physician conduct. Davis, supra
note 236, at 217-19, 225.

According to Davis, medical malpractice actions are based on the reasonableness of the physi-
cian's conduct in treating a patient who will follow the physician's advice. Generally, the more con-
servative the treatment, the more likely the finder of fact is to find it reasonable. Id. at 225.
Athletes, however, may not accept "conservative" treatment and may demand more. Id. Davis
would "rephrase" the duty of the physician treating college athletes to one of "provid[ing] the facts
necessary for the athlete to make an informed decision regarding the risks that are assumed in under-
going a mutually agreeable course of treatment." Id. at 230-31. He believes that:

The determinative issue in future medical malpractice cases between motivated ath-
etes and sports medicine personnel should be whether the athletes were provided the
This proposal is, at best, a compromise. On the one hand, college athletes are treated identically to their peers — as competent adults — given decisionmaking rights which they are expected to exercise and for which they should be held responsible. In return, they give up the opportunity to have others make certain important decisions and then take responsibility for those decisions should adverse results occur. They gain, in all but limited circumstances, the right to have enforced their autonomous decisions concerning the treatment and care of their bodies and their athletic careers.

Colleges, too, gain and lose under this proposal. They gain some necessary information with which to make an informed decision. The information includes all relevant data on the injury itself and all of the facts concerning the available, acceptable courses of treatment. The emphasis is on all information and facts. This requires the practitioner to realize his limitation and to seek additional consultations upon any uncertainty. Unlike the non-athlete, the nature of the motivated athlete prescribes any exceptions to the practitioner's duty of full disclosure of information.

Once given the relevant information, the athlete must assume the consequences of his choice of treatment. This standard puts the initial burden on the provider to ensure that the diagnosis is correct and that all of the options for treatment are explored. The burden then shifts to the athlete to choose a "fix" or a "cure." This standard penalizes the individual who maltreats an athlete but allows physicians the necessary leeway when their patients reject treatment that would be prescribed for a non-athlete with the same medical problem.

Id. at 237. I do not believe that Davis' and my position are different in any way except "label." Davis advocates a "different" standard of care for physicians who treat athletes because of the special nature of the "motivated athlete." I would apply the traditional standard of reasonable care under the circumstances being mindful that the special nature of the athlete — willingness to "play hurt," fear for his or her economic future, pressure from others, belief in immortality and invincibility — is one of the circumstances which the physician must take into account in reasonably treating and advising the athlete.

463. Cf. John Thompson, Students Must Bear Weight of Education, N.Y. TIMES, Nov. 18, 1990, § 8, at 7 (arguing that student athletes must bear responsibility for acquiring an education, just as their non-athlete peers do):

Why can't we ask the student athletes who graduate without having learned how to read, what they were doing when they should have been cracking the books? Certainly there is no excuse for such a thing happening. Parents, professors, coach and school each must be held accountable for their failure, but doesn't the individual also have to bear the primary responsibility?

Somewhere along the way shouldn't that student have said "Stop! I'm being cheated of the education everyone around me is getting?" If they were being denied anything else they felt was rightfully theirs there would certainly be a hue and cry, so why not when education is the issue? We expect students who are not athletes to pursue education aggressively, why not expect the same of the student athlete? Why not demand the student athlete take on this responsibility?

See also Thomas H. Murray, Drug Testing and Moral Responsibility, PHYSICIAN & SPORTS MED. Nov. 1986 at 47-48 (arguing that athletes should not be screened routinely for recreational or street drug use because such screening without cause sends a message to athletes that they are not and cannot be responsible adults).
freedom from liability in athletic injury cases as long as they do not act negligently. That is, the college will stand in the same relationship to the injured athlete as it stands to the injured biology student who becomes intoxicated on a field trip and falls. Unless there is a "special relationship" established between college and student — unless, for example, the college voluntarily undertook a duty to the student it did not otherwise have and the student relied on the undertaking, or unless the injury was highly foreseeable and the college did nothing to warn the student about it or to try to prevent it — the college will not be liable to the athlete for the injury.\textsuperscript{464} In return, the college gives up some control over the athlete's life and some control over college affairs — that is, except in the case of substantial risk of life threatening injury, the college cannot refuse an athlete's request to play. The college also is required to undertake the very serious responsibility of making sure the student is provided with and understands the information relevant to treatment and return to play decisions and is offered a supportive environment in which to make those decisions.

The compromise does not seem too much to ask of either college or athlete. Colleges and universities — and society at large — demand much of student athletes, especially those in the revenue producing sports. Some have called for making major college football and basketball teams "farm clubs" for professional football and basketball teams, or at least for paying college athletes far above their current tuition, room, board, and incidental expense money.\textsuperscript{465} Even without paying athletes salaries, colleges and universities and those who support college athletics

\textsuperscript{464} Because, under my proposal, student athletes are treated as autonomous adults, they would be precluded from arguing that their particular vulnerabilities placed the college in a special relationship to them, thereby necessitating greater caretaking of them by the institution.

\textsuperscript{465} A "nearly perennial measure" introduced in the Nebraska legislature would allow state universities to pay football players a stipend over and above tuition, room, and board. Douglas Lederman, Athletics Notes: Bills to Regulate College Sports Introduced in 3 Legislatures, CHRON. HIGHER EDUC., Feb. 13, 1991, at A38. In 1988, the measure passed the Nebraska legislature, but was vetoed by the governor. In 1991, the bill passed by a vote of 28-1. It must be voted on twice more before being sent to the governor for signing. \textit{Id}. The recent legislation introduced by Representative McMillen, \textit{see supra} note 278, would permit NCAA schools to provide $300 per month to needy athletes in addition to their athletic scholarships. \textit{A Bill to Change the NCAA}, CHRON. HIGHER EDUC., July 31, 1991, at A24.

can do better by athletes than they currently do. In addition to providing them with safe playing conditions and good medical care, they can provide them with a sound educational experience in the classroom and the opportunity to exercise the rights and responsibilities which they otherwise accord to their students.

Athletes, too, benefit by their relationship with their college or university. For scholarship athletes, they receive a partially or fully paid education. They frequently live in separate, special housing, eat special meals, and receive individualized academic attention.\textsuperscript{6} In return, it does not seem too much to ask of them to take responsibility for the major decisions affecting their lives.

Some will resist this proposal. They will say it is impractical. Adopting the rationale of physicians, they will argue that informed consent is not possible — young athletes, like patients in general, cannot understand the information necessary to make so-called informed deci-

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\textsuperscript{6} See Knight Foundation Commission on Intercollegiate Athletics, Keeping Faith With the Student-Athlete: A New Model for Intercollegiate Athletics 11 (1991) [hereinafter Knight Commission Report]. The report of the Knight Commission, a private foundation commission constituted to study intercollegiate athletics and to make suggestions for reform, stated: We reject the argument that the only realistic solution to the problem is to drop the student-athlete concept, put athletes on the payroll, and reduce or even eliminate their responsibilities as students.

Such a scheme has nothing to do with education, the purpose for which colleges and universities exist. Scholarship athletes are already paid in the most meaningful way possible, with a free education. The idea of intercollegiate athletics is that the teams represent their institutions as true members of the student body, not as hired hands. Surely American higher education has the ability to devise a better solution to the problems of intercollegiate athletics than making professionals out of the players, which is no solution at all but rather an unacceptable surrender to despair.


\textsuperscript{466} See Edward G. Lawry, Conflicting Interests Make Reform of College Sports Impossible, CHRON. HIGHER EDUC., May 1, 1991, at A44. Lawry rejected the Knight Commission's description of student athletes as "true members of the student body":

[Student athletes are far from a representative sample of the student body; they certainly don't blend in very well on their own campuses. How are athletes "true" members of the student body when they have special computers, special tutors, special dorms, special food, special enrollment procedures, and special counselors? These special aids, designed to help athletes maintain academic standing, are not provided to other students to help them remain eligible for non-athletic, extra-curricular activities. Student athletes "represent" an institution only in the sense that they play their sport under its name — exactly as they would if they were paid employees of the university.

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sions; testing the athletes' comprehension of such information and providing more information when necessary would be too resource intensive; athletes are too sheltered or too young or too caught up in their own sense of immortality to make such decisions; athletes would prefer that others make the decisions for them; and others, perhaps physicians and coaches in particular, can convince athletes to do what the physicians and coaches believe to be in the athletes' best interests. It will be impossible, the critics will say, to remove the pressures affecting young athletes so they can make truly "voluntary" decisions. And, as with everything that takes time and effort, the proposal will cost money, perhaps in more sophisticated medical testing of ill or injured athletes, perhaps in new and better safety equipment, certainly in professional time spent with the athlete during the informed consent process.

Such disagreement is welcome. The National Collegiate Athletic Association, the governing body for many of the intercollegiate athletic programs in this country, has little policy on matters such as informed consent to medical care and return to play.\textsuperscript{467} Most colleges and universities deal with the question on a case-by-case basis. Tragedies like the death of Hank Gathers or the quadriplegia of Marc Buoniconti sporadically force the issues onto the front pages of the Sports Section. But in short time the issues fade as fans and athletes and coaches and university presidents again become more concerned with the overall record of a team rather than with the injury to one player here and there.

The law is finally becoming concerned with the academic exploitation of student-athletes.\textsuperscript{468} It is time for those interested in college athletics — players, coaches, physicians, college officials, parents, alumni/ae,
commentators, fans — to expand the debate from academics to all aspects of college athletics, including how we perceive and treat college athletes in the world of adult decisionmaking.

POSTSCRIPT: On December 8, 1991, the New York Times reported that the family of Hank Gathers had settled their lawsuit against Gathers' cardiologist, Dr. Vernon T. Hattori, for $1 million dollars. The Times reported further that negotiations with the other defendants, including Gathers' coach Paul Westhead, are "stalled." The suit is scheduled to go to trial on February 24, 1992.

Fleishman-Hillard Inc., a major public relations firm, "to help it get its own message out." Id. at A25.

Perhaps spurred on by the fear of further legislative involvement in college athletics, the NCAA and other groups are also offering proposals to "reform" college athletics. For example, the NCAA's academic-requirements committee has proposed plans to raise academic standards for athletes by requiring a 2.5 grade point average in 13 core high school courses (the standard is currently a 2.0 in 11 courses) in order for any student to participate in athletics during his or her first year of college, by requiring a 1.9 average by the start of the fourth academic year and a 2.0 by the start of the fifth in order to retain continued eligibility to play, by requiring athletes to complete 24 credit hours during their first year of studies and 27 each year after that, and by requiring each athlete to pass at least 8 credit hours each semester to be eligible to play the following semester. Douglas Lederman, Panel Asks NCAA to Strengthen Academic Standards, CHRON. HIGHER EDUC., April 3, 1991, at A33-34. See also Douglas Lederman, Council Backs Tougher Academic Standards Proposed by NCAA Presidents' Commission, CHRON. HIGHER EDUC., Aug. 14, 1991, at A26; Douglas Lederman, Emboldened Presidents' Commission Urges NCAA to Toughen Its Academic Requirements for Athletes, CHRON. HIGHER EDUC., July 3, 1991, at A25. If these proposed requirements would constitute "reform," one can only wonder at the "standards" college athletes are currently required to meet.


Similarly, the Knight Foundation Commission on Intercollegiate Athletics, a private committee made up primarily of current and former college administrators, along with the Executive Director of the NCAA, a member of the House of Representatives, and several private corporate executives, issued a report recommending a structure for addressing problems raised in intercollegiate athletics. Knight Commission Report, supra note 465.

470. Id.
471. Id.