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# Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?

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> A point is reached when an existing system is so seriously flawed that a consensus begins to emerge among thoughtful people that something like "perestroika"[1] is necessary. . . . "[B]ig-time" intercollegiate athletics in this country is at that point.[2]

## I. PRE-GAME WARM UP: INTRODUCTION

Every year, student-athletes with remaining eligibility face the unfortunate possibility that their university, after granting them an athletic scholarship, will not renew their athletic scholarship for the upcoming school year.[3] Every student-athlete faces this situation despite the popular belief that athletic scholarships are four-year deals.[4] In

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1. *Perestroika* is a reference to the restructuring of the Soviet economy and bureaucracy that began in the mid 1980s.

2. Raymond L. Yasser, *A Comprehensive Blueprint for Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 155-56 (1992). Professor Ray Yasser takes a thoughtful and measured critique at some of the problems inherent in the NCAA. Professor Yasser argues that the NCAA's contradictory goals of preserving amateurism in athletics while making as much money as possible for member schools leads to an intercollegiate sports structure that is seriously flawed and requires reform. *See id.*

3. NCAA Bylaw 15.3.5 covers renewals and nonrenewals of athletic scholarships, and Bylaw 15.3.5.1 deals with the institutional obligation. Bylaw 15.3.5.1 reads as follows:

> The renewal of institutional financial aid based in any degree on athletics ability shall be made on or before July 1 prior to the academic year in which it is to be effective. The institution shall promptly notify in writing each student-athlete who received an award the previous academic year and who has eligibility remaining in the sport in which financial aid was awarded the previous academic year (under Bylaw 14.2) whether the grant has been renewed or not renewed for the ensuing academic year. Notification of financial aid renewals and nonrenewals must come from the institution's athletics department. (Revised 1/10/95).

NCAA, 2004-05 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS art. 15.3.5.1, at 202 (NCAA ed., 2004), *available at* http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf [hereinafter NCAA DIVISION I MANUAL].

4. *See* Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 147-48 (2000) (identifying a common perception among the general public and a majority of student-athletes that athletic scholarships are awarded for a four-year period, when the NCAA rules actually limit the period of a scholarship award to one year).

reality, athletic scholarships are one-year contracts that are either renewed or not renewed by the university each year.[5]

The common understanding among athletes is that they will have their scholarship renewed each year by their college or university as long as they: (1) remain in "good academic standing"[6] and make "progress toward [their] degree,"[7] (2) are good citizens (not involved in any activities consisting of serious misconduct or moral turpitude), and (3) are actively participating and following all team rules in the sport from which their athletic scholarship derives. This common understanding is taken from the National Collegiate Athletic Association (NCAA) article governing situations where reduction or cancellation of financial awards is permitted *during the period of the award*.[8] The factors given in this rule are essentially identical to the above understanding among student-athletes. A member of the university or the coaching staff may remark, "Listen, your scholarship cannot be taken away if you keep your grades up (good academic standing/progress toward degree), you

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5. NCAA Bylaw 15.02.7 identifies the period of the award being one year. The rule provides as follows:

> Period of Award. The period of award begins when the student-athlete receives any benefits as part of the student's grant-in-aid on the first day of classes for a particular academic term, or the first day of practice, whichever is earlier, until the conclusion of the period set forth in the financial aid agreement. An athletics grant-in-aid shall not be awarded in excess of *one academic year*.

NCAA DIVISION I MANUAL, *supra* note 3, art. 15.02.7, at 194 (emphasis added).

6. NCAA article 14.02.5 reads as follows:

> Good Academic Standing and Progress Toward Degree. The phrases "good academic standing" and "progress toward degree" are to be interpreted at each member institution by the academic officials who determine the meaning and application of such phrases for all students, subject to the controlling regulations of the institution; the conference(s) (or similar associations), if any, of which the institution is a member, and applicable NCAA legislation (see Bylaw 14.4).

*Id.* art. 14.02.5, at 128.

7. *Id.*; *see also id.* art. 14.4.1, at 152 (clarifying "progress toward degree" requirements).

8. The misconception is taken from this NCAA article 15.3.4.1, which states:

> Reduction or Cancellation Permitted Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient:
>
> (a) Renders himself or herself ineligible for intercollegiate competition;
> (b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement (see Bylaw 15.3.4.1.1);
> (c) Engages in serious misconduct warranting substantial disciplinary penalty (see Bylaw 15.3.4.1.2); or
> (d) Voluntarily withdraws from a sport at any time for personal reasons; however, the recipient's financial aid may not be awarded to another student-athlete in the academic term in which the aid was reduced or cancelled.

*Id.* art. 15.3.4.1, at 202 (emphasis added).

avoid engaging in serious misconduct (moral turpitude), and you don't voluntarily withdraw from the team (not actively participating in the sport)." This statement is technically true, but only applies during the period of the award.

In other words, the failure of the student-athlete to abide by the above factors allows the university to break its one-year contract with the student-athlete and take the scholarship away during the year. The preceding incomplete representation made frequently by coaches and university officials, whether intentional or not, leaves student-athletes with the impression that if they comply with the above requirements their athletic scholarship will be renewed each year. Many athletes unfortunately discover that this understanding is false. After the one-year contract term expires, athletic scholarships can be revoked without cause by the university, provided reasonable notice is given to the student-athlete.[9]

Moreover, current NCAA legislation[10] gives NCAA member institutions tremendous leverage over student-athletes in terms of bargaining power and remedies. For example, when an athlete signs a National Letter of Intent (NLI)[11] to attend a university, the language of the agreement disproportionately favors the NCAA and its member institutions. In fact, there is no bargaining power afforded to the prospective student-athlete. The terms of the agreement cannot be altered in any way.[12] Additionally, when a coaching staff, acting through the college or university, does not renew an athlete's scholarship for the ensuing year, the university receives no penalty. When a scholarship is not renewed, or when a player is "run-off,"[13] the coaching staff is actually rewarded in the sense that it gets exactly what is desired, an open scholarship. Yet, the student-athlete whose scholarship is not renewed by the university is penalized upon transferring to another institution by having to sit out of competition for an entire year. There is no "mutuality

9. *See id.* (providing the text of NCAA Operating Bylaw article 15.3.5.1, which deals with the institution's obligation regarding the renewal or nonrenewal of athletic financial aid awards).

10. *See generally id.* The 2004-05 Division I Manual consists of the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. *Id.*

11. The text of the NLI can be found on the official Web site for the National Letter of Intent Program. *See* National Letter of Intent, NLI Text, http://www.national-letter.org/guidelines/nli_text.php (last visited Feb. 20, 2006).

12. *See id.* (referring specifically to paragraph 15 of the NLI, which states, "No Additions or Deletions Allowed to NLI. No additions or deletions may be made to this NLI or the Release Request Form").

13. *See infra* notes 89-90 and accompanying text.

of remedy"[14] or equitable relief between the two parties. When a student-athlete decides to transfer,[15] the NCAA's overregulation and discouragement of these transfers[16] vastly impinges upon the freedom of the student-athlete.

The NCAA Division I rules and regulations that govern athletic scholarship contracts give way to a win-at-all-costs standard, thus dehumanizing the student-athletes[17] and eroding the cornerstones of the NCAA, namely the principles of student-athlete welfare[18] and amateurism.[19] Current NCAA legislation grants colleges and universities the freedom to deny the renewal of an athlete's scholarship without cause, provided reasonable notice is given.[20] This is inconsistent with the NCAA principles of student-athlete welfare[21] and amateurism[22] because: (1) student participation in intercollegiate athletics is not treated as an

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14. Mutuality of remedy is defined as "the availability of a remedy, esp. equitable relief, to both parties to a transaction, sometimes required before either party can be granted specific performance." BLACK'S LAW DICTIONARY 1406 (8th ed. 2004).

15. *See* discussion *infra* Part III.B.

16. *See generally* Ray L. Yasser & Clay Fees, *Attacking the NCAA's Transfer Rules as Covenants Not To Compete*, 15 SETON HALL J. SPORT L. 221 (2005) (discussing the NCAA's "anti-transfer rules" at length).

17. D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF NORTH AMERICAN SPORT 17, 55, 182-85 (5th ed. 1993); Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1128-29 (1997). The institution of sports has been said to represent a "microcosm of [American] society." Davis, *supra*, at 1128-29. The fundamental values of American society are not only reflected through the institution of sports, but the sports world also helps to shape these values. *Id.*; *see* EITZEN & SAGE, *supra* note 17, at 55. Positive values such as fair play, sportsmanship, the ability to function as a member of a team, self-discipline, perseverance, sacrifice, physical fitness, and hard work are consistent threads through the fabric of the institution of sports at all levels. *See, e.g.*, Davis, *supra* note 17, at 1128. However, sports as a microcosm of American society also encompass the negative qualities. *See id.* These negative qualities, inherent in both our society and the institution of sports, include "selfishness, envy, conceit, [and] hostility," as well as over-competitiveness which instills a win-at-all-costs state of mind. *Id.* at 1129 (quoting EITZEN & SAGE, *supra* note 17, at 185); *see* EITZEN & SAGE, *supra* note 17, at 182-85. In athletics, a win-at-all-costs mentality "leads to dehumanization of athletes and to their alienation from themselves and from their competitors." EITZEN & SAGE, *supra* note 17, at 185; *see also* Davis, *supra* note 17, at 1129.

18. The NCAA Principle of Student-Athlete Welfare reads as follows: "Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes." NCAA DIVISION I MANUAL *supra* note 3, art. 2.2, at 3.

19. The NCAA Principle of Amateurism reads as follows: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.* art. 2.9, at 5.

20. *See id.*, art. 15.3.5, at 202 (referring to NCAA Bylaw 15.3.5 which covers renewals and nonrenewals of athletic scholarships, and Bylaw 15.3.5.1 which deals with the institutional obligation).

21. *See id.* art. 2.2, at 3.

22. *See id.* art. 2.9, at 5.

avocation,[23] (2) student-athletes are not protected from the exploitation of professional and commercial enterprises,[24] and (3) the NCAA and its member institutions are not "establish[ing] and maintain[ing] an environment that fosters a positive relationship between the student-athlete and coach."[25]

The contract between the aggrieved student-athlete and the NCAA member institution granting the athletic scholarship is an unconscionable contract of adhesion because of the vast inequality of bargaining power between the institution and the student-athlete, the lack of meaningful choice or alternative for the student-athlete, the supposedly agreed upon terms hidden or concealed in the contract, and the contractual terms that unreasonably favor the institution.

This Article scrutinizes the inequities placed upon student-athletes with athletic scholarships and analyzes the doctrine of unconscionability as it applies to athletic scholarship contracts. In order to become familiar with "big-time" intercollegiate athletics and the body governing its activities, Part II of this Article (the Starting Lineups) provides an overview of the NCAA, detailing its main goals, purposes, and principles. Part III (Opening Tip-Off) examines the NCAA legislative process, presents common hypothetical scenarios involving student-athletes who are negatively affected by the NCAA's athletic scholarship program and transfer regulations, and discusses the NCAA's contradictory mission. Part IV (Court Time) offers a brief introduction to the law of contracts and the courts' acknowledgement of the athletic scholarship as a contract. Part IV then focuses on the doctrine of unconscionability as it relates to the athletic scholarship contract, giving

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23. *See id.*; *see also* RAY YASSER ET AL., SPORTS LAW-CASES AND MATERIALS 2 (5th ed. 2003). Yasser remarks that the line between professionalism and amateurism has blurred. "An amateur is one who engages in athletic competition as an 'avocation' as distinguished from a 'vocation.'" *Id.*

24. *See* NCAA DIVISION I MANUAL, *supra* note 3, art. 2.9, at 5, The Principle of Amateurism, stating:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by physical, mental and social benefits to be derived. Student *participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.*

*Id.* (emphasis added). *But cf.* YASSER ET AL., *supra* note 23, at 2-3 (remarking that the line between professionalism and amateurism has been blurred).

25. A subsection to the NCAA Principle of Student-Athlete Welfare, the Student-Athlete/Coach Relationship reads as follows: "It is the responsibility of each member institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach." NCAA DIVISION I MANUAL, *supra* note 3, art. 2.2.4, at 3. *But cf.* YASSER ET AL., *supra* note 23, at 2-3.

the aggrieved student-athlete a viable and assertable claim. Part V (Post-Game Wrap-Up) recommends possible solutions that would preclude the NCAA and its member institutions from being susceptible to claims that the athletic scholarship contract is an unconscionable contract of adhesion. Part VI (Final Score) concludes the Article.

## II. THE STARTING LINEUPS: AN OVERVIEW OF THE NCAA, ITS PURPOSES AND PRINCIPLES

Today's NCAA[26] has expanded to include 1274 voluntary member institutions and their 361,175 student-athletes.[27] The organization is devoted to the sound administration of intercollegiate athletics.[28] The NCAA was constructed with noble intentions and high ideals that in many instances continue to this day.[29] Since its inception in the early 1900s, the number and extensiveness of NCAA rules and regulations have increased exponentially to the point where the NCAA literally controls nearly every aspect of intercollegiate athletics.[30] The NCAA

> regulates athletic competition among its members, sets rules for eligibility to participate, establishes restrictions and guidelines for recruitment of prospective student-athletes, conducts several dozen championship events in the sports sanctioned by the association, enters into television and promotional contracts relating to these championship events, and enters into agreements to license the NCAA name and logos.[31]

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26. *See* Hakim, *supra* note 4, at 153–55 (detailing President Theodore Roosevelt's involvement with the birth of the NCAA); *see also* Sarah M. Konsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1582 (2003). *See generally* Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489 (1995) (discussing the early history of the NCAA).

27. *See* NCAA, Composition of the NCAA, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Feb. 10, 2006).

28. *See* YASSER ET AL., *supra* note 23, at 3.

29. For example, the NCAA goals, purposes, and principles discussed in this Article are much truer to form when analyzing Division III athletics. However, these noble standards have been clouded at the Division I level, where money and big business has flourished, taking precedence over the foundational purposes for which the NCAA was put into existence, namely student-athlete welfare and amateurism.

30. Konsky, *supra* note 26, at 1582 n.7 (discussing that the NCAA rules manual has grown from 161 pages in 1970-71). Today, the current page total of the three manuals equals 1226. *See* NCAA DIVISION I MANUAL, *supra* note 3; NCAA, 2004-2005 NCAA DIVISION II MANUAL (NCAA ed., 2004), *available at* http://www.ncaa.org/library/membership/division_ii_manual/2004-05/2004-05_d2_manual.pdf (last visited Feb. 20, 2006); NCAA, 2004-2005 NCAA DIVISION III MANUAL (NCAA ed., 2004), *available at* http://www.ncaa.org/library/membership/division_iii_manual/2004-05/2004-05_d3_manual.pdf. *See generally* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

31. YASSER ET AL., *supra* note 23, at 2-3.

The current structure of the NCAA functions very much like a large corporation. "The NCAA operates through the Council, the Executive Committee, and the President's Commission."[32] The Council, its ruling body, consists of "a president, secretary-treasurer, and forty-four institutional representatives who set general policy and oversee the various committees."[33] The Executive Committee is comprised of eighteen members, and "oversees the organizational bureaucracy and ongoing business."[34] The President's Commission, includes forty-four members and generally oversees the Association, conducts studies of intercollegiate athletics issues with the purpose of gaining knowledge to urge certain courses of action, and proposes legislation.[35]

The NCAA also has a Committee on Infractions serving as its enforcement arm.[36] This full time enforcement staff hears cases, handles investigations about potential rule violations, and levies penalties.[37] Penalized institutions may appeal the rulings by the Committee on Infractions. The NCAA Council hears any appeals for the final stage of the enforcement process.[38]

The NCAA is divided into three divisions: Division I, Division II, and Division III.[39] Factors that determine which division a member institution belongs include, inter alia, the number of sports offered at the institution, and whether and to what extent athletic scholarships are available.[40] This Article will focus on Division I sports and, thus, will primarily utilize the NCAA Division I Manual for 2004-2005.[41]

### *A. NCAA Purposes and Goals*

The fundamental policy of the NCAA is as follows:

> The competitive athletics programs of member institutions are designed to be a vital part of the *educational system.* A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the *educational program* and the athlete as an integral part of the student body

32. Yasser, *supra* note 2, at 125.
33. Konsky, *supra* note 26, at 1582.
34. *Id.*; NCAA, Governance Organization Chart, http://www.ncaa.org/wps/portal/ (follow "Legislation & Governance: Committees" hyperlink; then follow "Governance Organizational Chart" hyperlink) (last visited Feb. 20, 2006).
35. *See generally* NCAA DIVISION I MANUAL, *supra* note 3, art. 4.5.3-4.5.3.7, at 28-29 (regarding selection and term of office).
36. *See* Konsky, *supra* note 26, at 1582; *see also* Yasser, *supra* note 2, at 128.
37. *See* Konsky, *supra* note 26, at 1582; *see also* Yasser, *supra* note 2, at 128-29.
38. Yasser, *supra* note 2, at 129.
39. NCAA Division I Football further delineates into Division I-A and Division I-AA.
40. *See* Yasser & Fees, *supra* note 16, at 223.
41. *See* NCAA DIVISION I MANUAL, *supra* note 3.

> and, by so doing, *retain a clear line of demarcation between intercollegiate athletics and professional sports.*[42]

Thus, the NCAA declares that the motivational pillars providing the Association with its reason for being are: education and amateurism.[43]

In addition to its main fundamental policy striving for education and amateurism, the NCAA further outlines nine purposes that the NCAA and its members should always strive to achieve.[44] Of the nine purposes listed, one is particularly noteworthy in the context of this Article. NCAA article 1.2(c) provides the following: "To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism."[45]

### *B. NCAA Principles*

There are sixteen principles listed under article 2 of the NCAA Constitution.[46] For the purpose of this Article, the principles of primary importance and focus include: (1) the principle of student-athlete welfare[47] and (2) the principle of amateurism.[48] Other interrelated

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42. *See id.* art. 1.3.1, at 1 (emphasis added).
43. *See* Yasser, *supra* note 2, at 126.
44. Article 1.2 of the 2004-2005 NCAA Division I Manual states:

> (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit;
> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;
> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
> (d) To formulate, copyright and publish rules of play governing intercollegiate athletics;
> (e) To preserve intercollegiate athletics records;
> (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;
> (g) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;
> (h) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and
> (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level.

NCAA DIVISION I MANUAL, *supra* note 3, article 1.2, at 1.

45. *Id.* art. 1.2(c), at 1 (providing that one of the purposes of the NCAA is "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism").
46. *See generally id.* art. 2, at 3-5.
47. *See id.* art. 2.2, at 3 (The Principle of Student-Athlete Welfare).

principles include the principle of sound academic standards,[49] the principle of institutional control and responsibility,[50] and the principle of competitive equity.[51]

## III. OPENING TIP-OFF: OVERVIEW OF NCAA LEGISLATION PROCESS, COMMON HYPOTHETICAL SCENARIOS, AND THE NCAA'S CONTRADICTORY MISSION

### *A. Overview of the NCAA Legislation Process*

The NCAA legislation process is analogous to the process by which bills become laws in the United States.[52] NCAA proposals for legislation (i.e., legislative ideas, which are equivalent to bills) can be proposed by

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48. *See id.* art. 2.9, at 5 (The Principle of Amateurism).

49. The NCAA Principle of Sound Academic Standards reads as follows:

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

*Id.* art 2.5, at 4.

50. The NCAA Principle of Institutional Control and Responsibility reads as follows:

> 2.1.1 Responsibility for Control. It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution's chief executive officer is responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditures.
>
> 2.1.2 Scope of Responsibility. The institution's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interest of the institution.

*Id.* art. 2.1, at 3.

51. The NCAA Principle of Competitive Equity reads as follows: "The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics." *Id.* art. 2.10, at 5.

52. *See id.* art. 5, at 33-47; *cf.* Project Vote Smart, Government 101: How a Bill Becomes a Law, http://www.vote-smart.org/resource_govt101_02.php (last visited Feb. 20, 2006) (describing the process through which a bill becomes law in the United States). Basically, for a bill to become a law in this country, either the Senate or the House of Representatives introduces a bill (an idea for legislation). *See* Project Vote Smart, *supra.* The bill is discussed in Committee Hearings and then on to Floor Action in the house that the bill was first introduced. *Id.* If passed in that house, it goes to the other house for Committee Hearings and Floor Action. *Id.* If the bill is then passed in the other house, it then goes to the State Governor or President (bills under consideration to become state laws would go to the Governor of that particular state, while bills under consideration to become federal laws would go to the President of the United States) to be accepted or vetoed. *Id.* Once the President or Governor signs a bill or both houses override his veto, the bill then becomes a law. *Id.*

an NCAA Conference legislative recommendation, the NCAA Management Council or Board of Directors, an NCAA Cabinet or Committee, an NCAA member, or simply a referral to the NCAA from any source.[53] Next, the proposal goes to the Management Council for formal initial consideration.[54] If approved, the Management Council must notify all NCAA member institutions of the proposal.[55] That notification triggers a sixty-day comment period[56] during which the members can supply their input on the proposal to the Management Council.[57] After the sixty-day comment period expires, the Management Council reconvenes for a second consideration of the proposal, taking into account the input from those members that provided a comment on the proposal.[58] If the second consideration is approved without significant modification,[59] the proposal goes to the Board of Directors for consideration.[60] If approved without significant modification,[61] the Board of Directors must notify the members, triggering a sixty-day period in which members disagreeing with the approved proposal can request membership override.[62] If there is call for an override vote, and the override board attains at least a five-eighths majority vote, the membership action is final and the proposal is denied.[63] But if there is either no call for an override vote, or if the override board does not attain

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53. *See* NCAA DIVISION I MANUAL, *supra* note 3, art. 5, at 33-47. *See generally id.* fig. 5-1, at 46.

54. *See id.* art. 5.3.2.2.1, at 38, fig. 5.1, at 46.

55. *See id.* art. 5.3.2.4.2, at 39.

56. *Id.*

57. *Id.*

58. *See id.* art. 5.3.2.2.1, at 38.

59. NCAA rule for altering a proposal states:

> If the Management Council alters a proposal after its initial approval but does not increase the modification of existing legislation beyond that of its initial proposal, it may proceed to take action to forward the proposal to the Board of Directors. If the alteration increases the modification beyond that initially approved, the Management Council shall forward the altered proposal to the Division I membership for review and comment before taking final action.

*Id.* art. 5.3.2.2.1.1, at 38.

60. *Id.*

61. *See id.* art. 5.3.2.2.2, at 38, fig. 5.1, at 46.

62. The NCAA procedural rule for a membership override states:

> The member institutions may override (e.g., rescind) the adoption of legislation enacted under the procedures set forth in Constitution 5.3.2.2.2 or the failure of the Board of Directors, or of the Management Council in legislative areas delegated to it by the Board in accordance with Constitution 5.3.2.2.1.2 to act on or adopt legislation initiated and considered through the legislative process.

*Id.* art. 5.3.2.3, at 38.

63. *See id.* art. 5.3.2.3.3, at 39.

a five-eighths majority vote, then the Board of Directors' action is final and the proposal becomes NCAA legislation.[64]

In addition to the general NCAA legislative process, it is important to discuss the purpose or basis of NCAA legislation,[65] the approaches to the legislative process,[66] and the different categories of legislation[67] involved.

The basis for NCAA legislation is to ensure that it is "consistent with the purposes and fundamental policy set forth in Constitution 1,[68] and shall be designed to *advance one or more principles such as those set forth in the Constitution Article 2*."[69] Moreover, the NCAA has two approaches with respect to its legislative process.[70] First, the NCAA "recognizes that certain fundamental policies, practices and principles have applicability to all members."[71] Second, the NCAA realizes that some legislation will only be applicable to "division groupings of members, based on a common philosophy shared among the individual members of the division and . . . are common to the nature and purposes of the institutions in the division."[72]

As a result of the recognized approaches, NCAA legislation is divided up into four categories.[73] They are as follows: (1) dominant, (2) division dominant, (3) common, and (4) federated.[74] "A dominant provision is one that applies to all [NCAA members] and is of sufficient importance to the entire membership . . . ."[75] A division dominant provision only "applies to members of a certain division and is of sufficient importance to that division."[76] A common provision applies "to more than one, of the divisions of the [NCAA]."[77] Finally, "a federated provision is a regulation adopted by a majority vote of the delegates present and voting of one or more of the divisions or subdivisions of the Association, . . . [and] applies only to the division(s) or subdivision(s) that adopt(s) it."[78]

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64. *See id.* art. 5.3.2.2.2, at 38.
65. *See id.* art. 5.01.1, at 33.
66. *See id.* art. 5.01.2, at 33.
67. *See id.* art. 5.02.1, at 33.
68. *Id.* art. 1.3.1, at 1.
69. *Id.* art. 5.01.1, at 33 (emphasis added).
70. *See id.* art. 5.01.2, at 33.
71. *Id.*
72. *Id.*
73. *See id.* art. 5.02.1, at 33.
74. *See id.*
75. *Id.* art. 5.02.1.1, at 33.
76. *Id.* art. 5.02.1.1.1, at 33.
77. *Id.* art. 5.02.1.2, at 33.
78. *Id.* art. 5.02.1.3, at 33.

The NCAA Constitution's fundamental policies, purposes, and principles, analyzed for this Article are all dominant provisions of great importance applying to all NCAA members.[79] The NCAA Bylaws analyzed for this Article are all division dominant provisions, applying only to NCAA Division I sports.

### *B. Common Hypothetical Scenarios Involving Student-Athletes Affected by the NCAA's Athletic Scholarship Program and Transfer Regulations*

Student-athletes on athletic scholarships who decide to transfer to another institution typically do so because (1) of their own free-will,[80] (2) the institution granting their athletic scholarship did not renew their scholarship,[81] or (3) they were "run-off" or coerced[82] to leave the team.[83] The following hypothetical scenarios demonstrate these common situations.

First, Jane Bigtime is a basketball player on scholarship playing in one of the most superior athletic conferences in the nation. Her university's basketball team and sports program in general, however, traditionally finish with an abysmal conference record. Jane was the second leading-scorer in the conference during the past season and earned honors of first team all-conference selection, and all-American status. She retains two years of eligibility and decides to finish her collegiate career by transferring to another university, known nationally as a basketball powerhouse. However, the NCAA strongly discourages athletes transferring from one school to another.[84] As a result, when Jane transfers she will be penalized by being forced "to complete one full academic year of residence" before being eligible for athletic competition,[85] and she will not be allowed to receive an athletic

79. *See generally id.* art. 1, at 1; *id.* art. 2, at 3-5.
80. *See supra* Part III.B.
81. *See supra* Part III.B.
82. *See infra* notes 89-90 and accompanying text.
83. *See supra* Part III.B.
84. E-mail from Lynn Holzman, Director of Membership Servs., NCAA, to Sean Hanlon, Law Student, University of Tulsa College of Law (Oct. 15, 2004, 11:23 a.m. CST) (detailing the evolution of the transfer rule, complete with rationale, from 1964-1999); *see* NCAA DIVISION I MANUAL, *supra* note 3, art. 14.5, at 164-72; *see also* NCAA, 2004-2005 TRANSFER GUIDE § IV, at 21 (NCAA ed., 2004), *available at* http://www.ncaa.org/library/general/transfer_guide/2004-05/2004-05_transfer.pdf [hereinafter TRANSFER GUIDE].
85. *See* NCAA DIVISION I MANUAL, *supra* note 3, art. 14.5.1, at 164.

scholarship at the new institution until she obtains a release from her former collegiate institution.[86]

Consider the second hypothetical situation. Joe Hoopster, a heavily recruited high school athlete, was fortunate enough to receive an athletic scholarship to attend and play basketball at the university of his dreams. During his freshman season he was a steady contributor to the team, started several games, and even led the team in scoring a couple of times. Immediately following the season, his coach was fired. A new coaching staff arrived during the spring semester. Despite the fact that this is not the coaching staff that recruited him, Joe is prepared to work hard and demonstrate his ability. Unfortunately, the new coach has other plans. He has identified certain scholarship athletes on the basketball team, particularly those with several years of eligibility left, as not fitting in with his coaching system or his plan to rebuild the team. As a result, he has decided not to renew the athletic scholarships for those athletes he identified for the upcoming school year. Joe Hoopster is among the list of players that will not be renewed.

Joe, however, is currently in good academic standing with the university. He has not engaged in any type of serious misconduct or any act constituting moral turpitude. Additionally, Joe had been an active member of the basketball team, was never late for a practice or a team meeting, and was always a hard worker with a good attitude. He still desires to play NCAA Division I basketball, and given his situation, Joe decides to transfer.

Upon transferring to another NCAA Division I basketball team, Joe will be further penalized by having to sit out from competition for one full year[87] and cannot receive an athletic scholarship at the new institution

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86. *See* TRANSFER GUIDE, *supra* note 84, § IV, at 21 (noting that without permission from the student-athlete's original institution, the student-athlete cannot be given financial assistance at the second institution until the student-athlete has attended the second institution for one academic year); *see also* Yasser, *supra* note 2, at 146 (noting that "an athlete can not receive financial assistance at the school transferred to unless the school transferred from agrees to 'release' the athlete").

87. For a transferring student, the general principle of the NCAA residence requirement states the following:

> A student who transfers (see Bylaw 14.5.2) to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution (see Bylaw 16.8.1.2), unless the student satisfies the applicable transfer requirements or receives an exception or waiver as set forth by this bylaw. In the sport of basketball, a transfer student-athlete who satisfies the applicable transfer requirements or receives an exception or waiver as set forth in this section, but initially enrolls as a full-time student subsequent to the first term of the academic year shall not be eligible for competition until the ensuing academic year.

until the former school grants a release.[88] Joe has to obtain the release from his former school, even though the new coaching staff, acting through the university, decided not to renew his scholarship based on factors he could not control. The decision to terminate his scholarship was based solely on the presumption that athletically, Joe did not fit in with their system.

Now picture the third hypothetical situation putting a different spin on the Joe Hoopster hypothetical. The identical fact pattern of the second hypothetical still applies; however, instead of being notified by the university that his scholarship is not going to be renewed for the following year, Joe Hoopster is "run-off"[89] the basketball team by the coaching staff. Running a player off is very common in big-time intercollegiate athletics.[90] Under this tactic, the coaching staff will make things so miserable for the student-athlete that he decides to leave on his own accord.

From an NCAA rules standpoint, when Joe transfers in this situation he will be treated exactly like Jane. Yet, the situations are very different. Jane, the all-American, is undoubtedly treated very well, and her decision to transfer is met with remorse from the university and basketball coaching staff. On the contrary, Joe (in the "run-off" player hypothetical) has been mentally and physically abused until he finally

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*See* NCAA DIVISION I MANUAL, *supra* note 3, art. 14.5.1, at 164.

88. *See supra* note 86 and accompanying text.

89. Kevin B. Blackistone, *As Colleges Go Big-Time, Scholarships Lose Worth*, DALLAS MORNING NEWS, Apr. 4, 1998, at 1B. Vic Trilli, former head coach at the University of North Texas, not only threatened to take away scholarships, but did take them away. *See id.* Vic Trilli took away the scholarships of four of his basketball student-athletes in an effort to transform the basketball program at UNT into a "big-time" program. *See id.* Unfortunately, what he did, in actuality, was run off four students from a college campus, in the name of big-time intercollegiate athletics. *See id.* "What Trilli did . . . to this quartet of student-athletes, as the NCAA likes to call them, is what's known in the college coaching business as running players off the team. It's cruel. It's wrong. It's the fault of college athletics going big time." *Id.*; *see* NCAA DIVISION I MANUAL, *supra* note 3, art. 15.3.5.1, at 202 (allowing coaches to take scholarships from student-athletes by not renewing the offer based solely on athletic concerns).

90. *See* Jeff Passan, *NCAA's 5/8 Rule Has Run Course*, FRESNO BEE, Jan. 21, 2004, at D2. "Because athletic scholarships are renewable yearly, coaches could push aside players who don't pan out and replace them without penalty." *Id.* "Running off players happens predominantly at schools with new coaches. Bob Knight booted three players the week Texas Tech hired him." *Id.*; *see also* Gary Parrish, *NCAA Toughens Grad Rates—Schools To Be Punished for Not Making the Grade*, COM. APPEAL, Apr. 30, 2004, at D1 (discussing that the purpose of the NCAA five-eighths rule was "designed to prevent coaches from running unwanted players off, with the idea being that they'd stay true to the players because replacing them might not be an option").

quits the team.[91] When this happens the coaches have met their goal.[92] They have successfully run the player off, obtaining an open scholarship to work with.

In the above hypothetical scenarios, the NCAA, an organization that exists to enforce the important principles of student-athlete welfare[93] and amateurism,[94] negatively impacts both Jane Bigtime and Joe Hoopster. Nevertheless, the NCAA continuously acts in ways that protect the interests of its member institutions and big business at student-athletes' expense.

### *C. The NCAA's Contradictory Mission*

Over the years, the NCAA has been subject to a variety of criticism most deriving from the seemingly contradictory nature of its mission.[95] The NCAA purports to preserve the ideals of amateurism and student-athlete welfare on one hand, while trying to make as much money as possible for its member schools on the other hand.[96] Consequently, the principle of student-athlete welfare has unfortunately eroded over time, blurring the principle of amateurism along with it.[97] Cold-blooded coaches, despite popular belief, are not the root cause of this erosion, but they are a natural consequence under the current NCAA system.[98]

Over the course of the NCAA's existence, big-time intercollegiate athletics has grown into a billion dollar industry, and NCAA member institutions, specifically the athletic departments of those institutions, strive to cash in.[99] Accordingly, winning-at-all-costs as soon as possible, becomes of primary importance, overshadowing the important principle

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91. *See* Yasser & Fees, *supra* note 16, at 250-51 (discussing examples of abuse of players by coaches along with advancing the important point that this behavior would not be tolerated in other academic settings).

92. Passan, *supra* note 90; Parrish, *supra* note 90; *see* Blackistone, *supra* note 89 and accompanying text.

93. *See* NCAA DIVISION I MANUAL, *supra* note 3, art. 2.2, at 3.

94. *See id.* art. 2.9, at 5.

95. *See* Yasser, *supra* note 2, at 155-56.

96. For example, even the NCAA official Web site displays this inherent contradictory nature when bragging about its former executive director Cedric Dempsey. The Web site states the following: "Cedric W. Dempsey held the post through December 31, 2002. Dr. Dempsey was a strong advocate for the *welfare of student-athletes* and was instrumental in the move of NCAA national office to Indianapolis in 1999 and *the negotiation of a comprehensive championships rights agreement with CBS worth potentially $6 billion over 11 years*." NCAA, History, http://www.ncaa.org/about/history.html (last visited Mar. 6, 2006) (emphasis added); *see also* Yasser, *supra* note 2, at 155-56.

97. *See* Blackistone, *supra* note 89.

98. *See id.*

99. *See id.*

of student-athlete welfare.[100] If an athlete is deemed not talented enough, coaches have the option, under NCAA rule 15.3.5.1,[101] to replace one athlete with another when it is time to decide whether or not to renew the athlete's one-year scholarship. Ironically, this is exactly the same option coaches have in professional sports. This situation, contrary to the most fundamental policy of the NCAA, presents no "clear line of demarcation between intercollegiate athletics and professional sports."[102] Therefore, as the great fortune of big-time intercollegiate athletics flourishes, the principle of student-athlete welfare erodes, the principle of amateurism blurs, and the fundamental policy of the NCAA is significantly diminished.[103] Mario Puzo was right when he began his classic novel *The Godfather* with "[B]ehind every great fortune there is a crime."[104] The time has come to reform the structure of big-time intercollegiate athletics as governed by the NCAA.[105]

## IV. COURT TIME: THE LAW OF CONTRACTS AND THE ATHLETIC SCHOLARSHIP AS AN UNCONSCIONABLE CONTRACT OF ADHESION

The elements of oppression, unfair surprise, and terms unreasonably favoring NCAA member institutions, create an unconscionable contract of adhesion between the aggrieved student-athlete and the institution granting the athletic scholarship. Prior to analyzing the doctrine of unconscionability and its relation to athletic scholarships, a brief overview of modern day contract law is necessary. After an overview of today's contract law, this Article will demonstrate the courts' recognition of athletic scholarships as contracts.

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100. *See id.* NCAA Constitution, article 2.2.4, Student-Athlete/Coach Relationship, reads as follows: "It is the responsibility of each member institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach." NCAA DIVISION I MANUAL, *supra* note 3, art. 2.2.4, at 3.

101. NCAA DIVISION I MANUAL, *supra* note 3, art. 15.3.5.1, at 202.

102. *Id.* art. 1.3.1, at 1.

103. *See generally id.*

104. MARIO PUZO, THE GODFATHER (1969) (beginning the classic novel with this quote from Balzac). As an interesting side note, *The Godfather* was the favorite book of Walter Byers, the first executive director of the NCAA. *See* DON YAEGER, UNDUE INFLUENCE: THE NCAA'S INJUSTICE FOR ALL 7 (1991).

105. *See* Yasser, *supra* note 2, at 123. The article describes a comprehensive proposal to reform the current NCAA which offers a working "blueprint for restructuring, not a call for demolition." *Id.* Professor Yasser's drive in this article is to take a look at the NCAA, piece by piece, and then propose solutions to make the reformed NCAA "something stronger and more beautiful." *Id.* His solutions derive from the underlying goal of having college sports occupy a "more appropriate role in the life of the university." *Id.* at 124.

### A. Law of Contracts: A Brief Overview

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[106] Therefore, the principal function of contract law is to provide a framework for the enforcement of promises.[107] In most instances, a contract cannot be formed without the presence of consideration, which is a viewed as a bargained-for exchange or the suffering of a legal detriment.[108] There are some situations, however, where a contract will be enforceable without consideration present when equitable principles so require.[109] As previously mentioned, the institution of sports reflects, as well as shapes, society's value system.[110] Similarly,

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106. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (providing the definition of a contract).

107. *See* Davis, *supra* note 17, at 1118.

108. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (stating "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"); *id.* § 71, stating:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
>  (a) an act other than a promise, or
>  (b) a forbearance, or
>  (c) the creation, modification, or destruction of a legal relation.
> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

*See also* Michael J. Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2188-89 (2002).

109. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86, stating:

> (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
> (2) A promise is not binding under Subsection (1)
>  (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
>  (b) to the extent that its value is disproportionate to the benefit.

*Id.* § 90, stating:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

*See also* Riella, *supra* note 108, at 2189.

110. *See supra* text accompanying note 17.

contract law, and law in general, also reflects and certainly contributes to shaping our society's culture and values.[111]

Contract law has evolved from a classical model to a neoclassical model, a detailed discussion of which is beyond the scope of this Article.[112] The classical model of contract law emerged in the nineteenth century. It involved a freedom of contract ideology with an emphasis on "individual autonomy and noninterference by the state." [113] The judiciary's function was to "mechanically apply abstract formal rules in order to limit judicial intrusion into private autonomy."[114] Conversely, the neoclassical or modern model of contract law has strived to balance the conflicting values of individual autonomy with public concerns through a "flexible and pragmatic" methodology.[115] This methodology allows the judiciary to give weight to "social factors, public policy, and community standards of morality."[116] Under classical contract law, the belief is that parties express every important term in their contracts.[117] Conversely, neoclassical or "modern contract law assumes and often expects parties not to incorporate expressly into the agreement every understanding and expectation."[118]

Critics of the neoclassical model argue that allowing courts to analyze several outside factors not expressly found in the contract results in a body of law that is unintelligible.[119] Advocates for the modern contract recognize that the neoclassical system is more complex, but feel that any hindrance caused by the complexity is outweighed by the results.[120] The neoclassical model of contract law provides results that balance individual autonomy (in allowing and valuing the formation of private agreements) while ensuring some degree of fairness (by looking

111. *See* Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219, 228 (1995) ("Contract, as does law in general, reflects the value system of the culture in which the legal system is embedded. The tensions and ambivalence of society are played out in law.").

112. For an in-depth discussion of the background of the classical model of contract law and the emergence of today's neoclassical model of contract law, see generally *supra* note 17 and accompanying text.

113. *See generally* Davis, *supra* note 17, at 1121.

114. *See id.*

115. *Id.* at 1122-23 (quoting Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286-87 (1990)).

116. *See id.* at 1123.

117. *See id.* at 1124.

118. *Id.*

119. *See id. See generally* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (describing the classical model of contract law as a body of "crystal rules," and the neoclassical or modern contract law as "mud rules").

120. *See* Davis, *supra* note 17, at 1126.

into outside social factors, public policy, and community values).[121] Several doctrines have developed as a result of the neoclassical contract law evolution including promissory estoppel, *unconscionability*, condition precedent, and good faith.[122]

Professor Carol M. Rose[123] provides an excellent analogy that supplements the above discussion in her article, *Crystals and Mud in Property*.[124] Rose recognizes that legal rules tend to fall along a spectrum and follow a predictable cycle.[125] On one end of the spectrum are "hard-edged or crystal" rules[126] that are mechanically applied and involve a few simple facts that attach legal consequences.[127] These crystal rules would be synonymous to the classical model of contract law. On the other end of the spectrum are rules that allow outside social factors, desirable to our society, to apply when interpreting a rule.[128] Rose refers to these as "mud rules"[129] which are identical to the neoclassical model of contract law. Legal rules tend to begin as crystal rules, which over time evolve into mud rules.[130] But if the legal rules become too muddy, the rules are likely to slide back toward the crystal end of the spectrum.[131]

The suitability of any rule depends on how well it realizes preferred social policy.[132] Crystal rules, while providing clarity and certainty in predicting how the law will be applied, may unfairly expose people to the deceitfulness of others because they know what they can get away with.[133] Alternatively, mud rules, designed to protect goodness and altruistic efforts, admittedly involve many factors, and it becomes more difficult to interpret definitively how they will be applied in a court of law.[134] Professor Rose recognized a similar argument advanced by Professor

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121. *See id.*

122. *See id.*

123. Carol M. Rose is a Yale Law Professor. *See* Yale Law School Faculty, http://www.law.yale.edu/outside/html/faculty/crose/profile.htm (last visited Feb. 20, 2006).

124. *See generally* Rose, *supra* note 119.

125. *See id.* at 580, 587 (describing the blurring of crystal rules with muddy doctrines, and the reverse tendency to attempt to crystallize the rule again).

126. *Id.* at 577, 592.

127. *See id.* at 590-91.

128. *See id.* at 593.

129. *Id.*

130. *See* Rose, *supra* note 119, at 577, 592 and accompanying text.

131. *See id.*

132. *See* Douglas Leslie, *Contracts: The Casefile Method*, Casefile 31.0 at 8-11, *available at* http://www.casefilemethod.com/getCaseFile.asp?Group=Contracts&CaseFile=ccs31_0 (last visited Feb. 27, 2006).

133. *See* Rose, *supra* note 119, at 592.

134. *See id.*

Laurence Tribe[135] discussing how judges make decisions not only based on the "rational calculations of the actors and people similarly situated to the actors" but also based on an attempt to mold the society in which we live.[136] Tribe believes that "decisions are constitutive, and it would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules and rational ex ante planning, particularly if those rules covertly serve the wealthy and powerful."[137]

### *B. Athletic Scholarship Recognized as a Contract*

In regard to the NCAA and student-athletes, courts have consistently determined that the athletic scholarship is a contract, and thus recognize a student-athlete's right to assert a breach of contract action against the college institution.[138] The first case holding that an athletic scholarship is a contract was *Taylor v. Wake Forest University.*[139] In *Taylor*, a student receiving an athletic scholarship was held in breach of his contractual duties owed to the university when he refused to participate athletically in order to focus on his academics.[140] Taylor, a football player for Wake Forest, along with his father sought recovery of educational expenses after the university terminated his athletic scholarship.[141] Taylor claimed that the Wake Forest coaches breached an oral agreement that Taylor could restrict or eliminate his involvement in athletics in order to maintain reasonable academic progress.[142] After his freshman football

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135. Laurence H. Tribe is a Harvard Law Professor. *See* Harvard Law Faculty Directory, http://www.law.harvard.edu/faculty/directory/facdir.php?id=74 (last visited Feb. 20, 2006).

136. Rose, *supra* note 119, at 593; *see* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 593 (1985).

137. Rose, *supra* note 119, at 593 (describing Professor Tribe's belief).

138. *See, e.g.*, Ross v. Creighton, 957 F.2d 413, 416 (7th Cir. 1992) ("[I]t is held generally in the United States that the 'basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'" (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504) (1972)). "Indeed, there seems to be 'no dissent' from this proposition." *Ross*, 957 F.2d at 416 (quoting Wickstrom v. N. Idaho Coll., 725 P.2d 155, 157 (Idaho 1986)); *see also, e.g.*, Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. 1972) (finding a student-athlete on athletic scholarship not to be "[c]omplying with his *contractual* obligations." (emphasis added)).

Commentators also describe the contractual relationship arising from the National Letter of Intent, Statement of Financial Aid, and university bulletins and catalogues. *See* Michael J. Cozillo, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1290 (1989).

139. *See Taylor*, 191 S.E.2d at 382.

140. *See id.* at 381.

141. *See id.* at 379.

142. *See id.* at 382.

season, Taylor opted out of athletic participation to focus on his struggling academic performance.[143] As a result, the university terminated his athletic scholarship, or Football Grant-in-Aid.[144] The court held that Taylor accepted a Football Grant-in-Aid that was "awarded for academic and athletic achievement" and in failing to participate athletically Taylor had breached his contractual obligations.[145]

When a university makes identifiable contractual promises to the student-athlete, it breaches its contractual obligations if it fails to make a good faith effort to perform those promises.[146] In *Ross v. Creighton University*, a men's basketball player, who promised to attend and play basketball for Creighton University, sued the university, alleging failure to perform its promises to provide academic benefits.[147] The court, similar to *Taylor*,[148] held that a contractual relationship exists between student-athletes and their university.[149]

Yet, in order to state a contractual claim against the university, the student-athlete "must point to an identifiable contractual promise that [the university] failed to honor."[150] While recognizing the contractual relationship between the student-athletes and their university, this narrow holding implicitly requires the student-athlete to bargain for specific contractual terms, a practice simply not allowed within the NCAA contractual documents pertaining to student-athletes' athletic scholarships.[151] Furthermore, this holding has the effect of eliminating a student-athlete's capability to assert a contractual claim based on a failure to perform implied promises.[152] In fact, application of this holding would seemingly allow coaches and university officials to make countless express oral promises that would not be enforceable unless those promises were found in the standard boilerplate NCAA and University forms.[153]

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143. *See id.* at 381.
144. *See id.*
145. *See id.* at 382 (quoting the contract).
146. *See* Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992).
147. *See id.* at 412.
148. *Compare Taylor*, 191 S.E.2d 379, *with Ross*, 957 F.2d 410.
149. *See Ross*, 957 F.2d at 416.
150. *Id.* at 417.
151. *See* Davis, *supra* note 17, at 1144 (discussing *Fortay v. University of Miami*, in which the court found the contractual relationship between the student-athlete and the university as arising from the NLI, Statement of Financial Aid, and various recruitment letters); Cozillo, *supra* note 138, at 1290 (describing the relationship between the student-athlete and the university is based on an express contract that consists of the NLI, Statements of Financial Aid, and university bulletins and catalogues).
152. *Ross*, 957 F.2d at 416-17.
153. *See id.*

Courts have recognized the NLI and the Statement of Financial Aid as the two main documents that form a contract between the student-athlete and the university or college.[154] The courts have also identified other documents, such as recruitment letters and university bulletins and catalogues, as part of the contract.[155] The NLI is "applicable only to prospective student-athletes who will be entering four-year institutions for the first time as full-time students."[156] This includes high school students and students attending junior colleges. In order for the NLI to be valid, the prospective student-athlete must also sign the institution's Statement of Financial Aid.[157] Both of these contracts will be considered null and void if the express terms and conditions are not satisfied.[158] The NLI is only signed one time by the potential student-athlete, and only for one school.[159] On the other hand, upon each renewal of the one-year athletic scholarship, the student-athlete is required to sign the Statement of Financial Aid form.[160] In addition to the terms and conditions found on both of these documents, the language subtly incorporates by reference the requirement of compliance with the rules and regulations of the NCAA.[161] Thus, NCAA rules and regulations are also contractually binding on the university officials and the student-athletes.[162]

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154. *See* Davis, *supra* note 17, at 1144.

155. *Id.*

156. National Letter of Intent, *supra* note 11, ¶ 1.

157. *Id.* ¶ 2.

158. *See id.*

159. *Id.* ¶ 8. While generally true that the NLI is only signed one time, there are two exceptions under provision 8 of the NLI which read as follows:

> [8]a. Subsequent signing year. If this NLI is rendered null and void under Provision 7, I remain free to enroll in any institution of my choice where I am admissible and shall be permitted to sign another NLI in a subsequent signing year.
>
> [8]b. Junior College Exception. If I signed a NLI while in high school or during my first year of full-time enrollment in junior college, I may sign another NLI in the signing year in which I am scheduled to graduate from junior college. If I graduate, the second NLI shall be binding on me; otherwise, the original NLI I signed shall remain valid.).

*Id.*

160. *See, e.g.*, Univ. of Tulsa Dep't of Intercollegiate Athletics, Financial Aid Agreement, conditions 4, 6 (2004-2005) (copy on file at Univ. of Tulsa Dep't of Intercollegiate Athletics). Condition 4 states, "This Tender is not automatically renewed. Your eligibility for a renewal of this Tender is subject to the University of Tulsa's renewal policies at the end of its term and if you are academically eligible under University, Conference USA, and NCAA legislation." *Id.* Condition 6 states, "[I]f you wish to accept this Tender, you must return two signed copies of this Tender to the Department of Athletics by [due date]." *Id.*

161. *See* National Letter of Intent, supra note 11. For an example of an NLI, see Univ. of Tulsa Dep't of Intercollegiate Athletics, *supra* note 160. Condition 2 requires compliance with the receipt of financial aid under NCAA legislation. *Id.* Condition 4 requires academic eligibility compliance under NCAA legislation. *Id.* Acceptance 2 requires compliance with NCAA

In the context of intercollegiate athletics, there is a judicial reluctance to recognize the relevance of any information not expressly contained in the signed contractual documents.[163] As such, the courts are using a classical model of contract law, mechanically applying the rule so as to keep the freedom of contract ideology alive, and reinforcing the classical model that courts do not create contracts for the parties involved.[164] While this position should apply to negotiated contracts, it hardly seems fair to apply such a rigid approach to athletic scholarship contracts that are nonnegotiable standard form agreements.[165] A refusal to apply the neoclassical model to these nonnegotiable agreements "uses contract[s] as a means of maintaining the powerlessness of student-athletes."[166]

### C. *Athletic Scholarships as Unconscionable Contracts of Adhesion*

> [I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American Law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? These principles are not foreign to the law of contracts.[167]

An adhesion contract is defined as a "standard-form contract prepared by one party, to be signed by the party in a weaker position . . . who adheres to the contract with little choice about the terms."[168] Oftentimes, a standardized form contract can create an inequitable situation where one party can "impose terms on another unwitting or even unwilling party."[169] Farnsworth discusses three factors that lead to this unbalanced situation.[170] The first factor involves the advantages of

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amateur rules, Bylaw 12, financial aid rules, and Bylaw 15. *Id.* Acceptance 4 requires any modification or cancellation to be in compliance with NCAA legislation. *Id.*

162. *See* National Letter of Intent, *supra* note 11. For an example of an NLI, see Univ. of Tulsa Dep't of Intercollegiate Athletics, *supra* note 160.

163. *See* Davis, *supra* note 17, at 1142; *infra* notes 172-195 and accompanying text.

164. *See* Davis, *supra* note 17, at 1145.

165. *See id.*

166. *Id.*

167. United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting) (questioning the majority's disregard of moral and equitable principles that have been part of our system of laws for centuries).

168. BLACK'S LAW DICTIONARY 342 (8th ed. 2004).

169. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (3d ed. 2004).

170. *Id.*

time and expert planning for the party offering the contract.[171] The second factor recognizes that the other party has little or no experience with the contract, or only a general understanding of its contents.[172] The third factor relates to the disparity of bargaining power between the two parties.[173]

Thus, the party drafting the contract has been afforded as much time as necessary to create a document with the aid of expert advice, regularly leading to a contract heavily favoring the drafting party.[174] The other party typically has little time to fully read the contract, much less completely understand the fine print and complicated clauses commonly contained in these form agreements.[175] Usually, these contracts are not between parties with equal bargaining power.[176] In fact, adhesion contracts regularly deny one party any bargaining power whatsoever. For example, these adhesion contracts may be used by an "enterprise with such disproportionately strong economic power that it simply dictates the terms."[177] Another recurring form of adhesion contracts is that of take-it-or-leave-it agreements. In a take-it-or-leave-it contract, the party's "only alternative to complete adherence is outright rejection."[178]

Adhesion contracts will not automatically be considered "unconscionable per se, and . . . conversely, unconscionable contracts are not all contracts of adhesion."[179] The fact it is an adhesion contract, however, will give substantial weight to a claim for unconscionability due to its standardized nature and the lack of bargaining power it affords the other party.[180]

### 1. The Doctrine of Unconscionability

The Uniform Commercial Code (U.C.C.) § 2-302 not only "recognizes the doctrine of unconscionability,"[181] but has also set the standard that if a contract is found to be unconscionable, it is

171. *Id.*
172. *Id.*
173. *Id.*
174. *See id.*
175. *See id.*
176. *See id.*
177. *Id.*
178. *Id.*
179. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981).
180. *See id.*; *accord* U.C.C. § 2-302 cmt. 1 (2004) ("Courts have been particularly vigilant when the contract at issue is set forth in a standard form.").
181. FARNSWORTH, *supra* note 169, § 4.28.

unenforceable as a matter of law.[182] In subsection (1), the U.C.C. provides:

> If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.[183]

Thus, this part of the U.C.C. allows courts "to police explicitly against the contracts or terms which the court finds to be unconscionable."[184] Prior to this part, courts dealing with unconscionable contracts had to arrive at the equitable result so desired "by an adverse construction of language, by manipulation of the rules of offer and acceptance, or by a determination that the term is contrary to public policy or to the dominant purpose of the contract."[185] U.C.C. § 2-302 allows courts to proceed directly to the unconscionability of a contract and to render a conclusion of law solely based on its unconscionability.[186] Consequently, Karl Llewellyn referred to this as "perhaps the most valuable section in the entire Code."[187]

U.C.C. article 2 only applies to "transactions in goods."[188] As a result, § 2-302 is technically only applicable to contracts involving the sale of goods.[189] Yet, this Part of the U.C.C. has been extremely persuasive in non-sales cases and has been used in those contexts either by analogy or because of the overriding sense of fairness it represents, outweighing the statutory limitation applying only to the sale of goods.[190] Due to its wide acceptance in nonsales cases, *Restatement (Second) of Contracts* § 208 was created to emulate U.C.C. § 2-302 so that the doctrine of unconscionability would apply to all contracts generally.[191]

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182. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a ("[L]ike the obligation of good faith and fair dealing, the policy against unconscionable contracts or terms applies to a wide variety of types of conduct.").

183. U.C.C. § 2-302; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208.

184. U.C.C. § 2-302 cmt. 1.

185. *Id.*

186. *See id.*

187. FARNSWORTH, *supra* note 169, § 4.28 (quoting Karl Llewellyn, who has been "credited with the authorship of U.C.C. § 2-302").

188. U.C.C. § 2-102.

189. *Id.*

190. *See* RESTATEMENT (SECOND OF CONTRACTS) § 208 cmt. a (1981).

191. *See* FARNSWORTH, *supra* note 169, § 4.28 (noting that in addition to RESTATEMENT (SECOND) OF CONTRACTS § 208, several uniform laws began to incorporate the doctrine of unconscionability).

The determination of unconscionability will be made in "light of [the contract's] setting, purpose, and effect."[192] The court rather than the jury will make this determination.[193] When unconscionability is asserted, the parties must be allowed to present evidence that will help the court make its final determination.[194] In addition, the party raising the claim of unconscionability has the burden of proving it.[195]

Neither the U.C.C., nor the *Restatement*, provides a specific definition for unconscionability, but the U.C.C. does provide a basic test to lend some general guidance.[196] "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing *at the time of the making of the contract*."[197]

2. Procedural and Substantive Unconscionability

A majority of the courts today still rely on the two-part test set forth in *Williams v. Walker-Thomas*.[198] The test provides that "unconscionability has generally been recognized to include an *absence of meaningful choice* on the part of one of the parties together with *contract terms which are unreasonably favorable* to the other party."[199] As a result, most cases of unconscionability include, and frequently require, some combination of the following two categories: (1) procedural unconscionability, which considers whether there was an absence of meaningful choice, and (2) substantive unconscionability, which focuses on the actual contract terms and whether those terms are unreasonably favorable to the drafting party.[200] Furthermore, it is generally applied and

192. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a.

193. *See* FARNSWORTH, *supra* note 169, § 4.28 (citing U.C.C. § 2-302 cmt. 3).

194. *See* U.C.C. § 2-302(2) ("[P]arties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f ("[P]arties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination.").

195. *See* Guaranteed Foods of Neb. v. Rison, 299 N.W.2d 507, 512 (Neb. 1980) (holding that the party asserting unconscionability must also plead it).

196. *See* FARNSWORTH, *supra* note 169, § 4.28.

197. U.C.C. § 2-302 cmt 1 (emphasis added); *see also* FARNSWORTH, *supra* note 169, § 4.28.

198. 350 F.2d 445 (D.C. Cir. 1965).

199. *Id.* at 449 (emphasis added). The description of unconscionability established in Williams v. Walker-Thomas has basically remained unchanged over the decades since the case was decided. FARNSWORTH, *supra* note 169, § 4.28.

200. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003) ("[U]nder Ohio law, the unconscionability doctrine has two components: (1) substantive

accepted that if more of one of the categories is present, then less of the other is required.[201]

"Procedural unconscionability focuses on two elements: oppression and unfair surprise."[202] The oppression element considers whether an inequality in bargaining power exists such that no real negotiation occurs between the two parties in addition to an absence of meaningful choice on the part of one of the parties.[203] The unfair surprise element examines whether the supposedly agreed upon terms are hidden or concealed in the document.[204] "In many cases the meaningfulness of choice is negated by a gross inequality of bargaining power."[205]

Substantive unconscionability examines the actual contractual terms to determine if the terms are unreasonably favorable to the more powerful party.[206] Factors considered include whether the integrity of the bargaining process is damaged, or if it is contrary to public policy.[207] Substantively unconscionable terms may generally be regarded as unfairly one-sided,[208] or as an "overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made."[209] While unconscionability normally requires a finding of both procedural and substantive elements, "the substantive element alone may be sufficient to render terms of a provision at issue unenforceable,"[210]

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unconscionability, i.e., unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible."); *see also* Little v. Auto Stiegler, Inc., 63 P.3d 979, 983 (Cal. 2003) ("The doctrine of unconscionability has both a 'procedural' and 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, and the latter on 'overly harsh' or 'one-sided' results." (quoting Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000)).

201. *See* FARNSWORTH, *supra* note 169, § 4.28 (citing *Armendariz*, 6 P.3d 669).

202. Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Cal. App. 1 Dist. 1997); *accord* Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) ("[T]he procedural aspect [of unconscionability] is manifested by: (1) 'oppression', which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) 'surprise', which occurs when the supposedly agreed-upon terms are hidden in a document." (citing A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (1982))).

203. *See Stirlen*, 60 Cal. Rptr. 2d at 145.

204. *See id.*; Svalina v. Split Rock Land & Cattle Co., 816 P.2d 878, 882 (Wyo. 1991) (providing a list of six factors to aid in the identification of procedural unconscionability, the last of which asks "was one party in some manner surprised by fine print or concealed terms").

205. Williams v. Walker-Thomas, 350 F.2d 445, 449 (D.C. Cir. 1965).

206. *See* 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:10 (4th ed. 1998).

207. *See id.*

208. Little v. Auto Stiegler, Inc., 63 P.3d 979, 983 (Cal. 2003) (quoting Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000)).

209. Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) (citing A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (1982)).

210. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (1998).

particularly "if the sum total of the (substantive) provisions" is grossly unfair and "drive[s] too hard a bargain."[211]

3. Application of Unconscionability to Athletic Scholarship Contracts

As previously mentioned, courts have found the NLI and the Statement of Financial Aid to be the two main contractual documents between the university and the student-athlete.[212] NCAA rules and regulations are incorporated by reference in both of these documents.[213] As a result, courts must not only look to the four corners of the NLI and the Statement of Financial Aid, but must also look at the NCAA rules and regulations because those provisions are included as part of the contract.

A student-athlete asserting a claim of unconscionability bears the burden of proving both procedural and substantive unconscionability before a court will find the athletic scholarship contract to be an unconscionable contract of adhesion.[214] The student-athlete must show: (1) an inequality of bargaining power between the institution granting the athletic scholarship and the student-athlete, (2) a lack of meaningful choice or alternative for the student-athlete, (3) supposedly agreed upon terms hidden or concealed in the contract, and (4) terms that unreasonably favor the institution.[215]

a. Procedural Unconscionability: Elements of Oppression and Unfair Surprise

The athletic scholarship contract is oppressive because there is no meaningful choice for the student-athlete entering into the contractual agreement. In order to receive an athletic scholarship, student-athletes must sign both the NLI and the institution's Statement of Financial Aid,

211. United Cos. Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 206 (D. Mass. 1998) (quoting Waters v. Min Ltd., 587 N.E.2d 231, 234 (Mass. 1992)).

212. *See* Davis, supra note 17, at 1144 (discussing what the courts consider as the contractual documents of the athletic scholarship).

213. *See supra* notes 160-161 and accompanying text (incorporating NCAA rules by reference in the National Letter of Intent and the athletic department's Statement of Financial Aid).

214. *See* Guaranteed Foods of Neb. Inc. v. Rison, 299 N.W.2d 507, 512 (Neb. 1980) (holding the party asserting unconscionability must also plead it); *see also* Little v. Auto Stiegler, Inc., 63 P.3d 979, 983 (Cal. 2003) ("The doctrine of unconscionability has both a 'procedural' and 'substantive' element, the former focusing on oppression or surprise due to unequal bargaining power, and the latter on overly harsh or one-sided results." (quoting Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000))).

215. *See supra* Part IV.C.1 (describing the doctrine of unconscionability).

both of which are standardized-form adhesion contracts.[216] While the student-athlete can choose which institution to attend, the contractual documents the student-athlete must sign are the same form agreements from school to school.[217] Thus, the student-athlete is deprived of any meaningful choice and is compelled to enter into and accept the agreement as stipulated.

The athletic scholarship contract will also be viewed as oppressive by the courts because of the gross inequality of bargaining power between the two parties.[218] For example, gross inequality of bargaining power may exist when the stronger party (NCAA) has knowledge that the weaker party (student-athlete) "is unable to protect his interest by . . . [an] inability to understand the language of the agreement."[219] Stemming from the gross inequality of bargaining power, the student-athlete has no opportunity to negotiate, change, or delete any of the provisions. This is explicitly set forth in the NLI.[220] Similarly, an institution's Statement of Financial Aid also has a provision severely limiting the student-athlete's bargaining power, stating that any changes or modifications must be in compliance with the university, its athletic conference rules, and NCAA legislation.[221] In addition to bargaining power, there is almost always a vast imbalance in knowledge between the two parties regarding the terms

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216. *See* National Letter of Intent, *supra* note 11. Both the NLI and the institution's Statement of Financial Aid are "standard-form contract[s] prepared by one party, to be signed by the party in a weaker position, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 342 (8th ed. 2004). In fact, the student-athlete has no choice about the terms found in the contractual agreement proffered by the NCAA and its member institutions. *See* National Letter of Intent, *supra* note 11.

217. *See* National Letter of Intent, *supra* note 11. The NLI is a uniform document used by NCAA member institutions. Additionally, each institution's Statement of Financial Aid is substantively the same document from school to school in order to comply with the NCAA.

218. *See* Roussalis v. Wyo. Med. Ctr., Inc., 4 P.3d 209, 247 (Wyo. 2000) ("[P]rocedural unconscionability [includes]: deprivation of meaningful choice as to whether to enter into the contract, compulsion to accept terms, opportunity for meaningful negotiation, such gross inequality of bargaining power that negotiations were not possible, characteristics of alleged aggrieved party (underprivileged, uneducated, illiterate, easily taken advantage of), and surprise by fine print or concealed terms.").

219. *See* U.C.C. § 2-302 (2004).

220. *See* National Letter of Intent, *supra* note 11, ¶¶ 15, 18 (stating in paragraph 15, "No additions or deletions may be made to this NLI or the Release Request Form," and stating in paragraph 18, "My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI").

221. *See, e.g.*, Univ. of Tulsa Dep't of Intercollegiate Athletics, *supra* note 160, acceptance 4 ("Any modification or cancellation of this Tender must be in compliance with University, Conference USA, and NCAA legislation.").

and provisions of the contract, particularly with regard to the NCAA rules.[222]

The NLI and the institution's Statement of Financial Aid are take-it-or-leave-it contracts of adhesion.[223] Farnsworth appropriately recognizes that when dealing with take-it-or-leave-it adhesion contracts, "the only alternative to complete adherence is outright rejection."[224] As a result of the NCAA and its member institutions' grossly disproportionate bargaining power, even the freedom of contract ideology will not prevent the courts from declaring the contract void as against public policy.[225]

Procedural unconscionability also includes an unfair surprise element where supposedly agreed upon terms are hidden or concealed.[226] Both the National Letter of Intent and the Statement of Financial Aid incorporate NCAA legislation by reference. In so doing, the most important terms affecting the lives of student-athletes are not only hidden in these documents, but are actually totally concealed. The NCAA Manual is a 460-page document containing rules often found to be difficult and convoluted.[227]

NCAA member institutions have positions within their athletic departments whose sole purpose is to ensure NCAA compliance.[228] The job of compliance director involves the difficult task of attempting to "master the intricacies of NCAA rules."[229] Many of the NCAA rules are either "too abstract to be read literally or must be interpreted by the NCAA even when they appear to be clear."[230] Thus, even those most qualified to handle NCAA rules experience difficulty.[231]

Accordingly, student-athletes and their parents are not given a reasonable opportunity to read and understand the NCAA terms of the

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222. *See infra* text accompanying notes 226–230 (discussing the inequality in knowledge between the student-athlete and the university officials in regards to NCAA rules).

223. *See* National Letter of Intent, *supra* note 11; *supra* text accompanying note 216.

224. FARNSWORTH, *supra* note 169, § 4.26.

225. *See* Shell Oil Co. v. Marinello, 307 A.2d 598, 601 (N.J. 1973) (citing Henningson v. Bloomfield Motors, Inc., 161 A.2d 69 (1960)).

226. *See supra* note 204 and accompanying text; *see also* Blackistone, *supra* note 89 ("There ought be a law against this sort of thing. NCAA rule 15.3.5.1 that permits an institution to take away athletic scholarship without cause. Or, at least, the fine print ought to be bolder.").

227. *See supra* text accompanying note 10.

228. *See* Vahe Gregorian, *The NCAA Honor System*, ST. LOUIS DISPATCH, July 20, 2003, at D1 (discussing the job of compliance director).

229. *Id.* NCAA compliance director's job is "inherently thorny, beginning with the call to master the intricacies of the NCAA rules, which are voted upon and implemented by member institutions." *Id.*

230. *Id.* (stating "in recent years many institutions have turned to attorneys" to interpret the rules).

231. *See id.*

athletic scholarship contract.[232] Moreover, even if the NCAA terms were conspicuously placed on the documents to be signed by the student-athlete and their parents, it is not reasonable to believe that an understanding of those rules would occur.[233]

b. Substantive Unconscionability: Terms Unreasonably Favorable

The athletic scholarship contract is substantively unconscionable because it is one-sided, overly harsh, and the "sum total of its contractual terms drives too hard a bargain."[234] NCAA rule 15.3.5.1 allows a member institution to revoke athletic scholarships without cause, provided reasonable notice is given to the student-athlete.[235] A student-athlete whose scholarship is not renewed and who has a continuing desire to compete in intercollegiate athletics is further penalized under the current NCAA rules upon transferring to another institution.[236] NCAA rule 14.5.1 requires a transferring student-athlete to sit out of NCAA competition for one full year before regaining eligibility.[237] Furthermore, the student-athlete whose scholarship is not renewed cannot be contacted by, or receive an athletic scholarship from another institution until the former institution "agrees to 'release' the athlete."[238]

This situation is analogous to *Campbell Soup Co. v. Wentz*, which is one of the most noted pre-U.C.C. § 2-302[239] cases having a "special impact" on the doctrine of unconscionability.[240] In *Campbell*, the Wentz brothers entered into a contract drafted by Campbell Soup Company for

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232. *See* Woodhaven Apartments v. Washington, 942 P.2d 918, 925 (Utah 1997) ("Procedural unconscionability addresses whether the party had a reasonable opportunity to read and understand the terms of the contract.").

233. *See supra* text accompanying notes 228-231.

234. State v. Brown, 965 P.2d 1102, 1110 (Wash. App. Div. 2 1998) (finding clause or term will be substantively unconscionable if "one-sided or overly harsh"); United Cos. Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 206 (D. Mass. 1998) (holding that substantive unconscionability will be found if "sum total of the provisions of a contract drives too hard a bargain").

235. *See* NCAA DIVISION I MANUAL, *supra* note 3, art. 15.3.5.1, at 202. NCAA rule 15.3.5.1 permits NCAA member institutions the option of not renewing a student-athlete's athletic scholarship without cause once the one-year term has been served. *Id.*

236. *See supra* note 87 and accompanying text.

237. *See id.*

238. Yasser, *supra* note 2, at 146; *accord* TRANSFER GUIDE, *supra* note 84, s. IV, at 21 ("University athletics staff members may not make contact with you or your parents, directly or indirectly, without first obtaining the written permission of your current director of athletics. If permission is not granted, the second school may not encourage your transfer and in Divisions I and II, may not provide you with financial aid until you have attended that second school for one academic year.").

239. *See supra* text accompanying notes 181-187 (discussing U.C.C. § 2-302).

240. 172 F.2d 80 (3d cir. 1948); *see* FARNSWORTH, *supra* note 169, § 4.28.

their Chantenay carrots at the price of $30 per ton.[241] Due to circumstances outside of either party's control, the carrots became "virtually unobtainable" as the market price skyrocketed to $90 per ton.[242] As a result, the Wentz brothers began to sell their carrots to others.[243] Upon learning of this, Campbell Soup sought to "enjoin further sale of the contract carrots to others, and to compel specific performance."[244] The United States Court of Appeals for the Third Circuit found it obvious that Campbell Soup's contract had been skillfully drafted with the "buyer's interest in mind,"[245] and that it was "too hard a bargain and too one-sided an agreement to entitle [Campbell Soup] relief in a court of conscience."[246] The clause of Campbell's contract found to be most objectionable allowed Campbell the option of not accepting the carrots under certain circumstances, but "prohibited the Wentzes from selling them elsewhere without the permission of Campbell."[247]

Like *Campbell*, the NCAA has afforded its member institutions the option of not accepting or not renewing the athletic scholarships of student-athletes, but it prohibits student-athletes from receiving an athletic scholarship elsewhere unless the current institution grants permission.[248] If permission is not granted, the transferring student-athlete may not participate in NCAA athletic competition, nor receive an athletic scholarship, until the student-athlete has attended the new institution for one academic year.[249] If permission is granted, the transferring student-athlete may receive an athletic scholarship at the new institution, but he is still penalized by having to sit out from NCAA competition for one academic year.[250] As demonstrated by *Campbell*, the "sum total" of the NCAA contract provisions is one-sided, overly harsh, and "drives too hard a bargain," thus resulting in substantively unconscionable results.[251]

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241. *See Campbell Soup*, 172 F.2d at 81.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 83.
246. *Id.*; FARNSWORTH, *supra* note 169, § 4.28.
247. FARNSWORTH, *supra* note 169, § 4.28; *see Campbell Soup*, 172 F.2d at 83.
248. *See supra* text accompanying notes 235-238.
249. *See supra* text accompanying note 238.
250. *See supra* text accompanying note 238.
251. *See* State v. Brown, 965 P.2d 1102, 1110 (Wash. App. Div 2 1998) (stating clause or term will be substantively unconscionable if "one-sided or overly harsh"). *See generally* NCAA DIVISION I MANUAL, *supra* note 3; *Campbell Soup*, 172 F.2d at 83 (stating that it was "too hard a bargain and too one-sided an agreement to entitle [Campbell Soup] relief in a court of conscience").

Consequently, the combination of oppression and unfair surprise directed towards student-athletes leaves no doubt that athletic scholarship contracts are procedurally unconscionable. Additionally, the terms and provisions of athletic scholarship contracts are unreasonably favorable to the NCAA and its member institutions, providing substantial evidence as to its substantive unconscionability. Therefore, athletic scholarship contracts are unconscionable contracts of adhesion.

c. Remedies

Courts have declined to allow for the recovery of damages in unconscionability suits.[252] Yet, if courts find unconscionability, they will have "broad discretion in further proceedings."[253] The courts may find the entire contract to be void, or they may refuse to enforce or limit the application of the term or clause found to be unconscionable.[254] Consequently, once the court recognizes unconscionability, the contradictory nature of the NCAA can be presented to further demonstrate the unfairness, allowing the court to reach an equitable decision in light of "[the contract's] setting, purpose, and effect."[255] Courts have even interpreted their authority as to allow them to add terms to unconscionable agreements.[256] In order to make an equitable decision, courts should either refuse to enforce the unconscionable terms and clauses of the athletic scholarship contract, or they should add terms to change the unconscionable results.

## V. POST-GAME WRAP UP: POSSIBLE SOLUTIONS

A complete discussion offering solutions to the procedural unconscionability aspect of the athletic scholarship contract is beyond the scope of this Article. However, the following suggestions, if implemented, would help to diminish the substantive unconscionability

252. FARNSWORTH, *supra* note 169, § 4.28.

253. *See* Bracey v. Monsanto Co., 823 S.W.2d 946, 950 (Mo. 1992) ("[I]t may refuse to enforce the contract. It may also enforce the remainder of the contract, free from provisions deemed to be unconscionable, or it may limit the application of the offending clause in order to avoid an unconscionable result.").

254. FARNSWORTH, *supra* note 169, § 4.28; *Bracey*, 823 S.W.2d at 950.

255. U.C.C. § 2-302(2) (2004) ("[P]arties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f (1981) ("[P]arties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination.").

256. *See* FARNSWORTH, *supra* note 169, § 4.28 (citing Am. Home Improvement v. MacIver, 201 A.2d 886 (N.H. 1964)).

portion of the agreement. Yet when there is clear procedural unconscionability present, the substantive unconscionability element must not only be diminished, but entirely eliminated, before the athletic scholarship contract is not unconscionable.[257] It is generally regarded that standing alone, procedural unconscionability is not as much of a concern to the courts as substantive unconscionability.[258] To be unconscionable, the clause or contract must be "substantively harmful to the nondrafting party."[259]

### *A. Recent NCAA Proposal*

A proposal from the Pacific 10 Conference (Pac-10) that would allow basketball, football, and ice hockey players to transfer once without having to sit out one year to establish residence and restore their eligibility recently made its way through the NCAA's legislative process.[260] This ability to transfer once is already an option for all other NCAA sports. Therefore, this proposal sought to rectify the arbitrary and capricious discrimination against the "revenue" producing sports.[261] This short-lived proposal was unfortunately rejected at the 2005 NCAA Annual Convention.[262] Ironically, coaches, who always have the freedom to jump from job to job despite their contractual obligations, do not like the idea of basketball, football, and ice hockey players being afforded the same option, even once.[263] Most would find it absurd for a professor to tell a theater student from Harvard who transfers to Yale that "she would be ineligible to participate in any dramatic production during her first year at Yale,"[264] or "telling a coach who takes a new job that he or she must stay off the sidelines or bench for a season."[265] The above examples seem laughable and would simply not be permitted in the collegiate world. But this is precisely what is allowed in the student-athlete context.

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257. *See* WILLISTON & LORD, *supra* note 206, § 18:14 ("Where there is clear procedural unconscionability, however, even minimal substantive unfairness may be enough to justify declaring the contract or clause unconscionable, and even a substantively fair bargain may be declared unconscionable if the procedural defects are great enough.").

258. *See id.* ("[P]rocedural abuses that do not result in substantive harms at all are certainly less likely to be declared unconscionable.").

259. *Id.* § 18:10.

260. NCAA, NCAA Proposal No. 2004-48, http://ncaa.org/library/membership/d1_official_notice/2005/d1_notice.pdf (last visited Feb. 20, 2006); *see also* Randy Riggs, *Transfer Rule in Trouble?*, TULSA WORLD, Sept. 30, 2004, at B7.

261. NCAA Proposal No. 2004-48, *supra* note 260 ("This restriction placed on these 'revenue' sports cannot be justified philosophically.").

262. *Id.*

263. *See id.*

264. *See* Yasser & Fees, *supra* note 16, at 222.

265. *Id.*

If passed, the Pac-10 proposal would have alleviated some of the substantive unfairness found in the current athletic scholarship contract.

### *B. Extended-Term Scholarship Contract*

One commentator, Louis Hakim, has suggested that it may be time for the NCAA to implement an extended-term scholarship contract of four- or five-year duration.[266] Current NCAA Bylaws, while "fully protecting student-athletes during their one-year term of award from reduction or cancellation based on athletic performance," fail to offer this protection at the end of that one-year term.[267] This failure to protect the student-athletes and allowing NCAA member institutions to revoke an athletic scholarship after the term has been served, leads to coaches running off mediocre student-athletes or to star players leaving the collegiate ranks early and making the jump to the world of professional sports.[268] Hakim argues that in either situation, the "educational goals of universities and student-athletes are not fulfilled."[269] There is an expectation among student-athletes and their parents that the institution will renew the scholarship as long as they remain in good academic standing, they do not take part in activities involving moral turpitude, and they actively participate in athletics.[270] With an extended-term athletic scholarship, this understanding would be upheld, and would be consistent with the NCAA's foundational principle of education. The extended-term athletic scholarship would allow student-athletes to obtain a meaningful educational degree, and "restore educational and academic integrity in and out of the classroom."[271] Offering an extended-term athletic scholarship to student-athletes would vastly reduce the substantive unconscionability element of the current athletic scholarship contract, which would help preclude the NCAA and its member institutions from being subject to claims that their athletic scholarship contracts are unconscionable contracts of adhesion.

## VI. FINAL SCORE: CONCLUSION

As it exists today, the athletic scholarship contract is an unconscionable contract of adhesion, inconsistent with the important NCAA principles of student-athlete welfare and amateurism. Today's

266. *See* Hakim, *supra* note 4, at 149.
267. *Id.* at 164.
268. *See id.* at 147-48.
269. *Id.*
270. *See supra* text accompanying notes 6-8; Hakim, *supra* note 4, at 165.
271. *See* Hakim, *supra* note 4, at 183.

athletic scholarship has considerable amounts of both procedural and substantive unconscionability that serve to benefit NCAA member institutions to the detriment of the student-athlete. Until significant changes are made to the current athletic scholarship system and to the contradictory nature of the NCAA's mission, the NCAA and its member institutions are susceptible to attacks under the doctrine of unconscionability.