

COLLEGE FOOTBALL IN THE TIME OF COVID-19

THOMAS A. BAKER III,* MARC EDELMAN,** & JOHN T. HOLDEN***

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INTRODUCTION

The COVID-19 health crisis and resulting “stay at home” orders have led to newfound challenges for commercial sports leagues concerning how to safely and ethically conduct games during such uncertain times.¹ For professional sports leagues, including Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League, many of the

*Thomas A. Baker III is a tenured Professor of Sports Law in the Sport Management Program at the University of Georgia.

**Marc Edelman is a tenured Professor of Law at the Zicklin School of Business, Baruch College, City University of New York, and an adjunct faculty member at Fordham Law School. Professor Edelman may be reached at Marc@MarcEdelman.com.

***John T. Holden is an Assistant Professor in the Department of Management at the Spears School of Business at Oklahoma State University.

1. See generally Matthew Futterman, *Why Major Sports Might Risk Comeback During the Pandemic*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/sports/coronavirus-sports-comeback-reopening.html>.

decisions about how to return to sport have entailed collectively-bargained negotiations between league owners and players' unions.² However, in collegiate sports, where the players are not unionized, these decisions are made unilaterally by colleges on either the individual school, conference, or national level—all without any meaningful player input.³ This article explores some of the legal and ethical challenges for college sports in the time of COVID-19, and it explains why it would be entirely inappropriate for colleges that are not planning to offer live classes this fall to have student-athletes return to campus this summer to prepare for a college football season.

I. COLLEGE FOOTBALL AND COVID-19: A POTENTIALLY DANGEROUS MIX

Since early March 2020, most Americans' lives have been changed dramatically by the threat of contracting the novel coronavirus disease, COVID-19.⁴ COVID-19 is a dangerous infectious disease that saw its first case reported in Wuhan, China, in late 2019.⁵

2. Kevin Baxter et al., *How the Coronavirus Is Affecting Sport Leagues and Events*, L.A. TIMES, <https://www.latimes.com/sports/story/2020-03-09/coronavirus-latest-news-sports-world> (updated June 15, 2020, 11:59 AM).

3. The NCAA refuses to recognize and negotiate with any bargaining unit that represents student-athletes. See Donald Remy, *NCAA Responds to Union Proposal*, NCAA, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> (last visited June 23, 2020).

4. See generally Robert Muccari, Denise Chow & Joe Murphy, *Coronavirus Timeline: Tracking the Critical Moments of COVID-19*, NBC, <https://www.nbcnews.com/health/health-news/coronavirus-timeline-tracking-critical-moments-covid-19-n1154341> (last updated June 19, 2020, 2:37 PM).

5. *Coronavirus*, WORLD HEALTH ORG., https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited June 23, 2020); see also Erika Edwards & Sara G. Miller, *The World Learned About a New Coronavirus 5 Months Ago. Here's What We*

Most people infected with the COVID-19 disease experience a mild to moderate respiratory illness.⁶ However, according to one study, the U.S. death rate among people who shows symptoms is 1.3%.⁷ At present, more than 100,000 Americans have died from the disease in just under three months.⁸

Because COVID-19 spreads through droplets of saliva or nose discharge, the world medical community has suggested both social distancing and wearing facial coverings as an important way to slow the disease's spread.⁹ As a result of these medical recommendations, many major U.S. professional sports leagues suspended their seasons on March 12, 2020.¹⁰ While certain foreign sports leagues such as the Korean Baseball Organization have since returned to operation, the U.S. commercial sports leagues have not done so yet.¹¹ Most of the U.S. professional leagues are still in negotiations with their players unions

Now Know about Covid-19, NBC, <https://www.nbcnews.com/health/health-news/what-new-coronavirus-n1119081> (last updated May 25, 2020, 7:00 AM).

6. See WORLD HEALTH ORGANIZATION, *supra* note 5.

7. Jake Ellison, *COVID-19: UW Study Reports 'Staggering' Death Toll in US Among Those Who Show Symptoms*, UW NEWS (May 18, 2020), <https://www.washington.edu/news/2020/05/18/covid-19-uw-study-reports-staggering-death-rate-in-us-among-those-infected-who-show-symptoms/>.

8. Jamie Ducharme, *COVID-19 Has Killed More Than 100,000 Americans*, TIME (May 27, 2020, 6:00 PM), <https://time.com/5843349/coronavirus-death-toll-100000/>.

9. See WORLD HEALTH ORGANIZATION, *supra* note 5 (discussing the method of transmission). See also Alice Park, *Wearing Masks and Social Distancing Actually Work to Contain COVID-19, According to a New Study*, TIME (June 1, 2020, 7:08 PM), <https://time.com/5846288/social-distancing-face-masks-covid/> (discussing social distancing and face covering to prevent spread).

10. Dakin Andone, *Major Sports Leagues in the US Halt Play or Exclude Fans from Coronavirus Outbreaks*, CNN, <https://www.cnn.com/2020/03/12/us/us-sports-coronavirus-response/index.html> (last updated Mar. 13, 2020, 11:49 AM).

11. Baxter et al., *supra* note 2.

about how to return to play safely and economically.¹² Meanwhile, the leaders of college sports are still engaging in intensive discussions among themselves.¹³

One of the complicating factors of negotiating the return to sport in the wake of the COVID-19 crisis has been the lack of clear analogs to rely upon for guidance on safety.¹⁴ Some Major League Baseball aficionados draw a comparison with the Spanish flu of 1918, during which time the games went on, while many players wore masks on the field.¹⁵ However, that was a very different time.

Meanwhile, the most recent experience of a disease outbreak of this nature was the Severe Acute Respiratory Syndrome (“SARS”) pandemic that occurred from 2002–2004 and led to some business shutdowns and travel advisories but not sports shutdowns.¹⁶ COVID-19 and SARS were both described as a “fast epidemic” because both diseases spread rapidly from one country to another, were aerosol-

12. Ryan Dunleavy, *Where Every Sport Stands in Coronavirus Comeback Planning*, N.Y. POST (May 31, 2020, 8:01 AM), <https://nypost.com/2020/05/31/where-every-sport-stands-in-coronavirus-comeback-planning/>.

13. See Chuck Carlton, *Under-the-Radar Issues the Big 12 Faces as It Attempts to Bring Back College Football*, DALL. MORNINGS NEWS (June 1, 2020, 6:22 PM), <https://www.dallasnews.com/sports/tcu-horned-frogs/2020/06/01/ncaa-considering-six-week-timeline-for-college-footballs-return/>, for an example of the discussions for bringing back college football.

14. See generally Megan McArdle, *No, There Are No Comparable Analogies to Coronavirus*, WASH. POST (Mar. 10, 2020, 2:09 PM), <https://www.washingtonpost.com/opinions/2020/03/10/no-there-are-no-comparable-analogies-coronavirus/>.

15. *Photos from the 1918 Spanish Flu Pandemic*, CBS News, <https://www.cbsnews.com/pictures/photos-from-the-1918-spanish-flu-pandemic/3/> (last visited June 29, 2020).

16. See Shi Davidi, *Coronavirus More Disruptive to Sports Than SARS and with More Uncertainty*, SPORTSNET (Mar. 10, 2020, 5:14 PM), <https://www.sportsnet.ca/baseball/mlb/coronavirus-disruptive-sports-sars-uncertainty/>.

borne, and have higher mortality and morbidity rates than their “slow epidemic” counterparts that take months or years to reach the same level of risk.¹⁷ Global pandemics such as SARS and COVID-19 are made possible through the “3Ts” of globalization: travel, trade, and tourism.”¹⁸ The sports industry leverages each of those “3Ts” and is therefore particularly vulnerable to fast pandemics like COVID-19.¹⁹

From a governmental perspective, the prevailing view is that the return of commercial sports might be feasible during the coronavirus era, but the playing of certain sports, such as football, would pose an especially significant risk.²⁰ Most notably, Dr. Anthony Fauci—the director of the National Institute of Allergy and Infectious Diseases—has suggested the possibility of sports coming back before the end of the pandemic if the games are played in empty stadia and players stay in hotels and maintain weekly testing.²¹ However, Dr. Fauci, at the same time, cautioned that close-contact sports such as football might prove difficult to operate safely because the virus could easily spread to different parts of the body during play.²²

17. Christopher-Paul Milne, *Racing the Globalization of Infectious Diseases: Lessons from the Tortoise and the Hare*, 11 *NEW ENG. J. INT’L & COMP. L.* 1 (2004).

18. *Id.* at 9.

19. *See generally* Futterman, *supra* note 1.

20. Mark Heim, *Dr. Anthony Fauci: Football is ‘Perfect Set Up for Spreading’ COVID-19 Virus*, AL.COM, <https://www.al.com/sports/2020/05/dr-anthony-fauci-football-is-perfect-set-up-for-spreading-covid-19-virus.html> (last updated May 11, 2020).

21. Chris Bengel, *Dr. Fauci: Sports Could Return This Summer Without Fans in Venues*, CBS SPORTS (Apr. 15, 2020, 11:42 AM), <https://www.cbssports.com/general/news/dr-fauci-sports-could-return-this-summer-without-fans-in-venues/>.

22. Allen Kim, *NFL Games Could Be the Perfect Storm for Spreading Coronavirus Even Without Fans, Dr. Fauci Warns*, CNN,

At present, most U.S. professional sports leagues are engaging in collective bargaining negotiations with their players' union to ascertain how, if at all, to reasonably return to sport competitions.²³ For instance, the National Basketball Association and its players union are exploring the possibility of resuming their season with games in a single venue—negating any need for travel.²⁴ Meanwhile, Major League Baseball and its players union are in the process of negotiating a plan to restart with special protocols for testing, travel, and lodging, as well as contingency plans, if players or staff test positive for coronavirus.²⁵

College sports, however, will not make decisions based on a collectively bargained process because the players are not unionized.²⁶ Thus, all decisions about return to play must occur exclusively at the management level, whether that be on the school, conference, or national basis.²⁷ According to NCAA president Mark Emmert, colleges will make these decisions in conjunction with a COVID-19 advisory panel composed of medical, public health, and epidemiology experts, as

<https://www.cnn.com/2020/05/11/us/fauci-nfl-spt-trnd/index.html> (last updated May 11, 2020, 7:29 PM).

23. Dunleavy, *supra* note 12.

24. Tom Lutz, *NBA Set to Resume Action on 31 June in Orlando after COVID-19 Hiatus*, *GUARDIAN* (June 3, 2020, 12:46 PM), <https://www.theguardian.com/sport/2020/jun/03/nba-return-date-basketball-teams-orlando-florida-basketball>.

25. R.J. Anderson, *COVID-19: MLB to Submit Protocols for Player Testing and Safety to Players Association, Report Says*, *CBS SPORTS* (May 13, 2020, 10:29 AM), <https://www.cbssports.com/mlb/news/covid-19-mlb-to-submit-protocols-for-player-testing-and-safety-to-players-association-report-says/>.

26. The NCAA does not negotiate with student-athletes. *See Remy, supra* note 3.

27. *See id.*

well as the NCAA's chief medical officer, Dr. Brian Hainline.²⁸ For college football, the Football Oversight Committee may also play a role in advising schools and their respective conferences on when and how to return to play.²⁹

II. POTENTIAL TORT LIABILITY EMERGING FROM COLLEGE FOOTBALL IN COVID-19

As the NCAA and its member conferences and schools explore the possibility of reopening college football for the fall 2020 season, many lawyers are likely exploring the legal risks of college football operating during the era of COVID-19.³⁰ Under tort law, the traditional elements that would establish liability by way of negligence would include the breach of a duty to care that causes harm.³¹ In the case of offering college sports contests, there is a strong argument that colleges, athletic conferences, and the NCAA all have some form of duty to keep students safe, and that duty is to some extent greater than the simple duty of care that every individual in society owes one another.³² The promises that the NCAA have long made to protect college athletes

28. Heather Dinich, *NCAA Won't Mandate Uniform Return to College Sports, Mark Emmert Says*, ESPN (May 12, 2020), https://www.espn.com/college-sports/story/_/id/29167509/ncaa-mandate-uniform-return-college-sports-mark-emmert-says.

29. *Id.*

30. See generally Xiumei Dong, *The Coming Wave of COVID-19 Class Actions*, LAW360 (Apr. 21, 2020, 7:11 PM), <https://www.law360.com/articles/1266062/the-coming-wave-of-covid-19-class-actions>.

31. 65 C.J.S. Negligence § 20.

32. See Tezira Abe, Note, *The NCAA's Special Relationship with Student-Athletes as a Theory of Liability for Concussion-Related Injuries*, 188 MICH. L. REV. 887, 893-94 (2020).

from exploitation, as well as the absence of a separate union body to represent and protect the athletes as one would find in professional sports, likely elevates this duty above the level of the common law duty of care that each individual owes to one another.³³

A reasonable starting point in which courts should look to ascertain the scope of the duty that the NCAA and its member colleges and conferences reasonably owe to their student-athletes is the founders of the NCAA's intention to ensure student-athlete safety in college football.³⁴ While representations from one hundred fifteen years ago may seem too distant in time to apply to the NCAA and its members today, similar representations were reinforced by NCAA president Mark Emmert's testimony before the U.S. Senate in 2014, where he proclaimed that the NCAA and its member schools have an "obligation to make sure we do everything we can to protect . . . student-athletes."³⁵

33. See *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001) (in which a North Carolina appellate court found the existence of a special relationship that gave rise to a heightened duty of care based on (a) a "mutual dependence" between the school and the cheerleader in which the University of North Carolina (UNC) benefited from the cheerleading program, and (b) the considerable degree of control that the school had over the cheerleader within the activity that led to injury). See also *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367–69 (3d. Cir. 1993) (in which the Third Circuit recognized a special relationship between a varsity athlete and a school because (a) the school actively recruited the student-athlete to participate in varsity athletics, (b) the student-athlete's participation benefited the college, and (c) the student-athlete incurred the injury while participating in a school-sponsored training session).

34. See Marc Edelman, *The NCAA's "Death Penalty" Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 389 (2014) (explaining that U.S. President Theodore Roosevelt called for the creation of a body like the NCAA in response to several deaths on the college football field).

35. Jon Solomon, *NCAA: Mark Emmert Is Wrong Witness in Wrongful Death Lawsuit*, CBS SPORTS (July 16, 2014, 2:05 PM), <https://www.cbssports.com/college-football/news/ncaa-mark-emmert-is-wrong-witness-in-wrongful-death-lawsuit/>.

Of course, however, if a college football player (or many) were to contract coronavirus during a return to sport, this does not necessarily mean the NCAA, a member conference, or a member school would be ultimately found liable. Breaches of duty may sometimes go uncompensated if the defendant's negligent conduct was not the proximate cause of the plaintiff's injury.³⁶ Additionally, several different affirmative defenses could negate the finding of tort liability, even where a breach of one's duty is the proximate cause of harm.³⁷ One such affirmative defense is based on the doctrine of assumption of risk.³⁸ As Judge Cardozo explained in the seminal 1929 decision, *Murphy v. Steeplechase Amusement Co.*³⁹:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.

Another potential affirmative defense is sovereign immunity.⁴⁰

Even in the absence of Congressional action, the sovereign immunity

36. See 65 C.J.S. Negligence § 219 for a general discussion on the role of proximate cause in establishing tort liability.

37. See 61A AM. JUR. 2D *Pleading* § 307 (2020) for a general discussion on the defenses to negligence.

38. See generally John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961). See also Donald T. Meier, Note, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout from the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80 (2002) (discussing the doctrine of assumption of risk in application to the NCAA and its member institutions).

39. 166 N.E. 173, 174 (N.Y. 1929).

40. Fourteen college presidents reportedly lobbied the Vice President and the Secretary of Education to provide some form of liability protection. See Kery Murakami, *Colleges Worry They'll Be Sued if They Reopen Campuses*, INSIDE HIGHER ED (May 15, 2020, 3:00 AM), <https://www.insidehighered.com/news/2020/05/15/colleges-look-for-protection-lawsuits-if-they-reopen>.

defense in some states is a shield for state institutions in sports-based claims asserted against them.⁴¹ For example, in *Plancher v. University of Central Florida Athletics Ass'n*, the Florida Supreme Court held that the school's athletic department "act[ed] primarily as an instrument of the state," and therefore was entitled to insulation based on sovereign immunity from alleged negligence that resulted in the collapse and death of a student-athlete during practice.⁴² Contrast that decision, however, with another from the Supreme Court of Texas in *Lowe v. Texas Tech University*, where the court refused to recognize sovereign immunity to protect an athletic department that failed to furnish a student-athlete football player with proper protective equipment, and that failure triggered the state's "statutory waiver of immunity."⁴³

Finally, sometimes tort claims grounded in negligence fail based on effective waivers in which parties freely and intelligently waive the right to sue.⁴⁴ Waivers present a cost-effective means for limiting some liability and are widely used in sports, both for participants and attendees. Waivers, however, are not enforced when they violate public policy.⁴⁵ The enforceability of waivers for

41. Abe, *supra* note 32, at 889.

42. 175 So.3d 724, 725, 729 (Fla. 2015).

43. 540 S.W.2d 297, 300 (Tex. 1976).

44. Sarah Smyth O'Brien & Jorge Solis, *Waivers of Liability in the COVID-19 Era: Proactive Steps Businesses Should Consider to Protect Against Possible Future Liability*, JD SUPRA (Apr. 8, 2020), <https://www.jdsupra.com/legalnews/waivers-of-liability-in-the-covid-19-39711/>.

45. See Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 81 (2012) for more on the role public policy plays in the enforceability of waivers in a sport context. Doyce J. Cotten & Sarah J. Young, *Effectiveness of Parental Waivers, Parental*

contracting COVID-19, however, has yet to be litigated and therefore represents something of an open question.⁴⁶

III. SIX REASONABLE GUIDEPOSTS FOR THE RETURN OF COLLEGE FOOTBALL

For close to 100 colleges across the country, college football serves as a major source of revenue as well as an important “front porch” for marketing the college overall; thus, there is a strong incentive to bring back college football as quickly as possible.⁴⁷ Nevertheless, for colleges that seek to return to play, they need to be mindful of both legal and ethical obligations to do so safely. Thus, colleges that seek to return to sport should follow these six guideposts before allowing for college football games or practices.

First, colleges should never pursue a course of action that exposes college football players to greater COVID-19 risk than the student body overall. By way of illustration, this means that colleges that have not yet opened their dormitories to their general student body should not allow college football players to return to student housing. Similarly, schools that are continuing to offer many of their classes online during the fall 2020 semester should not be scheduling live football games. And, schools that have not restarted

Indemnification Agreements, and Parental Arbitration Agreements as Management Tools, 17 J. LEGAL ASPECTS SPORT 53 (2007).

46. O’Brien & Solis, *supra* note 44.

47. JOE NOCERA & BEN STRAUSS, *INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA* 196 (2016).

intercollegiate travel for activities such as debate teams and mock trial teams should not be taking football players on road trips. The fact that many schools' football teams earn substantial revenues for their school and/or serve as their college's "front porch" should not be considered a factor in assessing a football team's return.⁴⁸

Second, colleges should not restart training or practices for college football players before training or practices restart for all other fall sports. Given that football requires as much, if not more, physical contact among players than many other fall sports, one could reasonably conclude the risk of beginning training or practice for college football remains too high until a college is ready to allow all of its fall athletes to return. Indeed, any college's plan to return their football players to campus in late July or August for practice while the school's soccer, field hockey, or volleyball players have not returned to sport should serve as a major red flag in terms of the school's meeting of its duty of care.

Third, colleges should ensure medical staffs fully inform football players of the risks of returning to their sport, and implement both a reasonable player testing protocol and a protocol where football players can speak individually and anonymously with college medical personnel if they have concerns about their safety.⁴⁹ In recent years,

48. *Id.* at 196.

49. The NCAA's principles or best-practices for resocialization do not include protocols for educating the athletes of the risks related to COVID-19 in relation to their involvement in intercollegiate athletics. *See Core Principles of Resocialization of College*

the failure of some colleges with big-time athletic programs to keep their athletes safe has emerged as a source of meaningful concern—ranging from allegations of unreported sexual abuse of student-athletes,⁵⁰ to poor or nonexistent concussion management protocol,⁵¹ to, on rare occasions, dangerous training practices leading to the death of athletes.⁵² Based on some NCAA member schools' history, slothful COVID-19 testing and management remains a *bona fide* risk of restarting college football.

Fourth, before returning to individualized training, organized practice or competitive play, the program must have adequate supplies of personal protective equipment (PPE) and sanitizing agents.⁵³ Constraints on access to PPE supplies and sanitizers have resulted from the COVID-19 pandemic,⁵⁴ but these constraints should not

Sport, NCAA, <http://www.ncaa.org/sport-science-institute/core-principles-resocialization-collegiate-sport> (last visited June 25, 2020).

50. See James Pilcher, *Ohio State Athlete-Abuse Scandal: How Big Will the Financial Impact Be? Who Will Pay?*, CINCINNATI ENQUIRER, <https://www.cincinnati.com/story/news/2019/05/23/ohio-state-athlete-abuse-scandal-how-much-cost-who-pay/3767031002/> (last updated June 1, 2019, 8:46 AM) (discussing sex abuse scandals at Big Ten institutions involving more than one hundred seventy-seven victims in twenty years).

51. See generally Elizabeth Etherthon, *Systematic Negligence: The NCAA Concussion Management Plan and Its Limitations*, 21 SPORTS LAW. J. 1 (2014).

52. Jeremy Bauer-Wolf, *University of Maryland Did Not Follow Procedures Before Football Player's Death*, INSIDE HIGHER ED (Sept. 24, 2018, 3:00 AM) <https://www.insidehighered.com/news/2018/09/24/university-maryland-did-not-follow-procedures-football-players-death> (discussing the University of Maryland's negligence in the death of football player Jordan McNair).

53. Within its "core principles" for bringing back collegiate sport, the NCAA has included the guideline that there must be adequate PPE for "athletics health care providers." See NCAA, *supra* note 49.

54. Lois Parshley, *The Mask Shortage Is Forcing Health Workers to Disregard Basic Coronavirus Infection Control*, VOX (April 3, 2020, 11:40 AM), <https://www.vox.com/2020/4/3/21206726/coronavirus-masks-n95-hospitals-health-care-doctors-ppe-shortage>.

lessen the standard of care that NCAA member schools owe in taking all reasonable steps to keep student football players safe. In regards to the standard for protecting student-athletes from risks related to the spread of COVID-19, college football programs should engage in rigorous and daily protocols for the sanitization of all contact points for transmission (e.g., equipment rooms, training rooms, weight rooms, practice fields and arena, stadia and arenas for competitive play, food halls, residence halls, and travel buses/planes).⁵⁵ In addition to sanitization efforts, schools will need to have in place temperature checks and testing protocols that include contact tracing after someone tests positive for COVID-19.⁵⁶ Contact tracing has already proven necessary because the NCAA authorized football and basketball to resume workouts on June 1,⁵⁷ and within three days, players started testing positive for COVID-19.⁵⁸

Fifth, a college should not punish any football player in any manner if they decide not to participate in football as long as COVID-19 remains an issue. Given the undeniable risks of returning to

55. Karen Weaver, *Without a Vaccine, There is No Way College Athletes Can Play This Fall*, FORBES (May 6, 2020, 1:00 AM), <https://www.forbes.com/sites/karenweaver/2020/05/06/without-a-vaccine-there-is-no-way-college-athletes-can-play-this-fall/#3a3e94515e5c>. See NCAA, *supra* note 49.

56. See NCAA, *supra* note 49.

57. Bill Chappell, *NCAA Says College Football, Basketball Workouts Can Resume June 1*, NPR (May 21, 2020, 2:15 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/21/860385225/ncaa-says-college-football-basketball-workouts-can-resume-june-1>.

58. Barrett Sallee, *Alabama Football: At Least Five Players Have Reportedly Tested Positive for the Coronavirus*, CBS SPORTS (June 4, 2020, 3:50 PM), <https://www.cbssports.com/college-football/news/alabama-football-at-least-five-players-have-reportedly-tested-positive-for-the-coronavirus/>.

football, college football players should be allowed to retain their scholarships if they choose to sit out in the fall 2020 football season.⁵⁹ In addition, schools should not threaten football players with loss of status on the team or future scholarships should they decide to sit out the season. It is noteworthy that even the Major League Baseball Players Association's proposal to return to the sport this summer provides these professional athletes with the choice, without punishment, to sit out the 2020 season.⁶⁰ Unpaid college football players certainly should be treated no worse than their professional counterparts, especially given that they are not unionized and purportedly students first.⁶¹

Finally, colleges should not require their football players to sign waivers in which the players assume the risk should they contract COVID-19. Irrespective of whether waivers of this nature would ever be upheld as a matter of law or if courts would view them as

59. See Jeff Passan, *Sources: MLBPA Proposes 114 Game Season in Counterproposal*, ABC NEWS (June 1, 2020, 11:29 PM), <https://abcnews.go.com/Sports/sources-mlbpa-proposes-114-game-season-counterproposal/story?id=70989642> (explaining that “[w]hile MLB’s 67-page health-and-safety protocol draft included the ability for high-risk players – those with preexisting conditions or family members more susceptible to COVID-19 – to opt out of the season, the union’s suggests that players can do so and receive a salary. Players not deemed high risk would be able to opt out but would not receive salary.”).

60. See *id.*

61. See generally Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627 (2017) (explaining that college football players remain un-unionized after the National Labor Relations Board declined to assert jurisdiction over a petitioning group of Northwestern University college football players).

unconscionable,⁶² the lack of bargaining power and often lack of access to lawyers makes attempting to shift these risks to student-athletes seem especially wrong.⁶³ Furthermore, unlike professional athletes, college football players do not enjoy collective union representation, nor do they earn free-market salaries—thus hurting the argument that the athletes may be assuming these risks as part of a good faith *quid pro quo*.⁶⁴

CONCLUSION

As we approach the summer of 2020, there is a growing itch to return to sports at both the professional and collegiate levels. Until there is either herd immunity or a vaccine for COVID-19, however, the playing of college football presents legal risks under tort law, as well as *bona fide* ethical concerns. While there are numerous legal grounds under which the NCAA, a member college or a member conference might be able to avoid liability if a college football player were to contract COVID-19, the goal of colleges and their sports-based governing bodies should not be to attempt to shift the legal risk or avoid

62. See generally Thomas A. Baker III, John Grady & Jesse M. Rappole, *Consent Theory as a Possible Cure for Unconscionable Terms in Student-Athlete Contracts*, 22 MARQ. SPORTS L. REV. 619 (2012) (discussing in detail the potential unconscionability of arguably adhesive contracts and contractual terms that student-athletes must sign, or forfeit their scholarships).

63. See generally *id.* at 626–27 (discussing arguably unconscionable risk-shifting clauses in student-athlete contracts and an argument for a consent-reinforcing approach to contracting with student-athletes).

64. See Edelman, *supra* note 61.

liability on technical grounds. Instead, the goal should be to use reasonable best efforts to keep college football players safe.

While there is not a one size fits all approach for how to keep college football players safe during the times of COVID-19, this article suggests six reasonable guideposts that a college should follow before commencing football practices, training, or games. Among them, colleges should not restart their football programs until they reopen similar opportunities to their general student body, including athletes in other sports. Medical personnel should fully inform college football players of the risks related to returning to sport. Colleges should not, in any way, penalize those football players who choose for personal safety reasons to sit out the 2020 college football season, and colleges should not try to make college football players sign waivers to assume the risks of contracting COVID-19 while playing their sport.