Note

Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury

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Abstract

Each year, thousands of athletes play college football and are at risk of incurring a traumatic brain injury ("TBI"). TBI can take many forms including concussion, Second-Impact Syndrome, Chronic Traumatic Encephalopathy ("CTE"), early-onset Alzheimer's, dementia, and other brain conditions. These injuries, which many experts believe can be caused by an athlete's participation in competitive football, can take years to manifest. But while college football players face these risks, universities in the National Collegiate Athletic Association ("NCAA") have benefited from the billions of dollars produced each year by the sport. Nevertheless, schools are not required to provide any medical care for athletes who suffer from TBI as a result of playing college football.

This Note argues that when considering the risk of TBI to college football players, the current terms of the athletic scholarship are so one-sidedly favorable to the NCAA and its member institutions that the athletic scholarship offered to football players is unconscionable. This Note examines the two-pronged approach to unconscionability that has been adopted by many states and argues that the athletic scholarship, considering the manner in which it is offered and the effect of its substantive terms, satisfies both prongs. Finally, this Note recommends different measures the NCAA and its member

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institutions should take to lessen the degree of unconscionability in the athletic scholarship for football players.

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Introduction

"Everything was difficult: planning my day, getting my clothes ready, just everything."

—Darin Harris¹

The 2008 National Collegiate Athletic Association ("NCAA") football season was a difficult one for the University of Washington Huskies ("Huskies").² The Huskies finished their season 0–12 as the only team in the country without a win, and the only team in their conference's history to go a full season without a victory.³ One of the Huskies' more competitive games came against nationally ranked Brigham Young University ("BYU") early in the season.⁴ As the game intensified early in the fourth quarter, Huskies strong safety, Darin Harris, got tangled up in a routine play with BYU tight end, Dennis Pitta.⁵ Harris lost his balance and fell face first into the ground.⁶ His facemask tore into his upper lip, and Harris was knocked unconscious.⁷

Harris was immediately rushed to the hospital as his injuries were quite severe. He spent over a week in a medically-induced coma⁸ and needed two plastic surgeries to repair an impaled lip. But perhaps most devastatingly, he was diagnosed with a severe traumatic brain injury ("TBI").⁹ His football career was over.¹⁰

Harris was lucky enough to stay in school and graduate with the help of University of Washington medical professionals.¹¹ The University's medical services seemed to be an integral part of Harris's mod-

¹ James Silberman, *University of Washington Needs To Do Right By Darin Harris*, Fansided (May 18, 2015), http://emeraldcityswagger.com/2015/05/18/university-of-washington-needs-to-do-right-by-darin-harris/.

² See Associated Press, Washington Finishes 0-12 Season with Loss to Cal, SEATTLE TIMES (Dec. 6, 2008, 9:21 PM), http://www.seattletimes.com/sports/uw-huskies/washington-finishes-0-12-season-with-loss-to-cal/.

³ See id.

⁴ See 2008 Washington Huskies Schedule and Results, Sports Reference, http://www.sports-reference.com/cfb/schools/washington/2008-schedule.html (last visited Feb. 9, 2017).

⁵ See Chris Fetters, Harris Opens Up About TBI, SCOUT.COM (May 27, 2015), http://www.scout.com/college/washington/story/1549632-harris-opens-up-about-tbi.

⁶ See id.

⁷ See id.

⁸ See Silberman, supra note 1.

⁹ See Fetters, supra note 5. Traumatic brain injury ("TBI") is a general term describing an event where an external force causes brain dysfunction. See Mayo Clinic Staff, Diseases and Conditions: Traumatic Brain Injury, MAYO CLINIC (May 15, 2014), http://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/basics/definition/con-20029302.

¹⁰ See Fetters, supra note 5.

¹¹ See Silberman, supra note 1.

est success, seeing that "[a]fter his football injury, Harris couldn't read, [and] certainly couldn't play football again." After graduation, however, the University of Washington began charging for medical services despite Harris's continuing need for care and despite the difficulties his injuries posed to remaining employed. Harris's story is just one of many examples illustrating the unconscionability of college football scholarships: where one-sided bargains potentially leave players bearing the entirety of the health risks associated with playing football, while universities and the NCAA reap tremendous revenues.

Injuries like those sustained by Harris are not unfamiliar to football. In the early twentieth century, a debate raged as to whether football was too inherently dangerous to be played in a civilized society. Calls to abolish football have since largely lain dormant. However, new scientific research and a wave of litigation against the National Football League ("NFL") and NCAA have renewed the conversation about football and the associated safety risks. This conversation has focused on the risks of TBI, whether those risks can be reduced, and who, if anyone, should be held liable for them.

¹² HBO, Real Sports with Bryant Gumbel: Student Athletes Healthcare Web Clip (HBO Sports), YouTube (Mar. 23, 2015), https://www.youtube.com/watch?v=VWtJOQAZvS0; see also Silberman, supra note 1.

¹³ See Silberman, supra note 1.

¹⁴ See Sean Hanlon & Ray Yasser, "J.J. Morrison" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. Sports & Ent. L.J. 241, 277 (2008) (arguing "elements of oppression, unfair surprise, and terms unreasonably favoring the NCAA member institution create an unconscionable contract of adhesion" between the athlete and university).

¹⁵ Revenues likely provide a better measure of financial viability and growth for college athletics than profits and losses. *See* Will Hobson & Steven Rich, *Playing in the Red*, Wash. Post (Nov. 23, 2015), http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills (noting belief of David Benedict, Chief Operating Officer of Auburn University athletics, that "[i]t's not accurate . . . to analyze college athletics in terms of profits or losses").

¹⁶ See W. Burlette Carter, The Age of Innocence: The First 25 Years of The National Collegiate Athletic Association, 1906 to 1931, 8 Vand. J. Ent. & Tech. L. 211, 215–16 (2006).

¹⁷ See Associated Press, NFL, Ex-Players Agree to \$765M Settlement in Concussions Suit, NFL.com (Aug. 29, 2013, 2:52 PM), http://www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit; ESPN.com News Services, NCAA Settles Head-Injury Lawsuit, ESPN (July 29, 2014), http://www.espn.com/college-sports/story/_id/11279710/ncaa-settles-head-injury-lawsuit-create-70-million-fund; see also Evan Wexler, How CTE Affects the Brain, PBS (Oct. 8, 2013), http://www.pbs.org/wgbh/frontline/article/the-four-stages-of-cte/.

¹⁸ See, e.g., Ken Belson, Brain Trauma to Affect One in Three Players, N.F.L. Agrees, N.Y. Times (Sept. 12, 2014), http://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html (noting that NFL acknowledges "playing football increases the risk of developing neurological conditions" but limits the amount it will compensate injured players).

Each of the roughly 12,000 athletes who play Division I NCAA football¹⁹ are at risk of incurring TBI.²⁰ The time commitment of a college football season is significant, and many of these players dedicate over forty hours per week throughout the season to practice, in addition to games scheduled for the season.²¹ With this regimen, players face significant risk of concussive and subconcussive hits to the head,²² which can result in TBIs that have long-term degenerative effects on the brain, including Chronic Traumatic Encephalopathy ("CTE"),²³ early-onset Alzheimer's, dementia, and other brain conditions.²⁴ As football players are subjected to these risks, the NCAA and many of its member institutions have generated tremendous revenues²⁵ while also insisting that the compensation players receive—an education made possible by an athletic scholarship—is an invaluable opportunity sufficient for an athlete's participation.²⁶

There are 128 Division I football teams who each have 85 to 100 scholarship athletes on their rosters. Additionally, there are "well over 1,000" walk-on athletes across the 128 schools. See Frank Fitzpatrick, College Football Walk-Ons: An Uphill Battle that Can Be Won, NCAA (Dec. 15, 2015, 4:16 PM), http://www.ncaa.com/news/football/article/2015-12-12/college-football-walk-ons-uphill-battle-can-be-won.

²⁰ A subconcussive hit can be generally defined as a hit to the head that does not result in a concussion. *See* Paul Myerberg, *Study Indicates Brain Injuries Among College Football Players*, USA TODAY: Sports (Mar. 7, 2013, 10:00 AM), http://www.usatoday.com/story/gameon/2013/03/07/study-links-brain-injuries-to-ncaa-football-players-hits-that-do-not-cause-concussions/1970 177/.

²¹ Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN Money (Mar. 31, 2014, 6:58 AM), http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/.

²² See Myerberg, supra note 20; see also Maxwell Strachan, Six Sentences That Every Parent Of A Football Player Should Read, Huffington Post (Nov. 12, 2015, 1:37 PM), http://www.huffingtonpost.com/entry/football-child-subconcussive-hits_us_5644d543e4b045bf3dee2490 ("We know football players get 1,000 to 1,500 sub-concussive hits per season, even in high school—that's tens of thousands of hits if they play 10 years.").

²³ Chronic Traumatic Encephalopathy ("CTE") is a degenerative brain disease found in people, particularly athletes, who have a history of repetitive brain trauma. *See What Is CTE?*, B.U. CTE CTR., http://www.bu.edu/cte/about/what-is-cte/ (last visited Feb. 9, 2017).

²⁴ See Belson, supra note 18.

²⁵ See Hobson & Rich, supra note 15. While many institutions insist that they have been unable to generate profits from these revenues, the revenue brought in has nevertheless allowed institutions to finance new state of the art facilities, both athletic and academic, and also to pursue greater publicity and prestige. See Carter Woodiel, The College Football Arms Race Is Upon Us, WTMJ.com (Aug. 20, 2016, 2:31 PM), http://www.wtmj.com/newsy/the-college-foot ball-arms-race-is-upon-us; see also Michelle A. Winters, Comment, In Sickness and in Health: How California's Student-Athlete Bill of Rights Protects Against the Uncertain Future of Injured Players, 24 MARO. SPORTS L. REV. 295, 300–01 (2013).

²⁶ See generally Scholarships, NCAA, http://www.ncaa.org/student-athletes/future/scholarships [https://perma.cc/E5HG-NRSY] (last visited Feb. 9, 2017).

There is still a debate in the scientific community as to whether there is a causal relationship between football and TBI,²⁷ but those who argue for no causation are increasingly in the minority.²⁸ There is persuasive evidence permitting a strong inference that there is a causal connection between football and TBI, and many of the nation's leading universities,²⁹ the federal government,³⁰ and the NFL³¹ have taken actions that acknowledge the weight of this evidence. This Note assumes causation is sufficiently established and discusses three forms of TBI in particular—concussions, Second-Impact Syndrome, and CTE.

This Note argues that when considering the risk of TBI, the athletic scholarship that the NCAA and its member institutions offer college football players is unconscionable. If the findings of a number of recent studies are accurate, a significant number of collegiate football players will suffer from some form of TBI at some point in their lifetime.³² TBI, an injury to the brain, can result in disabilities that prevent employment and decrease an overall quality of life, problems to which a college degree provides little solace or solution.³³ Although there are elements of unconscionability already present in the athletic

²⁷ Christie Aschwanden, *Football Leads To An Early Death? If Only It Were That Simple*, FiveThirtyEight (Apr. 2, 2015, 11:16 AM), http://fivethirtyeight.com/datalab/football-leads-to-an-early-death-if-only-it-were-that-simple/ (noting remark of Chad Asplund, director of sports medicine at the Georgia Regents University, who concluded scientific research had yet to prove there was a causal link between football and TBI).

²⁸ See generally Steve Fainaru, NFL Acknowledges, for First Time, Link Between Football, Brain Disease, ESPN (Mar. 15, 2016), http://espn.go.com/espn/otl/story/_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first.

²⁹ See Jon Solomon, Ivy League Becomes College Football's Model for Player Safety, AL.COM (Jan. 5, 2013, 4:30 PM), http://www.al.com/sports/index.ssf/2013/01/ivy_league_becomes _college_foo.html. The Ivy League has limited contact drills during practices based on recent brain injury research. Such steps are indicative of the Ivy League's recognition of the risk of harm, but it is a half measure at best.

³⁰ Blake McCoy et al., 'Concussion' Shines Light on Brain Injuries and Football, NBC News (Dec. 27, 2015, 5:05 PM), http://www.nbcnews.com/health/health-news/concussion-shines-light-brain-injuries-football-n486471 (reporting that "\$16 million will be earmarked [by the federal government] to find ways to diagnose CTE in living patients").

³¹ John Breech, For First Time Ever, NFL Admits There's a Link Between CTE and Football, CBS Sports (Mar. 15, 2016), http://www.cbssports.com/nfl/eye-on-football/25517174/nfl-vp-makes-surprising-admission-about-link-between-cte-and-football.

³² See Nadia Kounang, Football's Dangers, Illustrated by One Young Man's Brain, CNN (Jan. 11, 2016, 11:18 AM), http://www.cnn.com/2016/01/11/health/football-brain-damage-cte/(stating that Boston University researchers "have discovered CTE in the brains of 44 out of 55 college football players").

³³ See generally Chandi Edmonds, The Steep Cost of Brain Injury Recovery: Celebrities and 'Concussion' Get Attention, but More Help Is Needed, Nw. U.: Nw. Now (Dec. 28, 2015), http://www.northwestern.edu/newscenter/stories/2015/12/opinion-next-avenue-brain-injury.html.

scholarship, aside from those presented by TBI, this Note argues that because the threat of TBI significantly increases the cost of playing college football for athletes—while also decreasing the value of a college degree—the athletic scholarship as currently constructed for college football players should be voided for unconscionability.

Part I of this Note examines the NCAA's history with amateurism and the impact amateurism has had in limiting the terms of an agreement between an academic institution and athlete. Part II discusses TBI and its relationship with football. Part III looks into the doctrine of unconscionability and examines its applicability to the college athletic scholarship. Part IV argues that the formation of a college scholarship is procedurally unconscionable because: (i) the NCAA and its member institutions offer players a contract of adhesion from a vastly superior bargaining position, (ii) players often lack any meaningful choice in their pursuit of an education or career, and (iii) neither the NCAA nor member institutions are required to disclose in writing the healthcare coverage athletes can expect to receive. Further, Part IV argues that the terms are substantively unconscionable because the benefit received by virtually all college football players—the opportunity to pursue a degree at the member institution—is undermined by the risk of TBI, and athletes are expected to bear the burden of paying the extensive medical costs required to properly treat an unpredictable but perhaps probable onset of TBI. Finally, Part V proposes that in order for the college athletic scholarship to be less unconscionable, NCAA member institutions should be required to disclose information about TBI during an athlete's recruitment and provide athletes with medical coverage even after the athlete no longer attends the university.

I. THE HISTORY OF THE NCAA AND AMATEURISM

For some, the fundamental appeal of college athletics are the ideals of amateurism, where players "giv[e] everything they've got, and do[] it for their schools."³⁴ Despite the appeal that amateurism may have for some on a general level, the precise definition of amateurism has been quite elusive and has been in constant fluctuation since the inception of the NCAA.³⁵ Notwithstanding the term's evolution, the

³⁴ Joe Nocera & Ben Strauss, *Sonny Vaccaro's Crusade Against 'Complete Fraud' of Amateur Athletics*, ThePostGame (Mar. 16, 2016), http://www.thepostgame.com/men-action/201603/sonny-vaccaro-indentured-ncaa-athletes-rights-cartel-nocera-strauss (quoting Joakim Noah, former men's basketball player at the University of Florida).

³⁵ See Carter, supra note 16, at 213-14.

NCAA has continuously relied on the tenets of amateurism to restrict the compensation of college athletes.³⁶

A. The Evolution of the "Gentleman Amateur"

The NCAA was originally founded in 1905 as the Intercollegiate Athletic Association of the United States ("IAAUS") at the behest of President Theodore Roosevelt after the 1905 college football season tallied eighteen deaths and 149 serious injuries.³⁷ In the IAAUS, administrators from top college football programs sought to reform the game and eliminate serious injury and death.³⁸ The IAAUS became the NCAA in 1910,³⁹ and broadened its focus beyond player safety,⁴⁰ to establishing and protecting the tenets of amateurism in collegiate athletics.⁴¹

The concept of amateurism in the NCAA has shifted quite substantially since its founding.⁴² The framers of the NCAA believed their students "should aspire [to] that of the gentleman amateur."⁴³ This concept of amateurism prohibited athletes from receiving any kind of compensation including athletic scholarships.⁴⁴ Receipt of any kind of compensation was seen as a tainting of the game because professionals could not "enjoy the game for its own sake or . . . aspire to lofty principles such as sportsmanship."⁴⁵ Participation was to be for the love of the game.⁴⁶ Original notions of amateurism in the NCAA, however, stretched beyond the players, but also regulated universities, coaching, and even fans.⁴⁷ Universities were prohibited from recruit-

³⁶ See Marc Tracy & Ben Strauss, Court Strikes Down Payments to College Athletes, N.Y. Times (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html?_r=0 ("The N.C.A.A. is allowed to use amateurism as a justification in antitrust cases, and the N.C.A.A. is allowed to define amateurism as restricting any payments to the cost of attending.").

³⁷ See Carter, supra note 16, at 215-17.

³⁸ See Yuri Nicholas Walker, Comment, Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities, 15 Marq. Sports L. Rev. 601, 631 (2005).

³⁹ Id.

⁴⁰ K. Adam Pretty, Note, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 Notre Dame L. Rev. 2359, 2370 (2014).

⁴¹ See Carter, supra note 16, at 220–22.

⁴² See id. at 213-14.

⁴³ See id. at 230.

⁴⁴ See id. at 232.

⁴⁵ Id.

⁴⁶ See id. at 230.

⁴⁷ See id. at 231-33.

ing for athletic ability,⁴⁸ coaches were banned from the sidelines,⁴⁹ and fans were prohibited from engaging in "cheer or chatter" in the stands.⁵⁰

These tenets began to fall one by one: universities began to offer athletic scholarships specifically for athletic talent,⁵¹ hired professional coaches to lucrative contracts as full time professors, and built large stadiums to house raucous fans.⁵² As original tenets fell to the way-side, the NCAA has adjusted its definition of amateurism accordingly and has continued to insist it retains the right to define the term.⁵³ Today's tenets of amateurism are contained within the NCAA's bylaws, and serve as the bedrock for limiting a collegiate athlete's compensation.⁵⁴

Presently, in order to maintain amateur status, athletes are prohibited from receiving compensation outside of that provided by member institutions within the NCAA rules. Notably, college athletes cannot "accept endorsements or [receive] compensation of any kind from anyone."55 The prohibition of benefits is broad,56 and an athlete's compensation is restricted to "tuition and fees, room, board and course-related books," provided by the institution.57 It was only recently, after public outcry,58 that the NCAA relaxed these rules marginally by allowing member institutions to give student stipends to better reflect the true cost of attendance.59

⁴⁸ See id. at 233.

⁴⁹ See id. at 231-32.

⁵⁰ See id. at 231.

⁵¹ See Brian L. Porto, What Recruiters Don't Tell Athletes and Athletes Don't Think to Ask: A Critique of the NCAA's Nonacademic Eligibility Rules, 13 VA. Sports & Ent. L.J. 240, 243 (2014).

⁵² Carter, supra note 16, at 236-38.

⁵³ See Porto, supra note 51, at 243.

⁵⁴ See Ryan Vanderford, Note, Pay-for-Play: An Age-Old Struggle for Appropriate Reform in a Changing Landscape Between Employer and Employee, 24 S. Cal. Interdisc. L.J. 805, 809 (2015).

⁵⁵ John Niemeyer, Comment, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 Pepp. L. Rev. 883, 891 (2015).

⁵⁶ See id. at 887–88; see also, e.g., Brian Floyd, Dillon Baxter Ruled Ineligible For Golf Cart Ride With Agent, SB NATION (Nov. 20, 2010, 11:44 PM), http://www.sbnation.com/2010/11/20/2324788/dillon-baxter-ruled-ineligible-for-golf-cart-ride-with-agent.

⁵⁷ Scholarships, supra note 26.

⁵⁸ See Sara Ganim, UConn Guard on Unions: I Go to Bed 'Starving,' CNN (Apr. 8, 2014, 1:26 PM), http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/.

⁵⁹ See Shannon Scovel, Student-Athletes Surprised, Excited to Receive New Cost of Attendance Stipends, USA Today: College (May 9, 2015, 8:53 AM), http://college.usatoday.com/2015/05/09/student-athletes-surprised-excited-to-recieve-new-cost-of-attendance-stipends/.

B. Contractual Relationship with College Athletes

Scholarship athletes are bound to the NCAA's tenets of amateurism⁶⁰ once an athlete enters into a contractual relationship with a member institution by signing the National Letter of Intent ("NLI") and the Statement of Financial Aid.⁶¹ These forms are signed while a player is still in high school,62 typically without any legal representation and never with any negotiation.⁶³ By signing these forms, athletes agree to attend the designated institution and comply with the NCAA constitution and bylaws—including the tenets of amateurism—while institutions agree to "finance the student's athletic education for the academic year."64 Although the two forms are technically voluntary,65 players must sign them in order to guarantee receipt of their athletic scholarship and financial aid.66 Athletes interested in an institution's academic opportunities, but whose families cannot afford the cost of attendance, are heavily incentivized to sign the NLI and Statement of Financial Aid.⁶⁷ Should a player choose to forego the opportunity for financial aid, the player must still agree to abide by the NCAA's bylaws in order to participate in athletic competition.⁶⁸

II. FOOTBALL AND TRAUMATIC BRAIN INJURY

By participating in a full contact sport like football, college football players risk suffering a number of different types of injuries;⁶⁹ in particular, football players face the risk of TBI, an injury with poten-

⁶⁰ See Leslie E. Wong, Comment, Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity, 42 Tex. Tech. L. Rev. 1069, 1073–74 (2010).

^{61 &}quot;[C]ourts have generally accepted that student-athletes and universities do have a contractual relationship." Stacey Meyer, Comment, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 230 (2004); see also Ross v. Creighton Univ., 957 F.2d 410, 415–17 (7th Cir. 1992); Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991); Niemeyer, *supra* note 55, at 890.

⁶² Wong, supra note 61, at 1073-74.

⁶³ See Thomas A. Baker III et al., Consent Theory as a Possible Cure for Unconscionable Terms in Student-Athlete Contracts, 22 Marq. Sports L. Rev. 619, 619–20 (2012).

⁶⁴ Wong, *supra* note 61, at 1073–74; *see also* Niemeyer, *supra* note 55, at 890–91; NCAA, 2015–16 NCAA DIVISION I MANUAL § 2.9 (2015), http://www.ncaapublications.com/productdownloads/D116.pdf.

⁶⁵ A player could technically decline a scholarship and pay tuition out of pocket. This player would then still have to abide by the NCAA's rules on amateurism. *See* Niemeyer, *supra* note 55, at 891 n.44.

⁶⁶ See id.

⁶⁷ See id.

⁶⁸ See NCAA, supra note 64, § 12.01.1.

⁶⁹ See Matthew J. Mitten, Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries, 55 U. Pitt. L. Rev. 129, 133 (1993).

tially long-term or fatal ramifications.⁷⁰ These external blows can have devastating effects given the structure of the human skull and how the brain is situated inside the skull.⁷¹ The brain is "extremely fragile" and can be described as a "jello-type consistency" that is "suspended in a thin bath of cerebral spinal fluid."⁷² The brain's suspension and soft consistency make it "prone to distortions in shape when rapidly moved in one direction."⁷³ This impact on the brain can cause neurons to tear, giving rise to permanent brain damage; "[t]he cells can also be smashed against the 'protecting' skull, causing damage from direct contusion and bruising."⁷⁴ Three forms of TBI have been particularly pertinent to football: concussions, Second-Impact Syndrome, and CTE.

A. Concussions and Second-Impact Syndrome

There are approximately 1.6 to 3.8 million sports and recreation-related TBIs in the United States each year, most of which are concussions that go untreated.⁷⁵ Concussions were long thought of as temporary harms, but recent research and testimony show "a significant correlation between generally decreased cognitive function and participation in contact sports."⁷⁶ Concussion symptoms include: "amnesia, reduced attentiveness and concentration, confusion, bradycardia, hypertension, respiratory irregularities and vomiting."⁷⁷ For an athlete who plays a contact sport like football, "[e]stimates regarding the like-lihood" that he will experience "a concussion may be as high as 19% per season."⁷⁸ The high percentage of concussions is troublesome not only when considering the potential long-term ramifications, but also

⁷⁰ See What is CTE?, supra note 23.

⁷¹ Cailyn M. Reilly, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 252 (2012).

⁷² Michael E. Howard, *Mild Brain Injury: Causes, Damages, Diagnosis and Treatment, in* 10 Damages in Tort Actions § 133D, § 133D.21 (2007).

⁷³ Id.

⁷⁴ Id.

⁷⁵ See U.S. Dep't of Health and Human Servs., Heads Up: Facts for Physicians About Mild Traumatic Brain Injury (MBTI), CTR. FOR DISEASE CONTROL & PREVENTION 2, http://www.concussiontreatment.com/images/CDC_Facts_for_Physicians_booklet.pdf (last visited Feb. 9, 2017).

⁷⁶ Reilly, supra note 71, at 257.

⁷⁷ Howard, *supra* note 72, at § 133D.22[1].

⁷⁸ ImPACT Applications, Inc., *Concussions*, U. PITT.: NEUROLOGICAL SURGERY, http://www.neurosurgery.pitt.edu/centers-excellence/brain-and-spine-injury/concussions (last visited Feb. 9, 2017).

because the remedies and treatment for concussions remain "[f]rustratingly [e]lusive."⁷⁹

Football players also face the risk of Second-Impact Syndrome, which occurs when a person sustains a second TBI before fully healing from a prior concussion. Second-Impact Syndrome is rare but very dangerous, and can be fatal. A postconcussive hit that amounts only to a "minor blow [that] may not even be directly to the head" can be sufficient to cause Second-Impact Syndrome. The devastating potential of Second-Impact Syndrome is especially problematic when considering that the appropriate protocol for the diagnosis and recovery of concussions has been a continuous topic of debate among experts. Although cases of Second-Impact Syndrome among college athletes are admittedly rare, 4 it is nevertheless a life-threatening risk that college football players face on the field.

B. Chronic Traumatic Encephalopathy

Although injuries like concussions or Second-Impact Syndrome can be traced to one hard hit that leads to a player getting his "bell rung," a college football player might also develop a degenerative

⁷⁹ See Barry Meier & Danielle Ivory, Effective Concussion Treatment Remains Frustratingly Elusive, Despite a Booming Industry, N.Y. TIMES (July 3, 2015), http://www.nytimes.com/20 15/07/05/business/effective-concussion-treatment-remains-frustratingly-elusive-despite-a-boom ing-industry.html.

⁸⁰ Matthew D. Ramsey, A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome, 188 Mil. L. Rev. 1, 34 (2006).

⁸¹ See Second-Impact Syndrome, U. Wash. Med., http://www.uwmedicine.org/health-library/Pages/second-impact-syndrome.aspx (last visited Feb. 9, 2017).

⁸² Andrew W. Breck, Note, Keeping Your Head on Straight: Protecting Indiana Youth Athletes from Traumatic Brain Injuries Through "Return-to-Play" Legislation, 9 Ind. Health L. Rev. 215, 224 (2012).

⁸³ See Neil Craton & Oliver Leslie, Time to Re-Think the Zurich Guidelines?, 24 CLINICAL J. SPORT MED. 93, 93–94 (2014); see also Aschwanden, supra note 27; Meier & Ivory, supra note 79

⁸⁴ See Jorge Castillo, College Athlete Died of Head Trauma, Father Says, N.Y. TIMES (Aug. 30, 2011), http://www.nytimes.com/2011/08/31/sports/ncaafootball/college-football-player-died-from-head-trauma-father-says.html ("[T]he overwhelming majority of the world's classic second-impact-syndrome cases are people 18 and younger.").

⁸⁵ See, e.g., Jon Solomon, Life After Football Death, CBS Sports (Aug. 26, 2015), http://www.cbssports.com/collegefootball/feature/25281366/life-after-football-death (noting prominent neurologist Robert Cantu believes college football player Derek Sheely sustained Second-Impact Syndrome and his death was preventable).

⁸⁶ Frequently Asked Questions about Chronic Traumatic Encephalopathy, B.U. CTE CTR., http://www.bu.edu/cte/about/frequently-asked-questions/ (last visited Feb. 9, 2017). Second-Impact Syndrome is traceable to hard hits in that Second-Impact Syndrome occurs when a player is not fully healed from a prior concussion, which is likely the product of a hard hit. See Ramsey, supra note 80, at 34.

brain condition without ever having suffered from a concussion. "[CTE] is a progressive degenerative disease of the brain," caused by "repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head."87 This repetitive brain trauma "triggers progressive degeneration of the brain tissue," and has typically been associated with boxing.88 Recent studies strongly suggest, however, that it is also very common among football players.89 CTE can have devastating effects that include: "[M]emory loss, confusion, impaired judgment, impulse control problems, aggression, depression, . . . parkinsonism, and, eventually progressive dementia."90 The disease is also suspected of pushing individuals to suicide.⁹¹ Exactly when changes begin in the brain as a result of CTE varies by individual, and can begin within months, years, or in some cases, decades after trauma. 92 For a college football player, symptoms of CTE may not appear until years after he has left the institution. Even still, there is currently no method to conclusively diagnose CTE during a player's life, and all diagnoses occur posthumously.93

The risk of degenerative or lethal traumatic brain injury is continually being faced by players, while NCAA member institutions generate billions of dollars annually from college football. The burden of these risks and their associated costs are substantially incurred by the players per the terms of the athletic scholarship. It is under these kinds of circumstances, where the terms of the agreement are so one-sided, that the doctrine of unconscionability could provide relief.

⁸⁷ See What is CTE?, supra note 23 (emphasis added).

⁸⁸ *Id*.

⁸⁹ Jason M. Breslow, *New:* 87 Deceased NFL Players Test Positive for Brain Disease, PBS (Sept. 18, 2015), http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/new-87-de ceased-nfl-players-test-positive-for-brain-disease/ (reporting a study finding 96% of NFL players and 79% of all football players examined had CTE).

⁹⁰ See Frequently Asked Questions, supra note 86.

⁹¹ See Emily Oster, Do Concussions Lead to Suicide?, FIVETHIRTYEIGHT (Dec. 16, 2014, 6:00 AM), http://fivethirtyeight.com/features/do-concussions-lead-to-suicide/; see also Mark Fainaru-Wada et al., Doctors: Junior Seau's Brain Had CTE, ESPN (Jan. 11, 2013), http://espn.go.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players; Dan Gartland, Adrian Robinson, Who Committed Suicide in May, Found to Have CTE, Sports Illustrated (Oct. 14, 2015), http://www.si.com/nfl/2015/10/14/nfl-cte-concussions-suicide-adrian-robinson.

⁹² See What is CTE?, supra note 23.

⁹³ See Christine M. Baugh et al., Current Understanding of Chronic Traumatic Encephalopathy, 16 Current Treatment Options Neurology 306, 313 (2014), http://www.bu.edu/cte/files/2009/10/Baugh-CTE-review-2014.pdf.

III. Unconscionability

The doctrine of unconscionability is designed to "counteract two generic forms of abuses": (1) procedural shortcomings in contract formation, and (2) contractual terms that are "unreasonably favorable to the more powerful party."94 Unconscionability was first recognized as a contractual limitation in the first version of Article 2 of the Uniform Commercial Code ("UCC").95 Before this explicit recognition of the doctrine in the UCC, courts "strained contractual interpretations or manipulat[ed] . . . traditional contractual doctrines" in order to reach an equitable result for agreements they found to be unconscionable.96 However, the continuous straining and skewing of contractual doctrines led Karl Llewellyn, the author of the first UCC, to conclude that such practices were not "reliable tools," 97 "and prompted the creation of an explicit" doctrine of unconscionability in UCC section 2-302.98 Although the UCC only applies to goods and services, courts have developed a common law unconscionability doctrine applicable to all contracts.99

Unconscionability is broken into two prongs: procedural and substantive unconscionability. Most courts require that both prongs be met for a clause or contract to be unconscionable. These two prongs are typically analyzed through a balancing test, where an extensive showing of one element will allow for a lesser showing of the other.

 $^{94\,}$ 8 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts \$ 18:10 (Danny R. Veilleux ed., 4th ed. 2010).

⁹⁵ See Baker et al., supra note 63, at 621.

⁹⁶ See id.

⁹⁷ K. N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 703 (1939) (book review).

⁹⁸ See Baker et al., supra note 63, at 622.

⁹⁹ See John Edward Murray, Jr., Murray on Contracts 489 (3d ed. 1990) (the doctrine has been included as a limitation in section 208 of the Restatement); see also Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 512 (Cal. 1985) (stating "the market price set by an oligopoly should not be immune from scrutiny" when considering whether the price charged by a seller was unconscionable); Stephen E. Friedman, Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching, 44 Ga. L. Rev. 317, 345 (2010) (stating that the common law doctrine of unconscionability "has been deemed relevant or applicable to an enormous range of transactions beyond sales of goods").

¹⁰⁰ See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448-49 (D.C. Cir. 1965).

¹⁰¹ See Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability: An Empirical Study of Law in Action, 33 Fla. St. U. L. Rev. 1067, 1073 (2006).

¹⁰² See, e.g., Ortiz v. Hobby Lobby Stores, Inc., 52 F. Supp. 3d 1070, 1078 (E.D. Cal. 2014).

A. Procedural Unconscionability

"Procedural unconscionability concerns the bargaining process,"103 and may be found when there is "inequality in the contract formation."104 The procedural unconscionability analysis "begins with an inquiry into whether the contract is one of adhesion."105 Contracts of adhesion are contracts where a party with superior bargaining power offers a standardized contract on a take it or leave it basis to the weaker party.¹⁰⁶ Some courts conclude a contract of adhesion by itself satisfies the procedural unconscionability requirement, although this would, on balance, also require a stronger showing of substantive unconscionability.¹⁰⁷ The core inquiry of procedural unconscionability, however, focuses on whether there was "oppression" and unfair "surprise."108 Oppression looks to whether the inequality of bargaining power between the parties prevented negotiation and negated any meaningful choice on the part of the weaker party. 109 Unfair surprise analyzes the extent to which the drafting party hid contractual terms from the other party.¹¹⁰ Some factors courts consider are: the non-

¹⁰³ Wattenbarger v. A.G. Edwards & Sons, Inc., 246 P.3d 961, 974 (Idaho 2010).

¹⁰⁴ State ex rel. King v. B & B Inv. Grp., Inc., 329 P.3d 658, 669 (N.M. 2014).

¹⁰⁵ See Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000).

¹⁰⁶ Carmax Auto Superstores Cal. LLC v. Hernandez, 94 F. Supp. 3d 1078, 1103 (C.D. Cal. 2015); Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981) (defining a contract of adhesion as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it").

¹⁰⁷ See Lima v. Gateway, Inc., 886 F. Supp. 2d 1170, 1182 (C.D. Cal. 2012) ("Absent other indicia of oppression or surprise, a contract of adhesion has only a low degree of procedural unconscionability.").

¹⁰⁸ Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006).

¹⁰⁹ See M. Neil Browne & Lauren Biksacky, Unconscionability and the Contingent Assumptions of Contract Theory, 2013 Mich. St. L. Rev. 211, 222 & n.61 (illustrating an "absence of meaningful choice" resulting from a disparity of bargaining power (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965))); see also Williams v. First Gov't Mortg. & Inv'rs Corp., 225 F.3d 738, 748 (D.C. Cir. 2000) (stating "the meaningfulness of the choice is negated by a gross inequality of bargaining power" and lack of education and reasonable opportunity to understand contractual terms reveals absence of meaningful choice (quoting Walker-Thomas Furniture, 350 F.2d at 449)); McCollum v. Xcare.net, Inc., 212 F. Supp. 2d 1142, 1148 (N.D. Cal. 2002) (finding that oppression indicating procedural unconscionability arose from inequality of bargaining and the absence of real negotiation or meaningful choice); Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., 413 S.E.2d 670, 675 (W. Va. 1991) (finding grossly unequal the bargaining power between a large telephone corporation and a flower shop).

Nagrampa, 469 F.3d at 1280; A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121–22 (Ct. App. 1982) (stating that unfair surprise occurs most commonly when sellers hide supposedly agreed upon terms); see also Omar Anorga, Note, Music Contracts Have Musicians Playing in the Key of Unconscionability, 24 WHITTIER L. Rev. 739, 745 (2003) (A court looking

drafting party's "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, [and] whether alterations in the printed terms were possible." Should a court find a contract to be procedurally unconscionable, the analysis would then turn to whether the contract was also substantively unconscionable.

B. Substantive Unconscionability

Substantive unconscionability is seen by many "to be the heart of the unconscionability doctrine and, in some states," a showing of substantive unconscionability alone is sufficient to find unconscionability. 112 The terms of a contract are substantively unconscionable if they "negate the reasonable expectations of the nondrafting party," or have overly harsh terms on "price or other central aspects of the transaction."113 Further, contractual terms are suspect if they allocate the risks of a bargain in an objectively unreasonable or unexpected manner.¹¹⁴ Nevertheless, a plaintiff must make a strong showing that a contract's terms are "so outrageous and unfair in its wording or its application that it shocks the conscience or offends the sensibilities of the court."115 While courts have more or less laid out what may constitute procedural unconscionability, they have not given definitive parameters for what they will find substantively unconscionable. 116 Instead, the courts determine substantive unconscionability on a caseby-case basis, deciding each case based on its own facts.¹¹⁷

IV. Unconscionability Applied to College Football

Courts have not considered whether the risk of TBI in football makes the college football scholarship unconscionable. Most litigation concerning TBI and football has focused on tort liability, while contract claims regarding NCAA football have largely centered on anti-

for unfair surprise then considers factors including "hidden provisions, unintelligible language, and surreptitious attempts to contract out key provisions.").

¹¹¹ Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976).

WILLISTON & LORD, *supra* note 94, § 18:10; Catherine Riley, Note, *Signing in Glitter or Blood?*: *Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 106, 119 (2013).

¹¹³ WILLISTON & LORD, supra note 94, § 18:10.

¹¹⁴ A & M Produce Co., 186 Cal. Rptr. at 126.

¹¹⁵ Adams v. John Deere Co., 774 P.2d 355, 357 (Kan. Ct. App. 1989).

Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1273 (2003); see also, e.g., Ex parte Foster, 758 So. 2d 516, 520 n.4 (Ala. 1999).

¹¹⁷ See Korobkin, supra note 116, at 1273.

trust issues, or simply have not included arguments involving TBI.¹¹⁸ Although there has been little litigation, an examination of the bargaining process and the contractual terms of a college football scholarship shows that both procedural and substantive unconscionability are present. Hence, should a court consider the risk of TBI in an unconscionability analysis of college football scholarships, it should find that the current terms of a college football scholarship are unenforceable.

A. Procedural Unconscionability

The bargaining process behind an athletic scholarship is procedurally unconscionable. The college athletic scholarship is a nonnegotiable standard form contract, which makes it a contract of adhesion. Further, the formation of a college athletic scholarship brims with what has been described as "bargaining naughtiness," which leaves athletes without any meaningful choice and gives rise to unfair surprise. This Section examines all three aspects of procedural unconscionability.

1. Contracts of Adhesion and Lack of Meaningful Choice

In contracts of adhesion, parties with superior bargaining power offer weaker parties a standardized contract on a take it or leave it basis. ¹²¹ Contracts of adhesion confer a special benefit onto the drafter because they allow the drafter to create favorable terms, while "the adhering party is in practice unlikely to have read the standard

¹¹⁸ See, e.g., Anthony S. McCaskey & Kenneth W. Biedzynski, A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries, 6 Seton Hall J. Sport L. 7, 39–43 (1996); Tibor Nagy, The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules, 15 Marq. Sports L. Rev. 331, 332 (2005); Kyle R. Wood, NCAA Student-Athlete Health Care: Antitrust Concerns Regarding the Insurance Coverage Certification Requirement, 10 Ind. Health L. Rev. 561, 601–14 (2013).

¹¹⁹ See Kendall K. Johnson, Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts, 19 Sports Law. J. 1, 24 (2012); see also Meyer, supra note 60, at 244.

¹²⁰ See Arthur Allen Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. P.A. L. Rev. 485, 487 (1967).

¹²¹ See Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 511 (Cal. 1985) ("The term contract of adhesion 'signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (citation omitted)).

terms."¹²² States like California have found that a contract of adhesion by itself satisfies the procedural unconscionability requirement.¹²³

NCAA and member institutions enjoy a superior bargaining position from which they offer a standardized contract on a take it or leave it basis. The two parties in an athletic scholarship are the NCAA member institution and a high school athlete;¹²⁴ the educational and resource disparity between the two sides is accordingly wide. Students also rarely have any legal representation to help reduce this disparity.¹²⁵ In addition, scholarship terms are governed by NCAA legislation and bylaws,¹²⁶ which empower universities to unilaterally set many scholarship terms and bar any kind of negotiation.¹²⁷ The universities use this bargaining power accordingly to draft scholarship agreements that greatly favor the NCAA and member institutions,¹²⁸ and offer these terms on a take it or leave it basis—a contract of adhesion.¹²⁹

Additionally, courts find bargaining processes to be oppressive when the weaker party lacks meaningful choice.¹³⁰ The core inquiry of meaningful choice is not whether a weaker party's assent was "voluntary or genuine,"¹³¹ or whether a plaintiff, in the absolute sense, had the choice of entering into a contract.¹³² Rather, there is a lack of

¹²² Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (stating that all scholars who have written on contracts of adhesion have accepted as true that adhering parties are unlikely to read the contract terms).

¹²³ See Sanchez v. Valencia Holding Co., 353 P.3d 741, 751 (Cal. 2015) ("[T]he adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability."). Relying on the adhesiveness of a contract by itself, however, will likely require a stronger showing of substantive unconscionability to "ensure they are not manifestly unfair or one-sided." See id. (citation omitted).

¹²⁴ See John A. Maghamez, Comment, An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How O'Bannon v. NCAA and Keller v. NCAA Forever Changed College Athletics, 9 LIBERTY U. L. REV. 313, 319 (2015).

¹²⁵ See Baker et al., supra note 63, at 619.

¹²⁶ See Christopher Davis, Jr. & Dylan Oliver Malagrinò, The Myth of the "Full Ride": Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform, 65 Okla. L. Rev. 605, 607–08 (2013).

¹²⁷ See Greg Lush, Note, Reclaiming Student Athletes' Rights to Their Names, Images, and Likenesses, Post O'Bannon v. NCAA: Analyzing NCAA Forms for Unconscionability, 24 S. CAL. INTERDISC. L.J. 767, 787 (2015); see also Johnson, supra note 119, at 7 (recognizing "the NCAA's superior bargaining power and the adhesive nature of the contract").

¹²⁸ See Sean M. Hanlon, Note, Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?, 13 Sports Law. J. 41, 44–45 (2006).

¹²⁹ See id. at 69-70.

¹³⁰ See Paul Watford, Contractual Liability in Intellectual Property Disputes—A Case Study: Buchwald v. Paramount Pictures Corp., 18 Colum.-VLA J.L. & Arts 269, 287 (1994).

¹³¹ Id.

¹³² See id.; see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir.

meaningful choice when market conditions are such that parties cannot obtain the desired good or service without the disputed terms.¹³³ Even still, the availability of a substitute good or service does not by itself "defeat a claim of procedural unconscionability."¹³⁴ To understand why college athletes are unable to obtain the benefits of an athletic scholarship from an alternative source and how universities are able to offer scholarships on nonnegotiable terms, it is helpful to look at the underlying motivations of a high school athlete and the bargaining position in which the NCAA and its member institution offer scholarship terms.

High school football players can be broadly divided into two groups according to their aspirations: those who aspire to become professional football players and those who seek college degrees. Becoming a professional football player is extremely difficult. Only 6.7% of high school football players go on to play football in the NCAA. Tas Of the players who manage to make it to the college ranks, only about 1.9% become professionals at all, and only about 1.6% make the NFL. Despite these staggering odds, about half of Division I and Division II NCAA college football players still believe that they will become professional football players.

For college football players who strive to become professionals, many prudently aim to join the NFL—which is the most competitive and lucrative league. By aiming for the NFL, college football players who are ultimately unable to make the NFL still have the chance to join lower leagues like the Canadian Football League or the Arena Football League.¹³⁸ But players who are looking to join the NFL are

^{1965).} *But see* Johnson, *supra* note 119, at 23–31 (arguing college athletes have a meaningful choice because athletes could choose to refrain from participating in collegiate athletics or play outside the NCAA).

¹³³ See Watford, supra note 130, at 287; see also Hopkinton Drug, Inc. v. CaremarkPCS, L.L.C., 77 F. Supp. 3d 237, 246 (D. Mass. 2015) (finding CVS, being a large pharmacy provider, does not indicate there was a lack of reasonable choice because plaintiff had other market alternatives); Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 512–13 (Cal. 1985); Equitable Lumber Corp. v. IPA Land Dev. Corp., 344 N.E.2d 391, 396 (N.Y. 1976).

¹³⁴ Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1283 (9th Cir. 2006); see also Lush, supra note 127, at 782.

¹³⁵ Football, NCAA, http://www.ncaa.org/about/resources/research/football (last updated Apr. 25, 2016).

¹³⁶ Id. The study included NCCA athletes that played professionally in either the NFL, Canadian Football League, or the Arena Football League. Id.

¹³⁷ Results from the 2015 GOALS Study of the Student-Athlete Experience, NCAA 90–93 (Jan. 2016), http://www.ncaa.org/sites/default/files/GOALS_convention_slidebank_jan2016_pub lic.pdf.

¹³⁸ See Christopher Dabe, Former College Players Still Latch on to Pro Football Dreams at

essentially required to play in the NCAA, as 100% of players drafted into the NFL in 2015 were selected from the NCAA.¹³⁹ This recent 100% selection rate can be traced to the symbiotic relationship between the NCAA and the NFL, where the NCAA essentially serves as the NFL's minor league.¹⁴⁰ Both parties of this unofficial agreement benefit handsomely. The NFL avoids the costs associated with developing younger players, while the NCAA capitalizes on the development of a young football player by tying this process to amateurism and school spirit.¹⁴¹ This arrangement between the NFL and NCAA gives the high school football player whose goal is to become a professional football player no meaningful choice other than to accept a college football scholarship and play in the NCAA.

It is extremely rare, however, as mentioned above, for a college football player to make it as a professional; the goal for college players who do not want to become professional football players will almost certainly be to earn a degree and join the workforce. The for these players, graduating from an institution with the most excellent academic reputation becomes an extremely important consideration, Perhaps more so for the football player than the average student. The athletic obligations required of football players are substantial. Many college football players commit up to forty-five hours a week

CFL Tryout, NOLA.com (Apr. 14, 2014, 9:33 AM), http://www.nola.com/sports/index.ssf/2014/04/tryout_camps_provide_another_c.html; Football, supra note 135.

¹³⁹ See Football, supra note 135 (noting 256 out of 256 possible selections in the 2015 NFL draft went to former NCAA players).

¹⁴⁰ See Ebenezer Samuel, It's Time for NBA, NFL to Develop Minor League Systems to Replace the NCAA, N.Y. DAILY NEWS: Sports (Mar. 29, 2014, 11:03 AM), http://www.nydailynews.com/sports/college/score-minor-fix-solve-ncaa-problem-article-1.1738817.

¹⁴¹ See id

¹⁴² For a discussion on how well college degrees prepare college athletes to join the workforce, see generally Kevin Trahan, *How Much Is a Degree Worth to College Athletes? Not Much*, VICE Sports (Dec. 5, 2014), https://sports.vice.com/en_us/article/how-much-is-a-degree-worth-to-college-athletes-not-much.

¹⁴³ See Alicia Jessop, The Surprising Factors Driving College Football Recruits' College Decision, FORBES (Dec. 14, 2012, 1:31 PM), http://www.forbes.com/sites/aliciajessop/2012/12/14/the-surprising-factors-driving-college-football-recruits-decision/#41657d2c6395 (citing a study where college football players "ranked a school's academic reputation as the most important factor" in deciding which school to attend).

¹⁴⁴ See Class Action Complaint, at 27–28, McCants v. NCAA, No. 1:15-cv-176, 2016 WL 4272362 (M.D.N.C. Aug. 12, 2016) (claiming football commitments interfered with former UNC football players' ability to receive a "meaningful education"); see also, e.g., Andy Hutchins, Florida Details Football Players' 15-Hour Days with Daily Schedule Graphic, SB NATION (June 9, 2015, 1:00 PM), http://www.alligatorarmy.com/2015/6/9/8752711/florida-gators-football-players-daily-schedule-graphic (detailing the typical fifteen-hour day for University of Florida football players).

for football-related activities,¹⁴⁵ while still taking on the academic workload of a full-time student. Although universities do provide accommodations in order to help athletes remain academically eligible for competition,¹⁴⁶ college football players are nevertheless essentially full-time football players and full-time students, which may make it difficult to excel academically against peers who are unlikely to have similar obligations.¹⁴⁷ In light of this difficulty, the chance to obtain a degree from a well-known academic institution becomes, for many, an offer too enticing to pass up. In many cases, there are no reasonable alternatives for players looking to attend a reputable academic institution or even obtain a college education generally,¹⁴⁸ without also having to accept the nonnegotiable terms of an athletic scholarship. These players consequently have no meaningful choice.

2. Unfair Surprise

Unfair surprise typically arises "when [a] contracting party, usually an unsophisticated consumer, does not read" a contract's terms. 149 Generally, failure to read a contract's terms does not free a party from those terms. 150 However, for contracts of adhesion, when a contract's terms would defeat "the reasonable expectation[s] of the weaker party," it may be necessary for the stronger party to call attention to the potentially contentious terms. 151 Accordingly, in a contract of adhesion, a contract's formation may be procedurally unconscionable due to unfair surprise if a contracting party is unable to comprehend

¹⁴⁵ Peter Jacobs, *Here's The Insane Amount Of Time Student-Athletes Spend On Practice*, Bus. Insider (Jan. 27, 2015, 11:44 AM), http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.

¹⁴⁶ See Pete Thamel, Athletes Get New College Pitch: Check Out Our Tutoring Center, N.Y. Times (Nov. 4, 2006), http://www.nytimes.com/2006/11/04/sports/ncaafootball/04ncaa.html?page wanted=all.

¹⁴⁷ See Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete as Employee, 81 Wash. L. Rev. 71, 99–101 (2006); see also Steve Wieberg, Study: College Athletes Are Full-Time Workers, USA Today (Jan. 13, 2008, 1:45 PM), http://usatoday30.usatoday.com/sports/college/2008-01-12-athletes-full-time-work-study_N.htm.

¹⁴⁸ See Frederick E. Allen, When Colleges Recruit Athletes, Everyone Loses, FORBES (Aug. 2, 2012, 11:14 AM), http://www.forbes.com/sites/frederickallen/2012/08/02/when-colleges-recruite-athletes-everyone-loses/#84952532c07d (noting recruited athletes in high school are more likely to be admitted to select universities than similarly situated peers with similar or higher academic credentials).

¹⁴⁹ Anorga, supra note 110, at 745.

 $^{^{150}}$ See Smith v. M & M Pump & Supply, Inc., 41 N.E.3d 1026, 1028–29 (Ind. Ct. App. 2015).

¹⁵¹ See Monex Deposit Co. v. Gilliam, 671 F. Supp. 2d 1137, 1143–44 (C.D. Cal. 2009) (explaining procedural unconscionability is possible when "challenged term is hidden . . . or . . . otherwise beyond the reasonable expectation of the weaker party").

or was unaware of certain contractual provisions, despite not having read the provision.¹⁵²

The NCAA and member institutions unfairly surprise college athletes by either hiding contractual terms or misleading college athletes about the terms that have supposedly been agreed upon. 153 The NCAA Manual—with which every college athlete must comply—is over 400 pages long, and buried within the 400-page manual is less than a single page of relevant health care policy.¹⁵⁴ This section, which is about a half of one page, details a member institution's obligation to certify that its athletes are insured either through the athlete's personal insurance policy, the athlete's parent's insurance policy, or through university provided insurance.¹⁵⁵ Although the NCAA Manual places the onus on member institutions to certify health insurance coverage for its athletes, institutions are not required to provide any details of their healthcare policies in writing to their athletes. 156 Many high school seniors must instead rely on a recruiter's word, which makes it difficult to discern the extent of medical care an institution would be willing to provide its injured athletes.¹⁵⁷ Accordingly, "schools are not on the hook for one penny" and "players [do not]

¹⁵² See Lovey v. Regence Blueshield of Idaho, 72 P.3d 877, 882 (Idaho 2003) (finding unfair surprise when "lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language; the lack of opportunity to study the contract and inquire about its terms; or disparity in the sophistication, knowledge, or experience of the parties" (citations omitted)).

¹⁵³ See Kristina Peterson, College Athletes Stuck with the Bill After Injuries, N.Y. Times (July 15, 2009), http://www.nytimes.com/2009/07/16/sports/16athletes.html?pagewanted=all&_r =0.

¹⁵⁴ See NCAA, supra note 64, § 3.2.4.8; Meghan Walsh, 'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes, ATLANTIC (May 1, 2013), http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/.

¹⁵⁵ See Walsh, supra note 154.

¹⁵⁶ Craig Meyer, At Universities, How Athletes Are Insured for Injuries Varies, PITT. POST-GAZETTE (Oct. 26, 2015, 12:00 AM), http://www.post-gazette.com/sports/wvu/2015/10/26/At-uni versities-how-athletes-are-insured-for-injuries-varies/stories/201510260020 (noting National College Players Association "pushing for all schools to give written guarantees to recruits and parents about what kinds of coverage they have and how much of it they provide"); see, e.g., Mark Emmert, When College Athletes Get Hurt, Whose Wallet Should Feel the Pain?, PORTLAND PRESS HERALD (June 24, 2014), http://www.pressherald.com/2014/06/22/when-college-athletesget-hurt-whose-wallet-should-feel-the-pain/ (reporting that college football player, Cal Schaefer, and his family are required to pay \$30,000 to \$35,000 for injuries sustained playing football while Schaefer does not "know anything about insurance").

¹⁵⁷ See Jon Solomon, College Athletes' Rights: NCAA Requires Health Insurance, but Schools Decide What to Pay, AL.COM (Feb. 19, 2012, 7:55 AM), http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html; Walsh, supra note 154, at 231. It is unclear whether promises made during the recruiting process constitute a contract. See Fortay v. Univ. of

know what to expect" when it comes to healthcare coverage. Because institutions are not required by the NCAA to disclose the details of its healthcare policy to its athletes, institutions are able to create terms that are substantively unconscionable. The details and ramifications of these terms are discussed in the next Section, but passing mentions of the institution's healthcare policy during recruitment and the unilluminating details provided by the NCAA Manual create an unfair surprise for athletes who sustain serious injuries, like TBI, on the field.

B. Substantive Unconscionability

Substantive unconscionability concerns the terms of a contract that unreasonably allocate risk onto the weaker party, are overly harsh, or are shocking to the conscience. In this case, the terms of an athletic scholarship for college football are substantively unconscionable when taking into account the risk of TBI college football players face.

1. Unreasonable Allocation of Risk

Contracts of adhesion that contain terms that "allocat[e]...commercial risk[] in a socially or economically unreasonable manner" are substantively unconscionable. In other words, a court will find a term to be substantively unconscionable if it results in "the burdensome allocation of risk on the shoulders of one contracting party." In the shoulders of one contracting party."

The NCAA and its member institutions have used their bargaining power to shift the risk and cost of injury largely onto the player and away from the NCAA and member institutions. One of the risks in the commercial enterprise of college football are the injuries incurred by the players. Although instantly catastrophic injuries are far from the norm even in a full-contact sport like football, many uni-

Miami, Civ. A. No. 93-3443, 1994 WL 62319, at *1 (D.N.J. Feb. 17, 1994); Meyer, *supra* note 60, at 231

¹⁵⁸ Solomon, *supra* note 157 (quoting Ramogi Huma, president of the National College Players Association, an advocacy group for college athletes).

¹⁵⁹ Erez Reuveni, On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age, 82 Ind. L.J. 261, 301 (2007).

¹⁶⁰ See Korobkin, supra note 116, at 1273.

¹⁶¹ See A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 126 (Ct. App. 1982).

¹⁶² Browne & Biksacky, *supra* note 109, at 221; *see also* Altman v. PNC Mortg., 850 F. Supp. 2d 1057, 1080–81 (E.D. Cal. 2012).

¹⁶³ See Lindsay J. Rosenthal, Comment, From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition It Has Taken Almost a Century to Create, 13 Seton Hall J. Sport L. 321, 322 (2003).

versities have taken advantage of the scholarship terms they have established to free themselves of liability for athlete injuries. The shifting of these costs from institutions that receive billions in revenue annually onto college football players, particularly the costs associated with TBI, is both socially and economically unreasonable given the financial resources available to each party.

Although the NCAA requires its current athletes to have health insurance worth at least \$90,000, member institutions are not required to provide any of this coverage.165 College athletes could take out their own policies or join their parents' insurance policies to meet this requirement, 166 but many private insurance policies expressly exclude injuries related to college athletics.¹⁶⁷ This option is also particularly problematic for athletes from lower-income families who may not be able to afford sufficient insurance coverage. 168 Even still, for institutions who are willing to provide coverage for their enrolled athletes, 169 relying on the university can be potentially devastating, especially for injuries with long-term consequences like TBI.¹⁷⁰ College football coaches have the power under the NCAA Manual and bylaws to terminate scholarships for any reason including for injuries sustained on the field.¹⁷¹ Once a player's scholarship is terminated, so is his opportunity to earn a college degree, and perhaps more importantly, so is his insurance policy.¹⁷² Because the terms of the athletic scholarship allow NCAA member institutions to terminate scholarships for injuries, college football players can be responsible for a substantial portion of the medical costs that come with injury. Players thereby bear much of the risk, while potentially not receiving the supposed benefit of the bargain.

¹⁶⁴ See Emmert, supra note 156; Solomon, supra note 157; Walsh, supra note 154.

¹⁶⁵ Solomon, *supra* note 157; Ben Strauss, *A Fight to Keep College Athletes from the Pain of Injury Costs*, N.Y. Times (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html.

¹⁶⁶ See Emmert, supra note 156.

¹⁶⁷ Winters, supra note 25, at 311.

¹⁶⁸ Walsh, supra note 154.

¹⁶⁹ See Winters, supra note 25, at 311 (noting many smaller universities lack the financial resources to provide comprehensive insurance coverage for their athletes).

¹⁷⁰ Walsh, supra note 154.

¹⁷¹ Strauss, supra note 165.

¹⁷² *Id.* (chronicling Stanley Doughty's journey to the NFL where NFL team doctors from the Kansas City Chiefs found a potentially paralyzing spinal injury that Doughty sustained, and played with, while attending the University of South Carolina); *see also, e.g.*, Coleman v. W. Mich. Univ., 336 N.W.2d 224, 225 (Mich. Ct. App. 1983) (holding college football player could no longer pursue his degree after sustaining a career-ending injury and having his athletic scholarship terminated).

For the college football player who sustains a TBI because of his college football career and is diagnosed after leaving the institution, he is likely to find himself in a predicament similar to the player cut from the football team after suffering a catastrophic bodily injury: saddled with expensive medical bills and without the benefits that come with a college degree. TBI can take years to manifest, 173 and the vast majority of NCAA member institutions do not provide health insurance for college athletes who are no longer students. 174 Unlike catastrophic bodily injury, TBI could potentially affect a majority of college football players. 175 If the estimated risks of TBI inherent in college football are accurate, the majority of college football players will develop some form of TBI in their lifetimes as a consequence of playing collegiate football, 176 and the institutions will have no contractual obligations to provide remedies for these injuries.

This shift in healthcare obligations becomes even more gut wrenching when examining its ramifications. The consideration all scholarship players receive for playing football is the opportunity to earn a degree, and thereafter, join the workforce. TBI, as an injury to the mind, compromises an individual's ability to find and keep a job and earn a living, and thereby undermines the value of a college degree. An unemployable former athlete's ability to pay for the medical bills that arise as a consequence of playing college football would thus be severely limited. Meanwhile, institutions collectively enjoy astronomical annual revenues in the billions of dollars, generated

¹⁷³ See What is CTE?, supra note 23.

¹⁷⁴ There is an exception for California universities as a result of California legislation. *See California Governor Signs NCPA Student-Athletes Bill of Rights!*, NAT'L C. PLAYERS ASS'N (Sept. 27, 2012), http://www.ncpanow.org/news/releases-advisories/california-governor-signs-ncpa-student-athletes-bill-of-rights (describing National College Players Association's involvement in the passage of the California Student-Athlete Bill of Rights).

¹⁷⁵ See Ryan Jaslow, Brain Damage Found in College Football Players Who Didn't Suffer Concussions, Study Suggests, CBS News (Mar. 7, 2013, 1:51 PM), http://www.cbsnews.com/news/brain-damage-found-in-college-football-players-who-didnt-suffer-concussions-study-suggests/; Myerberg, supra note 20 (citing a Cleveland Clinic study that found raised levels of an antibody associated with brain trauma in forty out of sixty-seven college football players); Jon Solomon, Studies Show Magnitude of College Football's Concussion Problem, CBS Sports (Oct. 2, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24734520/studies-show-magnitude-of-college-footballs-concussion-problem (citing a study by Boston University CTE Center and Harvard University concluding that there are six suspected concussions in the NCAA for every one concussion reported).

¹⁷⁶ See Myerberg, supra note 20.

¹⁷⁷ See generally Return to Work and Job Stability After Traumatic Brain Injury, Brain Injury Ass'n Am., http://www.biausa.org/tbims-abstracts/return-to-work-and-job-stability-after-traumatic-brain-injury (last visited Feb. 9, 2017).

¹⁷⁸ Hobson & Rich, supra note 15 (reporting revenues of the institutions in the "Power

largely by the players. If current scientific hypotheses prove to be true, the current contractual terms would have a devastating result for players, while the NCAA and its member institutions would enjoy a large windfall.

2. Unconscionable Price

The terms of the athletic scholarship are also overly harsh when considering the market value of many Division I college football players and the price institutions pay in order to obtain the services of these players.¹⁷⁹ "In unfair price unconscionability cases, . . . the price to be paid is grossly disproportionate to the value of the good or service received in exchange."¹⁸⁰ Further, "unfair price contracts are often referred to as 'per se unconscionab[le]' because the imbalance in consideration is so severe as to be considered unconscionable on its face."¹⁸¹ Though it remains unclear as to precisely how a court might determine a price to be unconscionable, ¹⁸² courts have found an unconscionable price where the price paid was 250–400% greater than the value of the good or service.¹⁸³ Moreover, when such a disparity exists, courts are likely to intervene if the court finds that "market mechanisms are unlikely to rectify the situation."¹⁸⁴

The quid pro quo exchange between universities and college football players is fairly simple—players agree to participate in the

Five" conferences have risen from \$2.67 billion in 2004 to \$4.49 billion in 2014). This article also shows a corresponding increase in spending that has netted little profits for the institutions. There is, however, an argument that the rise in spending is artificial—largely due to bloated and irresponsible spending. *See also* Michael Steele, Comment, O'Bannon v. NCAA: *The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 534–35 (2015).

- 179 See Williston & Lord, supra note 94, § 18:15. ("Price unconscionability represents one category of substantive abuse or harsh term that often exists independently of any procedural abuse" (footnote omitted)).
 - 180 Browne & Biksacky, supra note 109, at 220 n.52.
- ¹⁸¹ Id. at 221 n.52 (alteration in original) (quoting DiMatteo & Rich, supra note 101, at 1091).
- ¹⁸² Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 Com. L.J. 287, 298–99 (2000).
- 183 See, e.g., Murphy v. McNamara, 416 A.2d 170, 173, 176–77 (Conn. Super. Ct. 1979) (finding unconscionable a buyer paying \$1268 for a television with a \$499 retail value); Jones v. Star Credit Corp., 59 Misc. 2d 189, 193 (N.Y. Sup. Ct. 1969) (finding substantively unconscionable a merchant selling a freezer with a retail value of \$300 for \$900 as a matter of law); Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), rev'd, 54 Misc. 2d 119 (N.Y. App. Term 1967) (finding unconscionable a deal where a buyer purchased an appliance for three times its value).
- ¹⁸⁴ Frank P. Darr, *Unconscionability and Price Fairness*, 30 Hous. L. Rev. 1819, 1844 (1994).

school's athletic program in exchange for the benefits that an athletic scholarship provides for the upcoming academic year. "Full [athletic] scholarships cover tuition and fees, room, board and course-related books."185 Depending on whether the school is a public or private institution, and depending on the school's location, the value of these scholarships can vary. The average costs for tuition, fees, and room and board range from \$19,548 per year at a public four-year institution for in-state residents to \$43,921 per year at a private nonprofit four-year institution.¹⁸⁶ Although most college students and families would be thrilled at the prospect of a potentially free college education, the value that a college football player adds to an institution is substantially greater than the value of a scholarship. 187 The fair market value of an average big time college football player's services was estimated to be about \$149,569 per year, and as high as \$622,000 per year in 2015.188 In this case, the price paid by the NCAA member institutions is substantially less than the fair market value of the services rendered by college football players. According to these estimates, the fair market value of a college football player's services at a four-year public institution is on average 765%, and as high as 3182%, greater than the value of a college scholarship—differentials that are substantially higher than what courts have previously found unconscionable.189

¹⁸⁵ Scholarships, supra note 26.

trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16 [https://web.archive.org/web/20160415213315/http://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16] [last visited Feb. 9, 2017). The NCAA has also amended its bylaws to allow for a "cost of living" stipend of about \$400 per month, depending on the institution. See Audrey Snyder, Cost of Attendance Stipends Give Scholarship Student-Athletes a Little Financial Freedom, Pitt. Post-Gazette (Sept. 1, 2015, 12:00 AM), http://www.post-gazette.com/sports/college/2015/09/01/Cost-of-attend ance-stipends-give-scholarship-student-athletes-a-little-financial-freedom/stories/201508310052. Although these figures represent the approximate cost of tuition, fees, and room and board, a joint study by the National College Players Association and Drexel University found that the average value of a Division I scholarship to be approximately \$23,204 per year, in 2012 dollars. See Ramogi Huma & Ellen J. Staurowsky, The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism, Nat'l C. Players Ass'n 3 (2012), http://www.ncpanow.org/news/articles/body/6-Billion-Heist-Study_Full.pdf.

¹⁸⁷ See Huma & Staurowsky, supra note 186, at 3.

¹⁸⁸ See Cork Gaines, The Average University of Texas Football Player Is Worth \$622,000 Per Year, Bus. Insider (Sept. 22, 2015, 1:55 PM), http://www.businessinsider.com/college-foot ball-player-value-2015-9 (calculating fair market value using the formula provided in the most recent NFL collective bargaining agreement); see also Huma & Staurowsky, supra note 186, at 13 (reporting the 2011–2012 fair market value of college football players is \$418,768).

¹⁸⁹ Percentages were calculated by dividing the estimated fair market value by the average

In addition to the discrepancy between fair market value and actual compensation received, the price paid for the opportunity to become a professional player or to receive a college degree by college football players who develop TBI increases dramatically, while the value of the scholarship received is simultaneously severely undermined. The costs of TBI are not explicitly a part of the quid pro quo exchange in an athletic scholarship, but college football players presumably bear this cost. ¹⁹⁰ In the final analysis then, the price paid by college athletes is grossly disproportionate to the consideration received in return. College football players are already vastly underpaid compared to their estimated fair market value, but the risk of TBI widens this gap considerably; the nature of the injury diminishes the value of a college degree while scholarship terms allocate the substantial cost of TBI onto players.

There is also little reason for courts to be optimistic about market forces acting to correct these issues. The NCAA and its member institutions have used amateurism to avoid the traditional application of different antitrust laws. ¹⁹¹ Being able to circumvent these rules has allowed the NCAA and its member institutions to engage in "price fixing," with the NCAA acting as purchaser and college athletes acting as suppliers. ¹⁹² With the rules of amateurism repelling market forces and with many antitrust laws being deemed as inapplicable to the NCAA, it is extremely unlikely that market forces could act to correct the discrepancy in consideration exchanged by parties in a college football scholarship.

By including TBI into the unconscionability analysis, the extent to which the terms of the college football scholarship are one-sided is revealed. Procedurally, many high school football players have little meaningful choice in deciding to play football in the NCAA, and the NCAA and its member institutions have used their superior bargaining position to either hide or misinform players about scholarship

cost for tuition, fees, and room and board. Using this calculation, college football players' fair market value at private institutions was greater than a college scholarship by an average of 340.5%.

¹⁹⁰ Although the cost of treating TBI is not explicitly a part of the quid pro quo exchange of an athletic scholarship, it is nevertheless a result of carrying out the terms of the athletic scholarship for football, and is presumably paid for by the football player. *See generally* Section IV.B.

¹⁹¹ See Nagy, supra note 118, at 332. But see O'Bannon v. NCAA, 802 F.3d 1049, 1064–76 (9th Cir. 2015) (finding that college athletic scholarships were subject to antitrust scrutiny but that universities were not required to give "cash payments untethered to . . . education expenses"), cert. denied 137 S. Ct. 277 (2016).

¹⁹² See id. at 332-33.

terms related to TBI. Substantively, the NCAA and its member institutions have managed to shift entirely the costs of TBI onto the players. Additionally, the value of a college scholarship is an unconscionably low price for universities considering the value players bring to universities and the risks players take on the field. The NCAA and its member institutions, however, do have some options to lessen the unconscionability of the current agreement.¹⁹³

V. Remedies

If a court were to find college athletic scholarships for football unconscionable, the court could decide either to void the entire contract or to void parts of the contract found unconscionable.¹⁹⁴ This Note recommends a two-fold remedy: (1) scholarship agreements should be altered to require the NCAA and member institutions to disclose known or suspected TBI risks of playing collegiate football and the terms of available healthcare plans, and (2) universities should be required to maintain insurance policies that cover football-related injuries like TBI for all players, even after graduation.

A. To Reduce Procedural Unconscionability, Universities Should Disclose the Risks of TBI to Incoming Players and the Terms of Their Respective Health Insurance Coverage for Football Players

Given that the NCAA and member institutions offer thousands of football scholarships every year, it seems unlikely that anything other than a nonnegotiable standard form contract can be offered without incurring substantial expense. Nevertheless, the NCAA and its member institutions should develop a succinct and clear disclosure procedure to inform players and their families of the risk of TBI in college football. By doing so, the NCAA and its member institutions will go a long way in making their athletic scholarships less procedurally unconscionable.¹⁹⁵

Requiring the NCAA and member universities to fully disclose all known or suspected TBI risks and the extent to which health insurance is provided for players who no longer attend the university should reduce procedural unconscionability significantly. Full disclosure should quell any unfair surprise and help families make more

¹⁹³ See infra Part V.

¹⁹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 208 (Am. Law Inst. 1981).

¹⁹⁵ See King v. King, 442 S.E.2d 154, 157 (N.C. Ct. App. 1994) (listing "inadequate disclosure" as a reason for procedural unconscionability).

meaningful choices. By requiring transparent disclosure of risks, prospective college players and their families will, at the very least, know what to expect in the event that the athlete develops TBI or incurs other serious injury. Prospective college players and their families will also be in a much better position to decide whether the risk of TBI is worth the opportunity to earn a college degree at a particular institution, or whether to attend college at all.

B. Universities Should Provide Lifetime Health Insurance Benefits that Cover Players for All Football Related Injuries

Requiring the NCAA and member institutions to provide lifetime health insurance coverage will likely be very expensive, but should be required to reduce the substantive unconscionability of a college football scholarship.¹⁹⁶ The NCAA and many member institutions generate billions of dollars in revenue annually from their football programs. Scholarship agreements, as currently constructed, direct almost all of the monetary benefit back to the institution and could potentially leave a majority of college football players with substantial medical bills for treating football-induced TBI. Further, society at large would also suffer from the loss of productivity and the burden of additional healthcare costs.¹⁹⁷ The NCAA and its member institutions should not be allowed to enjoy all the monetary benefits of college football without taking responsibility for the costs associated with the game. By requiring healthcare coverage for former players' TBIs, the NCAA and member institutions will shoulder their rightful burden.

The requirement to provide healthcare coverage for TBIs may push many universities to close their football programs due to the added expense.¹⁹⁸ Although this scenario may initially be a hard pill to

¹⁹⁶ The insurance coverage can be financed through a trust similar to a trust created to compensate victims of asbestos which requires evidence of an asbestos-related injury. See Mesothelioma and Asbestos Trusts, Asbestos.com, http://www.asbestos.com/legislation/trust-fund.php (last visited Feb. 12, 2017).

¹⁹⁷ See generally Hidden Health Tax: Americans Pay a Premium, Families USA (2009), http://familiesusa.org/sites/default/files/product_documents/hidden-health-tax.pdf (discussing the shift in healthcare costs from the uninsured to the insured). For a football player diagnosed with CTE who has insurance, the associated medical costs would still be shared by those in his insurance group, and raise premiums. See Gerri Willis, How Does Group Health Insurance Work?, CNN Money (Oct. 26, 2009, 5:14 PM), http://money.cnn.com/2009/10/26/pf/group_health_insurance_top_tips/.

¹⁹⁸ See Erin Durkin, Small Athletics Budgets Makes NCAA Division I Play a Challenge, USA Today: Sports (May 15, 2012, 2:46 PM), http://usatoday30.usatoday.com/sports/college/story/2012-05-15/small-schools-financial-deficit/54959184/1; see also Joseph E. Aoun, Game

swallow, this action will likely be beneficial. The most obvious benefit would be foreclosing the possibility that students incur TBIs at an institution that cannot afford to provide appropriate remedies. Some may argue that universities need football in order to remain financially viable and subsidize scholarships for their other athletic programs. Such an argument misses the mark in a discussion of unconscionability. It is unconscionable to sacrifice college football players on the altar of TBI for the financial gain of the university, the NCAA, or even fellow students. The burden should rest with the NCAA and member institutions to think of creative financial solutions to address the needs of athletic departments; saddling college football players with the costs of TBI for the financial gain of others should not be an acceptable solution.

Although many college football programs may close, it is likely that the largest college football programs will still remain financially viable. The requirement to provide health insurance coverage for all collegiate players has already been enacted in California universities that generate over \$10 million in media rights annually. Similar media deals with the "Power Five" conferences have been very lucrative and should help subsidize the costs of providing insurance to players.

Conclusion

Should scientific predictions about football and TBI be proven true, college football scholarships, as currently constructed, are unconscionable. The college athletic scholarship for football in particular is tethered with procedural and substantive unconscionability. Unless the NCAA and member institutions proactively make changes to the

Changer: Closing a Long-Standing University Program, Am. Council Ed. (Fall 2010), http://www.acenet.edu/the-presidency/columns-and-features/Pages/Game-Changer-Closing-a-Long-Standing-University-Program.aspx.

199 See Dennis Dodd, California Passes Student-Athlete Bill of Rights, CBS Sports (Oct. 9, 2012, 5:18 PM), http://www.cbssports.com/collegefootball/writer/dennis-dodd/20525847/california-passes-student-athlete-bill-of-rights.

200 See generally Chris Smith, The Most Valuable Conferences in College Sports 2014, FORBES (Apr. 15, 2014, 2:49 PM), http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/#4372a5fa145c; Jon Solomon, SEC Rakes in \$527.4 Million in First Year of CFP and SEC Network, CBS Sports (Jan. 19, 2016), http://www.cbssports.com/collegefootball/writer/jon-solomon/25454840/sec-rakes-in-5274-million-in-first-year-of-cfp-and-sec-network. The "Power Five" conferences are athletic conferences in NCAA football in which there is the highest level of competition. These conferences are the Atlantic Coast Conference, Pac-12 Conference, Big 10 Conference, Big 12 Conference, and Southeastern Conference. Emmert, supra note 156.

bargaining process and substantive terms of the athletic scholarship, these contracts will remain vulnerable to unconscionability suits and massive liability.