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## Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game

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# Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game

## ABSTRACT

*Despite decades of regulation, college athletics continues to face problems stemming from agents' unethical and illegal tactics in recruiting student-athletes. The NCAA, Congress, state legislatures, and professional players unions have all sought to regulate the interaction between athletes and agents in various ways, often leading to conflicts and gaps within existing laws, which some agents readily exploit. Agents frequently slip through the law's porous prevent defense while the brunt of enforcement and public opprobrium falls on unsophisticated student-athletes and their schools—who are frequently outsiders to the saga. This Note explores the causes resulting in an atmosphere of noncompliance, including the varying goals of regulators and the attitudes of student-athletes. This Note recommends changes within the current system to encourage agent compliance, ensure greater transparency in the interactions between agents and student-athletes, and lessen draconian NCAA restrictions on student-athlete behavior. A unified, streamlined, less restrictive system will be more protective of student-athletes interests and encourage ethical agent behavior.*

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“To stop agents from paying players, the NCAA will have to stop college students from wanting money and thinking they’re invincible—and stop agents from wanting to land clients. Good luck with that.”<sup>1</sup>

The average first-round pick in the 2010 National Football League (NFL) draft stands to earn \$28.57 million over the life of his contract, with \$17.06 million in guaranteed money.<sup>2</sup> The twenty most valuable college football programs of 2009 earned an average of \$35.15 million in profits.<sup>3</sup> Although major college athletics may be about more than money, these and similar figures necessarily marginalize any non-monetary concerns in the cost-benefit calculus of National Collegiate Athletic Association (NCAA) member schools, student-athletes, and athlete-agents.<sup>4</sup> The large amounts of money pervading college athletics skews the cost-benefit analysis underlying the behavior of all parties, often resulting in malfeasance in the eyes of regulating bodies, which may penalize all actors and institutions involved, guilty or not.

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1. Michael Rosenberg, *NCAA Facing Uphill Battle to Control Agents Paying Players*, SPORTS ILLUSTRATED (Oct. 13, 2010, 11:45 AM), [http://www.http://sportsillustrated.cnn.com/2010/writers/michael\\_rosenberg/10/13/ncaa.agents/index.html](http://www.http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/10/13/ncaa.agents/index.html).

2. *Contract Status of 2010 First-Round Draft Picks*, NFL.COM (Aug. 6, 2010, 6:06 PM), <http://www.nfl.com/news/story/09000d5d818ff636/article/contract-status-of-2010-firstround-draft-picks>.

3. Peter J. Schwartz, *College Football’s Most Valuable Teams*, FORBES (Dec. 22, 2009, 7:00 PM), <http://www.forbes.com/2009/12/22/most-valuable-college-football-teams-businesssports-college-football.html>.

4. See Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 567 (2009) (“As few thoughtful observers doubt, [intercollegiate football and men’s basketball at major NCAA institutions] are fantastically commercial and decidedly not amateur.”).

Throughout 2010, the sports world has seen allegations and revelations of agent improprieties in courting student-athletes, especially the provision of improper benefits.<sup>5</sup> In June 2010, the NCAA concluded a lengthy investigation of the University of Southern California's athletics programs for violations of the Association's rules governing athlete agent<sup>6</sup> interactions and amateurism involving former stars Reggie Bush and O.J. Mayo.<sup>7</sup> The NCAA's findings led to the imposition of substantial penalties including postseason bans, vacated wins, and scholarship reductions in football and men's basketball, as well as revenue forfeitures and probation for the programs involved.<sup>8</sup> Subsequently, Reggie Bush, who now plays professionally with the New Orleans Saints, returned his 2005 Heisman Trophy under significant pressure, the first forfeiture in the prestigious award's history.<sup>9</sup> In October 2010, former sports agent Josh Luchs admitted to providing thousands of dollars in money and benefits to numerous college football players throughout the 1990s.<sup>10</sup> Despite continuing efforts by the NCAA, professional players unions, and state and federal legislators to address agent misconduct, the problem persists.<sup>11</sup>

This Note examines the current regulatory scheme purporting to govern improper athlete-agent conduct, identifies the major insufficiencies of the current regime, and proposes necessary changes that will maintain the NCAA's ideal of fully non-professional intercollegiate athletics, sufficiently protect and prepare student-athletes in their dealings with agents, and regulate egregious agent conduct. Part I.A of this Note discusses the current status of the athlete-agent business model and the potential effects of unscrupulous agent conduct on student-athletes and their schools. Part I.B focuses on the many institutions involved in the current regulatory regime,

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5. See Robert Gagliardi, *Can the NCAA Realistically Stop Agents?*, THE LARAMIE BOOMERANG (July 22, 2010), <http://www.laramieboomerang.com/articles/2010/07/22/sports/doc4c47ca31ca111063426154.txt>.

6. The phrase "athlete-agent" will be used throughout this note to refer to individuals commonly called agents, or sports agents.

7. News Release, Nat'l Collegiate Athletic Ass'n, Division I Committee on Infractions Issues Decision on University of Southern California (June 10, 2010), available at <http://www.ncaa.org/wps/wcm/connect/ncaa/ncaa/media+and+events/press+room/news+release+archive/2010/infractions/20100610+d1+coi+usc> (last visited Feb. 12, 2010).

8. *Id.*

9. *Reggie Bush to Forfeit Heisman*, ESPN.COM (Sept. 15, 2010, 1:13 PM), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827>.

10. George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED (Oct. 18, 2010), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1175725/index.htm>.

11. See, e.g., Charles Robinson & Dan Wetzel, *Sources: Blake Recommended Agent to Dareus*, YAHOO! SPORTS (Oct. 3, 2010, 10:48 PM), <http://rivals.yahoo.com/ncaa/football/news?slug=ys-dareus100310>.

which aim to curb agent misfeasance in recruiting student-athletes. Part II discusses the major problems the current regulatory scheme presents, and Part III proposes a multi-faceted reform within the confines of contemporary regulations. This Note argues that unless the relevant regulatory bodies take a more proactive stance, student-athletes will continue to bear the brunt of scrutiny and punishment, while agents will continue to skirt the law in the hopes of landing a star player.

## I. WHERE WE ARE NOW AND HOW WE GOT HERE

### A. *The Athlete-Agent Industry: Competition and Problems*

In an era of ballooning player salaries, overcrowded agent markets, and limitations on agent contract commissions, competition among agents for clients has erupted, creating an unethical arms race of sorts, whereby agents break the rules to reel in the biggest fish.<sup>12</sup> Even given the stable pool of potential professional athletes in the college ranks, the number of would-be agents continues to increase, sparking fiercer competition and encouraging increasingly unethical behavior.<sup>13</sup> Despite the relatively miniscule chance that a student-athlete will become a professional, agents frequently engage in unethical or illegal activities to recruit potential clients. Agents use a variety of recruiting techniques, including sales puffing—knowingly overestimating a student-athlete's professional value to ensure signing.<sup>14</sup> Sports agents also employ runners, or financially interested third-party intermediaries, to befriend athletes and provide day-to-day influence and benefits.<sup>15</sup> Additionally, some agents may go beyond direct recruiting, providing cash or other benefits to athletes' families and friends.<sup>16</sup> Finally, agents may even resort to threats or extortion.<sup>17</sup> Some commentators suggest that the difficulties of

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12. Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1227 (2004).

13. Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 785–86 (2006) (noting instances of client stealing, agent disparagement, and improper benefits).

14. Willenbacher, *supra* note 12, at 1228.

15. Ben Bolch, "A Third Party Can Make for Shady Deals," L.A. TIMES, July 13, 2008, at <http://articles.latimes.com/2008/jul/13/sports/sp-runners13>.

16. See Charles Robinson and Jason Cole, "Cash and Carry: Reggie Bush Investigation," YAHOO! SPORTS, Sept. 15, 2006, at <http://rivals.yahoo.com/ncaa/football/news?slug=ys-bushprobe> (detailing material benefits provided by agents to the family of then-USC student-athlete Reggie Bush).

17. See, e.g., Peter H. Frank, "F.B.I. Is Reported to Be Investigating Threats By Agents," NEW YORK TIMES, Mar. 27, 1987, at <http://www.nytimes.com/1987/03/27/sports/fbi-is->

entering the agent business, combined with the enormous potential for wealth, motivates agents to do “whatever it takes” to land a client.<sup>18</sup>

The consequences of unscrupulous agent conduct for student-athletes and their educational institutions are severe.<sup>19</sup> An athlete who violates NCAA bylaws regulating amateurism stands to lose both his athletic eligibility and his athletic scholarship.<sup>20</sup> NCAA member institutions face sanctions, including loss of revenues, forfeiture of victories and scholarships, and postseason bans.<sup>21</sup> Additionally, NCAA scandals create a negative perception of college athletics, vilifying both student-athletes and the schools.<sup>22</sup> However, the agent behind the NCAA violations and resulting scandal escapes similar public opprobrium, given his relative anonymity in comparison to the student-athlete and the university.<sup>23</sup> Thus, the penalties fall wholly on the most public parties, while the unseen agents slip through the cracks, further encouraging an atmosphere of noncompliance.<sup>24</sup>

## B. Contemporary Regulatory Schemes for Athlete-Agents

### 1. NCAA Regulations

The NCAA describes the “basic purpose” of its “fundamental policy” as maintaining amateurism—by defining a clear line between intercollegiate and professional competition.<sup>25</sup> The NCAA’s efforts to

reported-to-be-investigating-threats-by-agents.html (documenting alleged threats and extortion by agents Norby Walters and Lloyd Bloom).

18. Davis, *supra* note 13, at 798.

19. This is not to suggest that student-athletes are never at fault for accepting gifts from, or entering into agreements with, agents. However, given the sophistication of the parties and the resources imbalance, student-athletes are, in most situations, less blameworthy.

20. Willenbacher, *supra* note 12, at 1230.

21. *Id.* at 1231.

22. *Sports Agent Responsibility and Trust Act: Hearing on 108 H.R. 351 Before the Subcomm. On Commercial and Admin. Law of the House Comm. On the Judiciary*, 108th Cong. 4, 6-7 (2003) (statement of Rep. Osborne, Member, H. Comm. on the Judiciary) [hereinafter *Judiciary Subcomm. Hearing*].

23. *Id.*

24. The NCAA frequently punishes schools for “failing to promote an atmosphere of compliance.” See, e.g., News Release, NCAA, Division I Committee On Infractions Issues Decision On University Of Connecticut (Feb. 22, 2011), available at <http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2011/Infractions/Division+I+Committee+On+Infractions+Issues+Decision+On+University+Of+Connecticut>; News Release, NCAA, Division II Committee on Infractions Issues Decision on University of Southern Indiana (Feb. 4, 2011), available at <http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2011/Infractions/20110204+D2+COI+Southern+Indiana>.

25. NCCA BYLAWS §§ 1.2–1.3, reprinted in NAT’L COLLEGIATE ATHLETIC ASS’N, 2009-10 NCAA DIVISION I MANUAL (2009), available at <http://www.ncaapublications.com/product/downloads/D110.pdf> [hereinafter NCAA BYLAWS].

promote the amateurism ideal fall into two major categories: preventing pay-for-play, and clearly distinguishing intercollegiate from professional athletics.<sup>26</sup> Anti-remuneration rules prohibit a student-athlete from leveraging his athletics ability “directly or indirectly” for any form of pay, promise of future pay, or any form of financial aid not available to the student body at-large.<sup>27</sup> Clear-barrier regulations restrict the interactions between student-athletes, coaches, agents, and professional sports organizations.<sup>28</sup>

The amateurism provisions of the NCAA Bylaws advance the goal of “maintaining a clear line of demarcation between college athletics and professional sports.”<sup>29</sup> Commonly referred to as the “no agent rule,” the NCAA’s primary athlete-agent regulation renders a student-athlete ineligible for intercollegiate competition “if he or she has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.”<sup>30</sup> Additionally, all agency contracts are presumed applicable to all sports in which the student-athlete participates, rendering him ineligible to participate in *any* future NCAA competition, regardless of sport, unless explicitly stated otherwise in contractual language.<sup>31</sup> The prohibition on agency contracts also applies to agreements regarding future representation, as well as those made by high school athletes or graduates before college enrollment.<sup>32</sup>

In a small exception to the “no agent rule,” the NCAA permits an individual to retain an advisor concerning a proposed professional sports contract without compromising his eligibility, but prohibits the advisor from representing a student-athlete—including attending contract negotiations or directly contacting a professional sports organization on her behalf—without impacting her eligibility.<sup>33</sup> The NCAA makes no distinction between lawyers and non-lawyers on this point, instead permitting a student-athlete to seek advice from *any* individual regarding professional negotiations, provided that no active representation occurs.<sup>34</sup> Like the regulations governing agency agreements and receipts of benefits, those governing legal counsel

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26. Fitt, *supra* note 4, at 564.

27. NCAA BYLAWS, *supra* note 25, §§ 12.1.2, 12.3.1.1, 12.4.

28. *Id.*

29. *Id.* § 12.01.2.

30. *Id.* § 12.3.1.

31. *Id.*

32. *Id.* § 12.3.1.1.

33. *Id.* § 12.3.2.

34. Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 217 (2005).

apply to student-athletes both before and after they enroll in college.<sup>35</sup> In the eyes of the NCAA, the critical distinction is whether an individual serves merely as an “advisor” or actually “represents” the individual in negotiations, either by presence during contract negotiation or by active discussion.<sup>36</sup>

Under these regulations, student-athletes and their guardians may interact with professional teams on their own—even negotiating a professional contract—without loss of eligibility.<sup>37</sup> Additionally, an NCAA member institution may establish a “professional sports counseling panel” for the benefit of its student-athletes.<sup>38</sup> This counseling panel is essentially an alternative mechanism for providing some traditional agent functions, including advising the student about professional prospects, helping him secure a personal injury insurance policy, reviewing proposed professional contracts, arranging meetings with professional teams, securing professional tryouts, and determining an athlete’s market value.<sup>39</sup> An NCAA student-athlete’s head coach may conduct many of the same services, including helping the athlete select an agent and determining the student-athlete’s market value, so long as the head coach receives no compensation for these services from an agent, and he follows NCAA-mandated reporting requirements.<sup>40</sup>

Perhaps most pertinently, the “no benefits rule” deems an individual ineligible for NCAA competition for accepting “transportation or other benefits from . . . [a]ny person who represents any individual in the marketing of his or her athletics ability; or [a]n agent,” even if the agent has indicated that he has no interest in representing the student-athlete and does not represent others in the student-athlete’s sport.<sup>41</sup> Notably, the regulations presume that any expenses received by student-athletes are based on athletic skill and are therefore an extra benefit unavailable to the general student

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35. *Id.* Thus, high school athletes, namely high school baseball players (and potentially basketball players, depending on the future status of the NBA’s age limit), may test their draft status and even negotiate with professional teams, but must do so on the inherently unequal terms of non-representation. *Id.*

36. *Overview of NCAA Bylaws Governing Athlete Agents*, NCAA.ORG (July 29, 2010), <http://ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Overview+of+NCAA+bylaws+governing+athlete+agents>.

37. NCAA BYLAWS, *supra* note 25, § 12.2.4.2.

38. *Id.* § 12.3.4.

39. *Id.*

40. *Id.* § 11.1.4.1. Coaches are required to report their activities to either their institution’s counseling panel or, in the absence of a panel, to their university’s president or chancellor. *Id.*

41. *Id.* § 12.3.1.2.



body.<sup>42</sup> Additionally, by referring to the receipt of benefits by any “individual,” the regulations apply to a class broader than currently enrolled college athletes, including future college recruits still enrolled in high school or preparatory institutions.<sup>43</sup> Thus, student-athletes cannot avoid NCAA sanctions by only receiving benefits before enrollment.<sup>44</sup>

The NCAA, in response to the participation of ineligible student-athletes in its competitions, may impose a variety of penalties on student-athletes, with potentially severe consequences for both the athlete and the member institution.<sup>45</sup> Because the NCAA lacks jurisdiction to regulate agents directly, any penalties it imposes for violations of its bylaws fall directly and disproportionately on student-athletes and educational institutions.<sup>46</sup> In the face of these coverage gaps, legislators and judges have created a variety of regulatory regimes to police what the NCAA could not—misconduct by the agents themselves.<sup>47</sup>

## 2. Common Law and Pre-UAAA State Legislation

Historically, state common law provided causes of action for student-athletes and educational institutions to bring against unprincipled athlete-agents.<sup>48</sup> The nature of the relationship binding student-athletes, agents, and educational institutions brings many of their interactions within the scope of agency and contract law.<sup>49</sup> However, a variety of countervailing forces, including the doctrine of contributory negligence, as well as a reluctance to file suit, resulted in few civil actions against agents under the common law.<sup>50</sup>

Under agency law, a student-athlete could hypothetically bring a sports-agent malpractice suit, alleging a violation of the duty of care owed to the student-athlete.<sup>51</sup> The agent, placed in a fiduciary position by his agreement to represent the student-athlete, is presumed to know the relevant NCAA regulations and any actions in

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42. *Id.*

43. *Id.* § 12.3.1.2(a).

44. *Id.*

45. *Id.* § 19.5.

46. Diane Sudia & Rob Remis, *Athlete Agent Legislation in the New Millennium: State Statutes and the Uniform Athlete Agents Act*, 11 SETON HALL J. SPORT L. 263, 268–69 (2001).

47. *See infra* Parts I.B.2–5.

48. John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, 143 (2006).

49. *See id.*

50. *See id.*; Willenbacher, *supra* note 12, at 1251.

51. Gray, *supra* note 48, at 143.

violation thereof.<sup>52</sup> As such, any failure to ensure that a student-athlete knew of the consequences of entering into an agency contract or accepting benefits would breach his fiduciary duty, rendering the agent liable for the student's ineligibility.<sup>53</sup> However, as NCAA student-athletes are generally expected to know and adhere to NCAA regulations,<sup>54</sup> a defense of contributory or comparative negligence would likely mitigate an agent's liability or lower a potential damages award.<sup>55</sup>

The common law theory of tortious interference with contractual relations could also potentially provide an NCAA member institution a cause of action against an agent.<sup>56</sup> Tortious interference occurs when a third party, who knows that a contract exists, intentionally causes a party to breach it.<sup>57</sup> If a court finds a contractual relationship between the school and student-athlete,<sup>58</sup> either in a financial aid agreement,<sup>59</sup> or National Letter of Intent,<sup>60</sup> the court will presume the agent is aware of the contract and its terms, including the requirement that the student-athlete adhere to NCAA regulations.<sup>61</sup> The agent's conduct, in consciously entering into a contract or providing benefits in derogation of the student-athlete's contract with his educational institution, directly contributes to any resultant ineligibility and NCAA-imposed penalties for the school.<sup>62</sup> Absence the agent's offering of a contract or benefits—both intentional actions—no contractual breach between the student-athlete and

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52. *Id.*

53. *Id.*

54. See Willenbacher, *supra* note 12, at 1240 (“[I]f the court was willing to find a breach of contract for violation of (school-imposed) training rules the court, presumably, would also find a breach of contract when the athlete fails to conform to NCAA eligibility requirements that were also an element of the contractual relationship” (citing *Taylor v. Wake Forest Univ.*, 16 N.C. App. 17 (N.C. Ct. App. 1972)).

55. Gray, *supra* note 48, at 143.

56. *Id.*

57. *Id.*

58. See Kevin Stangel, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 140–42 (2000); see also Willenbacher, *supra* note 12, at 1240–41.

59. Generally, courts have based this holding on a finding that financial benefits constitute valid consideration for a student-athlete's participation in NCAA competition. Stangel, *supra* note 58, at 140–46.

60. A National Letter of Intent is a voluntary program whereby a prospective student-athlete (recruit) pledges to attend a university for at least one academic year and the university promises to provide financial aid for that year, with an included prohibition on recruiting the student-athlete by any other institution. *About the National Letter of Intent*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/About+the+NLI> (last visited Feb. 14, 2011).

61. Gray, *supra* note 48, at 144.

62. Willenbacher, *supra* note 12, at 1242.

institution would have occurred.<sup>63</sup> Although an agent may argue that he did not intend for the student-athlete to breach his contract with the university, a person acting with knowledge of a likely consequence—here, contractual breach—is generally held to have intended that result.<sup>64</sup> Thus, regardless of the motivations or awareness of the student-athlete, an NCAA member could argue that the agent's conduct caused the contractual violation and establish liability.<sup>65</sup>

Over time, the common law regime proved less than effective in regulating athlete-agent activities, largely due to problems with proof of causation and reluctance to sue.<sup>66</sup> To protect local universities and student-athlete residents, as well as provide a more reliable enforcement mechanism, many states began to enact legislation to govern the actions of athlete-agents.<sup>67</sup> By 2001, twenty-six states had enacted statutes imposing civil and criminal penalties for athlete-agent misconduct.<sup>68</sup> Eleven states classified all or some agent improprieties as felony offenses, while the remaining states classified agent misconduct as a misdemeanor.<sup>69</sup> Most state statutes included provisions governing the following aspects of an athlete-agent's business:

- (1) restrictions on the agent's license; (2) posting and forfeiture of surety bonds or malpractice insurance; (3) legal validity of the agent contract and the athlete's ability to rescind the contract; (4) forfeiture of the agent's right to repayment of items paid on behalf of the athlete; (5) refunds of monies paid to the agent by the athlete or on her behalf; (6) civil/administrative fines; (7) civil causes of action against the agent by the athlete, university, state, or other injured person or business; and (8) criminal fines or imprisonment.<sup>70</sup>

Notably, this developing statutory scheme placed a complex compliance burden on athlete-agents.<sup>71</sup> The disjunction of regulations among the states created an atmosphere of noncompliance and non-

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63. See Gray, *supra* note 48, at 143–44.

64. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010).

65. Gray, *supra* note 48, at 144.

66. See *infra* Part II.A.

67. Sudia & Remis, *supra* note 46, at 268–69; see also Willenbacher, *supra* note 12, at 1237 (arguing that states have a great incentive to create statutes restricting agents' conduct and protecting student-athletes due to the economic impact potential sanctions could have on the state economy).

68. Sudia & Remis, *supra* note 46, at 271–72.

69. *Id.* at 273.

70. *Id.* at 274.

71. See *id.* at 275.

enforcement.<sup>72</sup> Various state registration requirements rendered compliance extremely costly and time-consuming, since most agents operated in many states.<sup>73</sup> Agents rarely followed the reporting or surety bond requirements because the cost of compliance often outweighed the penalties, and prosecution was unlikely.<sup>74</sup> Although state statutes covered many of the same subjects, they varied on critical points, including: the definition of a “student-athlete”; individuals exempt from registration; registration and renewal procedures and fees; disclosure and education requirements; and the content, form, and timing of required notice to athletes and educational institutions by agents.<sup>75</sup> Additionally, many state statutes directly conflicted with existing NCAA regulations (by prohibiting student-athlete and agent interaction altogether, for example), cancelling out the few protections actually provided for student-athletes by the NCAA bylaws.<sup>76</sup> The statutory scheme, as it stood in 2001, discouraged agent compliance because it was vague, burdensome, and costly.<sup>77</sup> Despite the developing body of law and growing awareness of agent misconduct, effective punishment has been rare.<sup>78</sup>

### 3. The Uniform Athlete Agents Act

In 1997, at the behest of the NCAA and its member institutions, the National Conference of Commissioners on Uniform State Laws (NCCUSL) began developing a model uniform agent regulation.<sup>79</sup> In 2000, the NCCUSL drafted the Uniform Athlete Agents Act (UAAA), to regulate agents and protect educational institutions, as well as, to a lesser extent, student-athletes.<sup>80</sup> To encourage voluntary compliance by agents, the UAAA sought to

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72. See Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining “Unauthorized Practice of Law” Could Take the “Lawyer” out of “Lawyer-Agent” Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 233 (2007).

73. Sudia & Remis, *supra* note 46, at 275. (noting that registering and paying fees in multiple states would be very costly, perhaps cost-prohibitive for young agents, and that the multiple and disparate forms and references required across the country made registering time-prohibitive for all agents).

74. See *id.* at 276.

75. Davis, *supra* note 13, at 808.

76. See Sudia & Remis, *supra* note 46, at 281.

77. *Id.*

78. Willenbacher, *supra* note 12, at 1237.

79. Lloyd Zane Remick & Christopher Joseph Cabott, *Keeping Out the Little Guy: An Older Contract Advisor’s Concern, a Younger Contract Advisor’s Lament*, 12 VILL. SPORTS & ENT. L.J. 1, 5 (2005).

80. See UNIF. ATHLETE AGENTS ACT, Prefatory Note, <http://www.law.upenn.edu/bll/archives/ulc/uaaa/aaa1130.pdf> (discussing UAAA purpose) [hereinafter UAAA].

establish a uniform scheme of state regulations by standardizing agent registration, reporting, record keeping, and punishable misconduct across all adopting states.<sup>81</sup> As of January 2011, forty states and two territories have adopted the UAAA, with three states operating under non-UAAA athlete-agent regulatory schemes.<sup>82</sup>

The UAAA's principal regulatory mechanism is the registration requirement,<sup>83</sup> whereby all agents seeking to contact a student-athlete within a given state must first register with the appropriate state authority.<sup>84</sup> However, the Act provides an exception for those athlete-agents contacted by a student-athlete or someone acting on his behalf, so long as no agency contract is executed and the agent submits a registration application within seven days of his first act as a sports agent.<sup>85</sup> Any agency contract formed in violation of this section is void, and the student-athlete must return any consideration received under the contract.<sup>86</sup> The UAAA imposes a standardized scheme of agent registration, requiring disclosure of a potential agent's (1) training, experience, and education; (2) criminal history regarding felonies and crimes of moral turpitude;<sup>87</sup> (3) legal history of false or deceptive representations; (4) previous denial, suspension, or revocation of licensure in any state; and (5) prior sanctions, suspensions, or declarations of student-athlete ineligibility.<sup>88</sup> Although the disclosure and reporting requirements appear daunting, the UAAA permits agents to cross-file applications across all UAAA jurisdictions, simplifying the registration and vetting processes.<sup>89</sup> The UAAA does not, however, designate a uniform registration fee.<sup>90</sup>

The UAAA further regulates the form of an agency contract and provides for notice to the contracting student-athlete's educational

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81. *See id.*

82. *FAQ on Uniform Athlete Agents Act*, NCAA.ORG (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act>. California, Michigan, and Ohio have non-UAAA laws. The remainder of the states, including Alaska, Massachusetts, Montana, Maine, New Jersey, Vermont, and Virginia lack laws directly regulating athlete-agents. *See also* COLO. REV. STAT. §§ 23-16-204–208 (repealed 2010) (Colorado rescinded its laws in April 2010).

83. The UAAA's definition of athlete-agent includes all individuals who enter into or directly or indirectly solicit or recruit a student-athlete to form an agency contract, including runners, but excluding corporations and business entities, family members, and persons acting solely on the behalf of professional sports organizations. UAAA, *supra* note 80, § 2(2) & cmt.

84. *Id.* § 4(a).

85. *Id.* § 4(b).

86. *Id.* § 4(c).

87. The reporting requirements, aside from education and training, generally apply to associates of aspiring athlete-agents as well. *See id.* § 5(a).

88. *Id.*

89. *Id.* § 5(b).

90. *Id.* § 9.

institution.<sup>91</sup> Agency contracts must disclose compensation arrangements, the names of any unregistered persons receiving compensation due to contract formation, and a description of services to be rendered.<sup>92</sup> Additionally, the UAAA requires that all agency contracts contain a conspicuous provision informing the student-athlete of the possible forfeiture of NCAA eligibility, the required notice to his educational institution, and his right to cancel the contract.<sup>93</sup> Agents may not pre- or post-date any agency contract under penalty of criminal sanctions.<sup>94</sup> Pre- and post-dating prohibitions limit the extent to which agents may contractually bind student-athletes while circumventing eligibility and reporting concerns.<sup>95</sup> Contracts that violate the notice and dating requirements are voidable by the student-athlete, who need not reimburse the agent.<sup>96</sup>

To protect educational institutions and prevent sanctions arising from the participation of ineligible players, the UAAA mandates that both the contracting student-athlete and agent provide notice to the athletic director of the affected NCAA member institution,<sup>97</sup> either within seventy-two hours of the agreement's signing or before the athlete's next scheduled competition, whichever occurs first.<sup>98</sup> The UAAA stipulates that a contracting student-athlete retains the unwaivable right to unilaterally void his agency contract within fourteen days of signing the agreement,<sup>99</sup> with no requirement to return any consideration received.<sup>100</sup> Under the UAAA, agents must maintain executed contracts and other records—including information regarding clients and recruitment expenditures—for five years, open to review by the state.<sup>101</sup>

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91. *Id.* §§ 10–11.

92. *Id.* § 10(b).

93. *Id.* § 10(c).

94. *Id.* § 14(b)(5).

95. *See id.*

96. *Id.* § 10(d).

97. In the case of an uncommitted high school athlete or transfer student, the UAAA requires that an agent provide notice to any school where he has reasonable grounds to believe the athlete intends to enroll. *Id.* § 11(a).

98. *Id.* § 11.

99. This statutory waiver right, however, does not affect collegiate eligibility, which terminates upon the entering into any agreement with an agent, regardless of its legal enforceability. NCAA BYLAWS, *supra* note 25, § 12.1.2(g).

100. UAAA, *supra* note 80, § 12. This statutory waiver right, however, does not affect collegiate eligibility, which terminates upon the entering into any agreement with an agent, regardless of its legal enforceability. NCAA BYLAWS, *supra* note 25, § 12.1.2(g).

101. *Id.* § 13.

The UAAA also prohibits certain agent conduct and imposes civil and criminal penalties on violators.<sup>102</sup> Agents face criminal penalties if they provide materially false or misleading information or make a materially false promise or representation with the intent of inducing an agency contract.<sup>103</sup> Agents are also proscribed from providing anything of value to a student-athlete or anyone associated with her before executing an agency contract.<sup>104</sup> The UAAA also penalizes agents for the following conduct: initiating contact with a student-athlete before registering in a given state, refusing to maintain or allow inspection of records, failing to register, registering with false or misleading information, or failing to include the required notice to student-athletes in agency contracts.<sup>105</sup>

In addition to criminalizing the above conduct, the UAAA provides for civil remedies by granting educational institutions a cause of action against an agent or student-athlete for any damages suffered as a result of violating the Act, including losses and expenses incurred from sanctions by the NCAA or athletic conference, self-imposed sanctions undertaken in anticipation of and to mitigate potential penalties, and associated party costs and reasonable attorney's fees.<sup>106</sup> Notably, the UAAA also allows for an official of affected states, such as the Secretary of State,<sup>107</sup> to assess a civil penalty of up to \$25,000 against an agent for violating the Act.<sup>108</sup> Furthermore, the Secretary of State, upon proper notification and hearing, may suspend, revoke, or refuse to renew an agent's registration for conduct violating the UAAA.<sup>109</sup>

#### 4. Federal Sports Agent Responsibility and Trust Act

In 2004, Congress enacted the Sports Agents Responsibility and Trust Act ("SPARTA"),<sup>110</sup> modeled after the UAAA, to protect

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102. *Id.* §§ 14–15.

103. *Id.* § 14(a)(1)–(2).

104. *Id.* § 14(a)(3).

105. *Id.* § 14(b).

106. *Id.* § 16.

107. The UAAA designates the Secretary of State as the default enforcement officer; however, states may designate the state officer of their choosing as the primary enforcer when adopting the Act. *Id.* § 3 cmt.

108. *Id.* § 17. Again, \$25,000 is the default penalty provided by the UAAA, but a state may elect to use whatever fine it decides when enacting the Act. *Id.*

109. *Id.* §§ 6–7.

110. 15 U.S.C. §§ 7801–08 (2006). Prior to 2004, federal law played an important, albeit punctuated, role in the regulation of agent conduct. Davis, *supra* note 13, at 811–12. Notorious agents were criminally prosecuted for federal mail and tax fraud, money laundering, and violations of Securities and Exchange Commission regulations, resulting in some of the largest

educational institutions and student-athletes from agent malfeasance in recruitment.<sup>111</sup> Congress' primary goal in passing SPARTA was to deter agents from offering improper inducements and misleading information to student-athletes and to discourage student-athletes from accepting such inducements.<sup>112</sup> SPARTA prohibits agents from directly or indirectly recruiting or soliciting a student-athlete's entry into an agency contract by the provision of false or misleading information, the making of a false promise, or providing anything of value to a student-athlete or his family, friends, or associates, including loaning money and acting as a guarantor.<sup>113</sup> Like the UAAA, SPARTA prohibits contractual pre- and post-dating and imposes affirmative obligations on agents, including required disclosures in agency contracts and notice to educational institutions upon the signing of an agency agreement.<sup>114</sup> Unlike the UAAA, SPARTA does not create a uniform registration system, although it does encourage states to adopt the UAAA to that end.<sup>115</sup>

SPARTA also establishes a system of sanctions for deceptive acts or practices and grants enforcement powers to the Federal Trade Commission (FTC).<sup>116</sup> The FTC may issue injunctions or impose monetary penalties of up to \$16,000 for each SPARTA violation.<sup>117</sup> Additionally, the statute authorizes state attorneys general to bring civil actions on behalf of a state's population in federal court if a SPARTA violation adversely affects the interests of that state's residents.<sup>118</sup> Moreover, like the UAAA, SPARTA provides educational institutions a federal cause of action against agents and student-athletes whose SPARTA violations result in institutional expenses, including NCAA-imposed penalties, disqualification, suspension, or restitution arising from institution-imposed penalties in anticipation of NCAA compliance actions.<sup>119</sup>

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punishments of agents to date. *Id.* However, these penalties were also limited to the most egregious cases. *Id.*

111. See H.R. REP. NO. 108-24(II), at \*1022.

112. See *id.*

113. 15 U.S.C. § 7802(a)(1)–(2).

114. *Id.* §§ 7802(a)(3)–(b), 7805(a).

115. *Id.* §§ 7802, 7807 (“It is the sense of Congress that States should enact the Uniform Athlete Agents Act of 2000 drafted by the National Conference of Commissioners on Uniform State Laws, to protect student athletes and the integrity of amateur sports from unscrupulous sports agents.”).

116. *Id.* § 7803 (The FTC is empowered to enforce violations of SPARTA as an unfair or deceptive trade practice as if all applicable sections of the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006), were incorporated into SPARTA).

117. 15 U.S.C. §§ 45(l)–(m) (2010); 16 C.F.R. §§ 1.98 (2011).

118. 15 U.S.C. § 7804(a).

119. *Id.* § 7805(b).



## 5. Professional Players Associations Regulations

Players associations, as unions of professional athletes, have exclusive authority to represent their members on matters relating to the terms and conditions of their employment, including contracts and salaries.<sup>120</sup> Unlike typical unions, however, players associations have generally negotiated only the framework of employment conditions in collective bargaining agreements (“CBA”) with team owners and have delegated authority to negotiate individual players’ contracts to agents or representatives approved by the association.<sup>121</sup> Thus, players associations have broad authority over agents, including the ability to determine which agents are certified to represent their member athletes, to establish rules governing certified agents’ representation, and to sanction agents who violate those rules.<sup>122</sup> The National Football League Players Association (NFLPA) has described agents as “in nearly all respects . . . like employees of the sports unions themselves.”<sup>123</sup> As such, courts have repeatedly upheld the authority of players associations to regulate sports agents.<sup>124</sup>

The NFLPA,<sup>125</sup> in 1994, adopted the Regulations Governing Contract Advisors (RGCA) to govern individuals seeking to represent players in their negotiations with NFL teams.<sup>126</sup> The NFLPA only allows certified agents, who meet competency and ethics requirements, to conduct contract negotiations.<sup>127</sup> The NFLPA imposes minimum requirements for certification eligibility, including an application fee, background check, completion of a written

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120. Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 321 (1998).

121. *Id.* at 320–21.

122. Davis, *supra* note 13, at 816.

123. *Id.* at 817.

124. See, e.g., *White v. Nat’l Football League*, 92 F. Supp. 2d 918 (D. Minn. 2000) (holding that teams and the players association intended for agents to be bound by the collective bargaining agreement, and as such, agents were subject to the regulations and for penalties thereunder); *Black v. Nat’l Football League Players Ass’n*, 87 F. Supp. 2d 1 (D.D.C. 2000) (determining that agent agreed to terms imposed by CBA in exchange for certification as a player agent, and therefore must accept provided procedures).

125. The regulatory systems adopted by each of the major sports players associations are substantially similar, but contains some differences; this Note will focus on the NFLPA’s regulations because of their comprehensive nature and recent amendments and because of football’s close relationship to ongoing controversies. See generally Major League Baseball Players Ass’n, *MLBPA Regulations Governing Player Agents* (effective Oct. 1 2010), <http://reg.mlbpaagent.org/Documents/AgentForms/Agent%20Regulations.pdf>.

126. Nat’l Football League Players Ass’n, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (Mar. 2007), available at [http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA\\_Regulations\\_Contract\\_Advisors.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf) (last visited Feb. 14, 2011) [hereinafter NFLPA REGULATIONS].

127. *Id.* § 2.

examination, mandatory seminar attendance, and possession of an undergraduate and post-graduate degree from an accredited educational institution.<sup>128</sup> The RGCA regulates contracts with a heavy hand: Any contract that does not meet NFLPA standards is unenforceable, an unenforceable contract results in no agent compensation, and a representative's commission is capped at a maximum percentage.<sup>129</sup> Notably, in 2004, the NFLPA amended its regulations, requiring that agents disclose, in writing, any payments made to runners.<sup>130</sup> The NFLPA prohibits agents from improperly soliciting an athlete, or providing improper inducements, including money or anything of value, to an athlete or any of his associates, to obtain an agency contract.<sup>131</sup>

Under its regulations, the NFLPA may sanction agents who violate any of the governing provisions, including by suspending agents, revoking agent certification, and assessing fines.<sup>132</sup> However, this broad authority has been rarely used.<sup>133</sup> Agents and players are reluctant to testify against offending agents for fear of triggering an NCAA investigation against their former institution, revealing their own indiscretions, or implicating a colleague or client.<sup>134</sup> Without cooperation from athletes, agent misconduct goes largely undeterred, even with an aggressive union.<sup>135</sup>

## II. CURRENT REGULATIONS ARE A POORLY DESIGNED DEFENSE

Despite the common ends each regulatory actor in the current athlete-agent governance regime seeks, the overall lack of uniformity and centralization of authority has created a series of compliance disincentives. Agents are undeterred by minimal penalties that are rarely imposed and continue to violate the law with impunity, while athletes and schools face intense scrutiny from the NCAA and the

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128. *Id.* § 2(A) (An exception is provided for agents who can demonstrate sufficient negotiation experience).

129. *Id.* §§ 4(A)–(B).

130. *Id.* § 3(A)(19).

131. *Id.* §§ 3(B)(2)–(3).

132. *Id.* § (6)(D). The regulations also state that, during a period of suspension, an agent may be prohibited from collecting fees based on representation agreements. *Id.* Presumptively, this indicates that revocation of certification will have the same effect, leading to an effective avoidance of agency agreements.

133. *See* Davis, *supra* note 13, at 821–23 (noting that, despite an increased number of complaints, player's association enforcement has been stymied to a large extent by a reluctance to cooperate).

134. *Id.* at 823.

135. *See id.* at 822 (noting how non-cooperation has made enforcement of agent regulations very difficult).

public.<sup>136</sup> Because institutions of higher learning cannot be full-time babysitting services, unprotected student-athletes or their families may frequently face semi-coercive situations with far more sophisticated parties, bearing full responsibility for the smallest misstep.<sup>137</sup> “[L]egislation is only as good as the people who enforce it, and the people that actually take into account what’s going on about it,”<sup>138</sup> but when non-enforcement and apathy are the norms of state enforcement, even the most comprehensive legislation is useless. Too many gaps in the defensive design and too little motivation by the players on the field allow agents to score at will.

### A. Non-Enforcement and Ineffective Deterrents

An Associated Press report released in August 2010 revealed that, “more than half of the 42 states with sports-agent laws have yet to revoke or suspend a single license, or invoke penalties of any sort.”<sup>139</sup> The same report showed that most other states described their athlete-agent laws as having been enforced only a few times or rarely.<sup>140</sup> Likewise, the Federal Trade Commission has failed to take aggressive action under SPARTA, with few filed complaints, no enforcement actions, and minimal statutory penalties.<sup>141</sup> Pennsylvania has only issued four fines against sports agents since 2003 and none greater than \$1,000.<sup>142</sup> In April 2010, the Colorado legislature rescinded the state’s 2008 athlete-agent regulations, after only four agents registered in compliance with the act.<sup>143</sup> Georgia dissolved its regulatory commission in July 2010, transferring enforcement duties to its Secretary of State, and Delaware plans to follow suit.<sup>144</sup>

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136. Willenbacher, *supra* note 12, at 1241–42.

137. Josh Luchs: *States Must Enforce Laws*, ESPN.COM (Oct. 13, 2010, 10:54 AM), <http://sports.espn.go.com/ncf/news/story?id=5681002> [hereinafter *Josh Luchs*] (“Twenty-four hours a day, seven days a week, people [are] coming at [players] from all different angles . . . . As good as [sic] job these coaches may want to do to try to shield these players, they’re only human beings and they’re trying to win football games.”).

138. Symposium, *The Uniform Athlete Agents Act*, 13 SETON HALL J. SPORTS L. 345, 364 (2003) (statement of Tony Agnone) [hereinafter UAAA Symposium].

139. *Report: State Agent Laws Unenforced*, ESPN.COM (Aug. 17, 2010, 4:20 PM), <http://sports.espn.go.com/ncaa/news/story?id=5470067> [hereinafter *AP Report*].

140. *Id.* (“One of the few examples of a state enforcing the law with some consistency is Texas, which has taken disciplinary action against 31 agents in the past two years, levying a total of \$17,250 in fines.”). *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

North Carolina illustrates the problems with enforcing the UAAA and SPARTA.<sup>145</sup> Because many of its sports agency laws have no direct funding mechanism, no dedicated resources, and therefore no dedicated enforcement, the state was forced to conscript state securities fraud personnel to investigate recent allegations of agent malfeasance.<sup>146</sup> In March 2010, the North Carolina Secretary of State opened an investigation into alleged agent improprieties within the University of North Carolina football program, issuing a search warrant for the financial records of NFL agent Gary Wichard a full year after allegations of improprieties came to light and four months after NFLPA suspended Wichard.<sup>147</sup> In addition to the funding problem facing many states,<sup>148</sup> prosecutorial discretion also limits enforcement. Put succinctly, “[i]f you’ve got bank robbers and rapists, white-collar crime—how many agent issues should be raised to the top of some prosecutor’s desk?”<sup>149</sup>

The NCAA suffers from inadequate resources and scant potential penalties, obstacles frustrating effective universal enforcement.<sup>150</sup> With few dedicated investigatory personnel and limited funding, the NCAA is often a passive enforcement body, relying on information about improper contact or benefits brought to its attention by third parties, rather than independently discovered.<sup>151</sup> As such, NCAA member institutions are reluctant to prosecute, or even investigate, agents for fear of inviting NCAA sanctions, or worse, a full-scale NCAA investigation into the program.<sup>152</sup> In addition, the NCAA may only impose penalties on the individual athletes and schools—the only applicable sanctions for agents come from the law, which currently has no bite.<sup>153</sup>

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145. *AP Report*, *supra* note 139.

146. *Id.*

147. *Agent’s Financial Records Sought*, ESPN (Mar. 2, 2011), <http://sports.espn.go.com/nfl/news/story?id=6174078>. Although this timing represents a major step forward for state enforcement, the time gap between allegations and investigation goes to show the significant difficulties facing the current regulatory regime.

148. Steve Yanda, *Laws Restricting Improper Agent Contact with NCAA Athletes Seen as Ineffective*, WASH. POST, July 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072205898.html>.

149. *AP Report*, *supra* note 139.

150. Yanda, *supra* note 148 (quoting sports agent Darren Heitner).

151. Yanda, *supra* note 148.

152. *Id.* According to Alabama Head Football Coach Nick Saban, “You know, we probably could have prosecuted [the agent] . . . [b]ut in prosecuting the guy that did wrong, we would have put our institution in jeopardy . . . .” *Id.*

153. *Id.*

Despite the availability of civil causes of actions for aggrieved educational institutions under SPARTA and the UAAA,<sup>154</sup> a variety of factors, beyond the initiation of NCAA sanctions, discourage schools from proceeding against agents or student-athletes.<sup>155</sup> First, any potential damages award that an institution may receive from an agent or former student-athlete would likely be unrecoverable, given the overall lack of financial resources of most aspiring agents, and even most professional athletes.<sup>156</sup> Second, the school would stand to lose both reputation and general revenue, including the enormous monetary losses stemming from sanctions.<sup>157</sup> Third, initiating a lawsuit, especially against a prominent former student-athlete, would keep the violation in public view, and may deter future student-athletes from attending the university.<sup>158</sup> Additionally, an NCAA member institution, especially one already subject to NCAA sanctions, may have difficulty recovering, due to constructive knowledge of the violations.<sup>159</sup> If an institution actively covered up agent malfeasance, looked the other way, or failed to promote an atmosphere of compliance, such conduct would severely limit any recovery in ways similar to contributory negligence.<sup>160</sup>

Although professional players unions could sanction or decertify agents who violate the applicable regulations, they are largely “outmanned and basically ineffective” in providing oversight.<sup>161</sup> For example, according to former agent Josh Luchs, the NFLPA only becomes involved in regulating agents “when things fall on their laps” or “when there’s an agent-agent dispute,”<sup>162</sup> which renders any penalty an ineffectual deterrent. Additionally, the NFLPA and other unions can only regulate potential contract advisors,<sup>163</sup> a category that excludes “financial advisors, marketers and the other remoras that circle potential NFL players hoping to siphon off scraps,” and “most of

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154. See *supra* text accompanying note 106. Neither SPARTA nor the UAAA provide causes of action to student-athletes. *Id.*

155. Willenbacher, *supra* note 12, at 1246.

156. *Id.* at 1246–47

157. *Id.*

158. *Id.* at 1247.

159. *Id.* at 1248.

160. See Gray, *supra* note 48, at 143 (discussing limitations imposed by student-athlete contributory negligence).

161. Josh Luchs, *supra* note 137.

162. *Id.*

163. Nat'l Football League Players Ass'n, REGULATIONS AND CODE OF CONDUCT GOVERNING REGISTERED PLAYER FINANCIAL ADVISORS 2 (Mar. 2007), available at [http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPAregs\(3\).pdf](http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFLPAregs(3).pdf). In 2002, the NFLPA implemented a voluntary certification program for financial advisors, the first such program among professional sports unions. *Id.*

the dirty [agents] are smart enough to use intermediaries to avoid a direct connection between agent and player.”<sup>164</sup>

Although the NFLPA has been at the forefront of regulating the agent industry in professional athletics, it has had difficulty enforcing its regulations because, as in the collegiate arena, professional players and agents are reluctant to bring up violations or testify at hearings.<sup>165</sup> “It is not uncommon for agents anonymously to inform players associations of the misconduct of other agents or to make allegations without specifically identifying the alleged offending agent,” but when asked to testify, “the complaining agent will refuse to do so.”<sup>166</sup>

Wake Forest Law Professor Timothy Davis notes three main reasons underlying an agent’s unwillingness to testify against or directly identify a peer: (1) concern that their own improprieties will be uncovered; (2) reluctance to implicate student-athletes; and (3) fear of retribution from other agents once labeled a “snitch.”<sup>167</sup> Likewise, athletes are reluctant to implicate unethical agents due to an overall desire to avoid litigation, a fear of jeopardizing any remaining collegiate eligibility, and the potential for NCAA sanctions on their current or former school.<sup>168</sup> NCAA member-institution officials and coaches also have a disincentive to bring violations to light for fear of NCAA sanctions.<sup>169</sup> Finally, professional teams are often hesitant to report known violations because they “do not want to ‘burn bridges’ with the agents with whom they are required to negotiate contracts.”<sup>170</sup> As such, the NFLPA and other players unions have largely failed to curb unethical agents’ recruitment tactics.<sup>171</sup>

In the rare case that agents are caught and punished, the current regulatory regime offers insufficient punishment to deter misconduct.<sup>172</sup> One commentator concludes, “the deterrents imposed

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164. Andy Staples, *Saban and Slive Are Powerful Men, but Are Powerless Against Agents*, SPORTS ILLUSTRATED (July 22, 2010, 12:09 PM), [http://sportsillustrated.cnn.com/2010/writers/andy\\_staples/07/22/agents/index.html](http://sportsillustrated.cnn.com/2010/writers/andy_staples/07/22/agents/index.html). But see Liz Mullen, *NFLPA Panel of Marketing Agents Meets for First Time*, SPORTS BUS. J. (Oct. 18, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/10/Oct-18-24/Labor-and-Agents/Marketing-agents.aspx> (noting that the NFLPA reached out to player marketing agents, by convening an advisory committee of player marketing agents in September 2010).

165. Davis, *supra* note 13, at 822.

166. *Id.*

167. *Id.* at 823.

168. *Id.* at 822.

169. Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the “Exclusive” Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 762 (2006).

170. *Id.*

171. *Id.*

172. Willenbacher, *supra* note 12, at 1243.

by SPARTA, the creation of a civil cause of action for universities and state attorneys general, as well as FTC penalties, are not substantially different from deterrents that already exist[ed] . . . [including] state statutes and common law.”<sup>173</sup> Agents stand to gain far too much money from successfully recruiting a star client to worry about the relatively low fines and other penalties imposed by the UAAA and SPARTA.<sup>174</sup> Educational institutions already enjoyed private causes of action under the common law regime.<sup>175</sup> Likewise, the small fines and lax enforcement render the remaining civil penalties toothless.<sup>176</sup> Additionally, SPARTA and the UAAA do very little to counteract the tendencies of NCAA member institutions and student-athletes “to put violations as far in the past as possible” by not following through on civil actions or testimony, a pattern often ending with NCAA sanctions, but no guaranteed recovery from potentially insolvent agents or athletes.<sup>177</sup>

### B. Coverage Gaps

A defense designed by one coordinator with a single strategy can be very effective, but a defense designed by several coordinators, each with a distinct strategy, even if well-conceived, may fail. First, certain parts of the field will be left completely uncovered, as in states without athlete-agent regulations.<sup>178</sup> Second, agents attempting to comply with the different defensive principles will soon be overwhelmed by the sheer complexities of compliance required to even play the game, as with multi-state regulation.<sup>179</sup> Finally, some categories of agents may face additional constraints from outside sources, leaving less-skilled agents to fill their absence, as when non-lawyers substitute for lawyers<sup>180</sup>

A multi-state registration scheme without centralized enforcement allows agents to skirt registration and compliance altogether by conducting their activities in states that either lack athlete-agent laws or fail to enforce them.<sup>181</sup> Without uniform

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173. *Id.*

174. *Id.* at 1243–44.

175. *See supra* Part I.B.2.

176. Willenbacher, *supra* note 12, at 1243.

177. *Id.* at 1247–48.

178. *See generally* AP Report, *supra* note 139 (noting that eight states do not yet have laws dealing with sports agents, though others with standardized laws rarely enforce them).

179. *See* Remick & Cabott, *supra* note 79, at 14.

180. *Id.* at 15–16.

181. AP Report, *supra* note 139 (describing the overall lack of enforcement in states with athlete-agent regulations).

enforcement of athlete-agent laws, and incessant media reports of agent-athlete misconduct, disregard for registration and compliance has, not surprisingly, become the norm.<sup>182</sup> In the absence of a centralized registration and enforcement regime, a massive collective action problem plagues the athlete-agent industry.

The current decentralized regulatory regime also creates compliance problems—similar to what prompted the UAAA.<sup>183</sup> Currently, universities in forty-nine states have college football programs, and each of the forty-nine has produced at least one player on an active NFL roster since the 2008-2009 season.<sup>184</sup> As such, a scrupulous contract advisor must play “the multi-state game,” registering in as many states as possible to maximize his ability to build a client base.<sup>185</sup> Despite explicitly recognizing the need for uniformity and providing for cross-filing and comity among UAAA states, the Act fails to establish a uniform registration or renewal fee.<sup>186</sup> Thus, registering agents face a broad range of registration fees, which, given the multi-state nature of the industry, can become quite expensive.<sup>187</sup> As a corollary, aspiring agents or contract advisors face a dilemma: bear a potentially large financial burden or ignore the law.<sup>188</sup> Coupled with the inherent competitiveness of the industry, this dilemma discourages lawful behavior.<sup>189</sup>

Another potential problem with the current statutory system governing athlete-agents is the disparity with which the law treats attorneys versus non-attorney agents.<sup>190</sup> Although the benefits of having a licensed attorney as an agent may be substantial, especially to a young athlete,<sup>191</sup> licensed attorneys seeking to act as athlete-agents face a competitive disadvantage in the market.<sup>192</sup> At the outset, an attorney “is subject to more extensive regulation than a

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182. See generally *id.*

183. Remick & Cabott, *supra* note 79, at 14.

184. The sole exception in both of these cases is Alaska, which does not feature a college football program. The author compiled this information by viewing a list of NCAA Division I, II, and III football programs, and cross-referencing a list of active NFL players and their undergraduate institutions on *ESPN.COM*.

185. Remick & Cabott, *supra* note 79, at 14.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 16–19.

190. See Geisel, *supra* note 72, at 237.

191. See Jonathan J. Amoona, *Top Pick: Why A Licensed Attorney Acting As A Sports Agent Is A “Can’t Miss” Prospect*, 21 *GEO. J. LEGAL ETHICS* 599, 609 (2008).

192. Bryan Couch, *How Agent Competition and Corruption Affects Sports and the Athlete-Agent Relationship and What Can Be Done to Control It*, 10 *SETON HALL J. SPORT L.* 111, 132 (2000).



non-attorney due to adherence to the Model Rules of Professional Conduct and fear of a malpractice action.”<sup>193</sup> Additionally, even if non-attorneys are held to similar rules, lawyers are subject to an entire body of common law precedent governing their conduct.<sup>194</sup> Due to the tendency of courts to broadly define the unauthorized practice of law, lawyers face strict regulations on their behavior, even when acting in other professional capacities.<sup>195</sup> A major concern of attorney-agents is engaging in the unauthorized practice of law by performing agent duties in states they have not registered as attorneys.<sup>196</sup> This substantially raises the burden of compliance, an unwelcome disincentive for a class of persons highly qualified to serve as effective athlete representatives.

### C. A Culture of Poverty and Entitlement

When asked by a *Sports Illustrated* writer whether he received improper benefits from sports agent Josh Luchs while in college, former University of Southern California wide receiver R. Jay Soward confirmed the allegations, stating, “I would do it again . . . I have four sons, and if somebody offered my son money in college and it meant he didn’t have to be hungry, I would tell him to take it.”<sup>197</sup> In fact, in compiling the story on Luchs, an interesting pattern emerged. Several of the former student-athletes who admitted to receiving money in violation of NCAA regulations “said they took the payments because their scholarship didn’t provide enough money for rent and food.”<sup>198</sup> Luchs himself justified the benefits on similar grounds: “A lot of people around [student-athletes] have money and are going out and enjoying the college experience—a lot of these kids don’t even have enough money to go out and buy groceries . . . clearly, at least in my case, the money served a purpose.”<sup>199</sup>

A recent study conducted by Ithaca College and the National College Players Association (NCPA), an athletes’ advocacy group, showed that “the average ‘full scholarship’ Division I athlete winds up having to pay \$2,951 annually in school-related expenses not covered by grants-in-aid.”<sup>200</sup> At some schools, according to the report, the

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193. *Id.*

194. Geisel, *supra* note 72, at 237.

195. *Id.*

196. *Id.* at 240.

197. Dohrmann, *supra* note 10.

198. *Id.*

199. *Josh Luchs, supra* note 137.

200. Alan Scher Zagier, *Study: Scholarship Athletes Still Pay For School*, ASSOCIATED PRESS (Oct. 26, 2010), <http://abcnews.go.com/Sports/wireStory?id=11969524>.

scholarship and grant shortfall often exceeded the actual cost of tuition, placing a large burden on student-athletes.<sup>201</sup> For the many student-athletes coming to college from disadvantaged backgrounds, accepting improper benefits may be more need than desire.<sup>202</sup> Ramogi Huma,<sup>203</sup> a former football player at the University of California at Los Angeles and founder of the NCPA, commented “[t]he amounts of money [Josh Luchs] talked about giving these players falls within the scholarship shortfalls. . . . These players are putting everything on the line to get a few bucks in order to make ends meet.”<sup>204</sup> Common sense cannot feed hungry college athletes surrounded by invidious individuals with deep pockets.

Yet, student-athletes and their coaches, families, and fans, cannot escape blame for the unethical behavior plaguing college athletics.<sup>205</sup> A sense of entitlement has become an integral part of the sports world, characterized by star athletes consistently hearing about their special gifts and status, and enjoying treatment as though they are not subject to social constraints from a very early age.<sup>206</sup> Contemporary youth athletics goes beyond enjoyment, teamwork, and life experiences, now serving as an ongoing job interview:

Fifth, sixth and seventh grade basketball players are recruited to first play for prestigious boys and girls AAU basketball programs, and then for even more prestigious public and private high schools. Youth soccer players are pressed hard to play for high-profile club teams while 11-, 12- and 13-year-old Little League players are now being pushed to play in weekend showcase events aimed at securing private high school scholarships and impressing an ever-increasing number of college coaches looking to get a jump on their competition.<sup>207</sup>

Eventually, when you tell a young person how superbly extraordinary his talents are, that seeps into his perception of reality as a whole, changing his decision-making calculus substantially.<sup>208</sup> When star

201. *Id.*

202. *See Josh Luchs, supra* note 137.

203. *About the NCPA President*, NAT’L COLLEGE PLAYERS ASS’N , <http://www.ncpanow.org/more?id=0005> (last visited Feb. 14, 2010) (Huma founded the NCPA after witnessing his All-American teammate at UCLA, Donnie Edwards, serve a suspension from the NCAA after receiving \$150 worth of groceries sent by an agent after his scholarship money ran out); *see also* Rob Osborne, *Does the Punishment Fit Football Crimes?*, L.A. TIMES, Nov. 4, 1995, [http://articles.latimes.com/1995-11-04/sports/sp-64625\\_1\\_redondo-beach-donnie-edwards-shawn-walters](http://articles.latimes.com/1995-11-04/sports/sp-64625_1_redondo-beach-donnie-edwards-shawn-walters).

204. Zagier, *supra* note 200.

205. *See* Rosenberg, *supra* note 1.

206. *See* Laurie Nicole Robinson, Note, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1318 (1998).

207. Keith Mills, *Athlete Entitlement Reaches New Heights at the NFL Draft*, PRESSBOX, <http://www.pressboxonline.com/story.cfm?id=6143> (last visited Feb. 14, 2010).

208. *See* Robinson, *supra* note 206, at 1319.

athletes step on a college campus, they witness peers from financially privileged backgrounds for the first time in their lives.<sup>209</sup> After an adolescence of adulation, with few tangible benefits, they often begin to wonder what, if anything, separates their deservedness of needs and luxuries from that of their peers. If they are such great athletes, why are they denied what is freely given?<sup>210</sup> Additionally, many star athletes become focused solely upon developing their professional career, turning their collegiate career into a mere stepping-stone.<sup>211</sup> The isolation of athletes on college campuses only serves to reinforce this special status, incentivizing them to disregard traditional deterrents.<sup>212</sup> With the recent NCAA rulings regarding the eligibility of 2010 Heisman Trophy winner Cam Newton of Auburn and star quarterback Terrelle Pryor of Ohio State, it may appear to student-athletes and commentators alike that even the NCAA bends its rules for a bright enough star.<sup>213</sup>

Agents, of course, fully appreciate student-athletes' vulnerabilities, propensities, and attitudes, not necessarily out of a predatory instinct, but as a necessary corollary to their chosen profession.<sup>214</sup> Nonetheless, a student-athlete's frequently poor background engenders both a lack of sophistication and a need for the bare essentials, making the athlete vulnerable to the agent's recruitment tactic of providing basic necessities.<sup>215</sup> Agents also play to a student-athlete's sense of entitlement, reiterating his special and deserving status, while offering to give the athlete what he truly deserves.<sup>216</sup> Student-athletes may convince themselves that they have earned or deserve benefits, that they will escape punishment, or that they would already be earning the money if not for the college-

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209. See Josh Luchs, *supra* note 137.

210. See Robinson, *supra* note 206, at 1318.

211. RONALD B. WOODS, SOCIAL ISSUES IN SPORT 133 (Human Kinetics 2007).

212. *Id.*

213. See Mark Emmert *Addresses Backlash*, ESPN.COM (Dec. 3, 2010, 11:32 AM), <http://sports.espn.go.com/nfl/news/story?id=5876716> (discussing how Newton was declared ineligible and eligible in a two-day span prior to the SEC Championship, during which it was determined that his father had committed NCAA violations that Newton had not known of or benefitted from—a decision which promoted a significant outcry in college football circles); *Ohio State Football Players Sanctioned*, ESPN.COM (Dec. 26 2010, 10:01 AM), <http://sports.espn.go.com/nfl/news/story?id=5950873> (noting that Pryor has been suspended for the first five games of the 2011 season for receiving improper benefits, but was allowed to compete in Ohio State's nationally televised Sugar Bowl contest against Arkansas, as the NCAA found that he, and four other Buckeyes, had not been adequately educated on NCAA rules.).

214. See Brandon D. Morgan, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, But Remains Safe*, 17 SPORTS LAW. J. 303, 314–15 (2010); see also Willenbacher, *supra* note 12, at 1247.

215. See Josh Luchs, *supra* note 137.

216. See Rosenberg, *supra* note 1.

attendance requirements of professional leagues.<sup>217</sup> Regardless of the ethics of paying college athletes, the current regulatory scheme does little to counteract these pressures and vulnerabilities.

### III. PLAYING COVER FOUR: FOUR SIMPLE STEPS TO HELP ATHLETES AND AGENTS PLAY BY THE RULES

Part II of this Note shows that a unifying force drives the current epidemic facing college athletics today—money. The problem, however, is that money cannot be eliminated, all parties want more of it, and virtually all are willing to bend the rules occasionally in pursuit of it. The question then becomes what logical steps will best correct the inefficiencies and ineffectiveness of the current system, so as to provide better transparency, greater protections to vulnerable student-athletes, and stronger disincentives for rule-breakers moving forward. The ideal solution is multi-faceted, but significantly more consistent than the current regime: a federal licensing system and regulatory agency, statutory causes of action for student-athletes, relaxation of NCAA amateurism regulations, and better reciprocity between the various regulatory bodies.

#### A. Uniform Federal Agent Regulation System

Despite its failure to solve all athlete-agent issues, the UAAA has performed admirably in at least three respects: (1) it partly remedied the compliance disincentives of the prior agent-regulation regime; (2) it prompted state and federal legislators to enact legislation to curb problems arising from agent misconduct; and (3) it began a more focused discourse by providing a blueprint for the proper mechanisms of future agent regulations.<sup>218</sup> However, the greatest problems facing the UAAA regime are what faced the system it replaced—a lack of uniformity, difficulties with compliance, penalties without bite, and apathy towards enforcement.<sup>219</sup> Only a federal scheme can uniformly regulate agents, actively encourage compliance, and dedicate sufficient resources for enforcement. Those states featuring UAAA laws need not rescind it, as the Act could provide a useful monitoring and enforcement supplement to federal regulation. However, two major revisions to the UAAA are necessary: (1) explicit deference to the federal registration and reporting schemes and (2) removal of state application fees.

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217. See Robinson, *supra* note 206, at 1318.

218. See *supra* Part I.B.3.

219. See *supra* Part II.A–C.

The principal component of any comprehensive regulatory scheme should be a national registry of sports agents to streamline the registration process and counteract the existing disincentive to comply with registration provisions.<sup>220</sup> Establishing the Sports Agent Licensing and Oversight Commission (SALOC) by amending SPARTA, while leaving intact the current UAAA/SPARTA agency contract form and disclosure requirements, would provide a centralized mechanism to (1) enforce the registration disclosure requirements of the UAAA; (2) establish a single application process and fee; (3) monitor registered agents; and (4) bring suits, both criminal and civil,<sup>221</sup> against non-registered agents who violate the law. A centralized registration scheme would necessitate some modification in reporting requirements, including a mandate that agents list the states in which they practice, and report any conduct in a non-listed state within a week.<sup>222</sup> As commentators have suggested, a \$2,000 registration fee, plus an annual \$1,000 renewal fee, would serve to effectively screen applications and offset registration costs.<sup>223</sup> The registration fee's screening mechanism would ensure that: (1) violating agents are not judgment-proof; (2) prospective agents understand the seriousness of their commitments under the law; and (3) funds exist to review the qualifications of prospective agents. Also, to further encourage candidate self-selection and prevent judgment-proof defendants, the federal licensing scheme should require a minimum level of bonding or insurance for all registered agents.<sup>224</sup> Although this may raise fees, the overall reduction in paperwork and registration fees provided by the centralized federal licensing scheme would offset any additional costs of compliance.

The next steps, monitoring and enforcement, would require a few more amendments to the existing SPARTA statute.<sup>225</sup> First, Congress should criminalize acting as an agent or entering into any agency agreement without a federal license, absent extenuating circumstances such as administrative delay.<sup>226</sup> Criminal penalties, in contrast to modern regulations, would force agents to weigh the

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220. Willenbacher, *supra* note 12, at 1249–50.

221. This mechanism would not otherwise affect the rights of educational institutions to bring private civil actions, or of student-athletes to bring civil actions. *See supra* Part I.B.2; *see also infra* Part III.B. (discussing changes to student-athlete civil actions).

222. Conduct would necessarily be defined as including actions conducted on behalf of, or in place of, the agent, including that by runners.

223. Remick & Cabott, *supra* note 79, at 20.

224. *See Gray, supra* note 48, at 153.

225. 15 U.S.C. §§7801–08 (2006). The current FTC civil penalties should remain—although the conduct at issue would be under the direct control and investigation of the FSALOA.

226. *See Willenbacher, supra* note 12, at 1250.

prospect of liability more seriously—while fines have not successfully deterred money-driven agents, the prospect of jail time just might.<sup>227</sup> In addition to criminal penalties, the law should also mandate that any commissions or other benefits received by an unlicensed agent (or any intermediary) be forfeited to the SALOC.<sup>228</sup> Likewise, the SPARTA amendments should provide that violations of the UAAA/SPARTA prohibited-conduct sections may result in temporary or permanent revocation of licensure, to prevent agents from benefiting from illegal conduct.<sup>229</sup>

Furthermore, to encourage the sports industry to better police itself, Congress should require professional sports teams and other entities to verify that the athlete-agents with whom they negotiate and contract are federally licensed.<sup>230</sup> The provisions governing agent conduct should conform, as closely as possible, to applicable NCAA regulations,<sup>231</sup> to prevent confusion and enforcement gaps.<sup>232</sup> Finally, Congress should expressly establish that lawyers registered under the federal agent-licensing scheme would not be engaged in the unlicensed practice of law while performing typical sports-agent duties in states where they are not licensed as attorneys, so long as they comply with SPARTA's conduct and registration provisions.<sup>233</sup>

To be effective, both as a regulatory scheme and as a symbolic measure, new legislation must include sufficient funding. Congress should establish a funding program for the states whereby each state that establishes a compliance agency receives minimum federal funding for the program, with matching federal funds for each state-allocated dollar beyond the minimum. State officials would then be the primary investigatory and enforcement arms of the regulatory scheme, bringing claims directly under the state UAAA law, and

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227. See David Brandt, *Law Enforcement Probes NCAA Issues Under Agent Act*, WASH. TIMES (Dec. 8, 2010, 4:17 PM), <http://www.bellinghamherald.com/2010/12/08/1761033/law-enforcement-probes-ncaa-issues.html> (noting that under current laws, a violating agent's "[w]orst case scenario, you're probably looking at a guy getting probation and paying a fine. He'll walk home that day.>").

228. See Willenbacher, *supra* note 12, at 1250.

229. See *id.*

230. See *id.* at 1251 ("While this restriction seems harsh, it does a great deal to protect the athlete at a relatively minor inconvenience for the large corporations or sports franchises that employ them.>").

231. See discussion *infra* Part III.C (discussing possible changes in NCAA athlete-agent regulations).

232. See *Sports Agent Responsibility and Trust Act: Hearing on 107 H.R. 4701 Before the Subcomm. on Commerce Trade and Consumer Prot. of the H. Comm. on Energy and Commerce*, 107th Cong. 20–21 (June 5, 2002) (statement of Howard Beales, Dir. of the Bureau of Consumer Prot. at the Fed. Trade Comm'n) [hereinafter *Commerce Hearing*] (discussing the potential for friction between NCAA regulations and SPARTA's more inflexible requirements).

233. See Geisel, *supra* note 72, at 245–46.

reporting violations to the federal agency. The SALOC should be primarily concerned with registration, reporting, and coordination, with the power to recommend FTC enforcement and criminal actions. This centralized and specialized funding system could counteract the inertia of the status quo, ensuring that compliance at least appears on a state's priority list.

### B. Student-Athlete Statutory Causes of Action

Although the UAAA and SPARTA preserve existing causes of action available under common law, neither explicitly protects the interests of student-athletes by providing a statutory cause of action.<sup>234</sup> A second step toward meaningful reform of the current agent regulation regime would be to provide current and former student-athletes a statutory cause of action against agents who damage their careers, scholarships, or reputations by causing them to lose their collegiate eligibility.<sup>235</sup> Student-athletes stand to lose athletic scholarships, educational opportunities, and the possibility of a professional career, yet are effectively unable to recover because of the difficulty of proving causation by the agent and the doctrine of contributory negligence.<sup>236</sup> A cause of action under SPARTA and the UAAA would overcome these difficulties. A statutory cause of action that precludes contributory negligence or comparative fault as an affirmative defense would provide a direct means of enforcement by the aggrieved party against the unethical agent. Essentially, violation of the relevant provisions would place the burden on agents, who would need more than complicity by the athlete to escape liability.

Facing student-athletes armed with a statutory cause of action and substantial statutory remedies, agents could no longer conceal their wrongdoing behind complicity of student-athletes.<sup>237</sup> Additionally, a civil remedy would permit student-athletes to protect their interests, regardless of whether a criminal or FTC proceeding ensues.<sup>238</sup> Confronted with a reformed statutory scheme, agents weighing the putative costs and benefits of unscrupulous conduct would find far higher costs than current regulations provide. Not all

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234. Gray, *supra* note 43, at 153.

235. See *Judiciary Subcomm. Hearing*, *supra* note 22, at 13 (statement of Scott Boras) (arguing for the propriety and potential effectiveness of a private cause of action for student-athletes).

236. Gray, *supra* note 48, at 153.

237. *Id.*

238. See *Commerce Hearing*, *supra* note 232, at 20–21 (statement of Howard Beales) (proposing that a private right of action could serve to further promote the interests of student-athletes when NCAA and federal regulations may not).

illegal or unethical conduct can be deterred, but a few adjustments would make agents think twice.

*C. Redefining Amateurism and Relaxing Athlete-Agent Conduct Provisions*

Realistic observers of the modern intercollegiate athletics landscape will undoubtedly notice “extraordinary amounts of money changing hands, fierce competition among collegiate athletes for professional opportunities, and the wholesale flouting of many rules that are intended to promote and preserve amateurism.”<sup>239</sup> “For the most talented college athletes, college play can resemble major league tryouts.”<sup>240</sup> Given the stakes and amount of money involved, it should surprise no one that the NCAA is reacting to new varieties of agent misconduct and closing loopholes in existing regulations, rather than consistently pursuing any coherent proactive policy.<sup>241</sup> Essentially, in trying to maintain its traditional concept of amateurism in a distinctly modern age, the NCAA is “governing out of a covered wagon.”<sup>242</sup> The NCAA’s only hope for effective regulation of major college athletics is to recognize “that collegiate sports is now big business . . . that there are a lot of attendant and subsidiary commercial interests . . . that are going to always be out there where they’re not going to be able to regulate them.”<sup>243</sup> In the absence of a coherent process of controlled NCAA deregulation of student-athlete interactions with agents as proposed by this Note, the NCAA’s rules will be frequently flouted and rarely enforced.

Perhaps no NCAA amateurism rule has been as roundly criticized in the past decade as the “no agent” rule, described as “an example of overly restrictive and ineffective rules that define amateurism in a way that is too tightly linked to the ideal of amateurism rather than a description of amateurism based in reality.”<sup>244</sup> The current NCAA regulations are largely silent on permissible and impermissible agent conduct, largely due to the body’s inability to regulate agent conduct directly.<sup>245</sup> Instead, the NCAA’s amateurism distinction turns on whether an agent merely advises a

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239. Fitt, *supra* note 4, at 567.

240. *Id.*

241. *See id.* at 568.

242. *Id.*

243. Symposium, *Are We Playing By the Rules? A Debate Over the Need For NCAA Regulation Reform*, 7 VAND. J. ENT. L. & PRAC. 439, 443–44 (2004) (statement of Linda Bensel-Meyers).

244. Fitt, *supra* note 4, at 569–70.

245. Karcher, *supra* note 34, at 223.



student-athlete ex parte or whether the agent has direct contact with a professional team or executes a written agency agreement.<sup>246</sup> However, as Professor Karcher suggests, “permitting a student-athlete to retain competent representation . . . would not destroy the line of demarcation any more than allowing the student-athlete or the [institution’s] professional sports counseling panel to engage in the same conduct.”<sup>247</sup>

Indeed, it would appear that the NCAA’s idealistic regulations actually tend to subjugate the student-athlete’s best interests in these matters. Student-athletes and their families typically lack the necessary sophistication to sign agency contracts or make sound decisions related to professional prospects.<sup>248</sup> For a student-athlete weighing the costs and benefits, the cost of following the no agent rule is a competitive disadvantage, while the benefit is no liability. Given the minimal risks of enforcement, however, this is hardly a benefit, so the calculus often results in a violation of amateurism rules.<sup>249</sup> Likewise, the no agent rule offers no protection to graduating high school students, especially those selected in the Major League Baseball draft, as they have no access to professional sports counseling panels at NCAA member institutions.<sup>250</sup> However, counseling panels for current student-athletes offer little protection, as generally, panel members are wholly unqualified in athletic-talent evaluation, and a conflict of interest is likely.<sup>251</sup> Thus, the better solution is not to limit a student-athlete’s options, but to enhance them, by allowing agency contracts, albeit with greater oversight.

In *Oliver v. NCAA*, the Ohio Court of Common Pleas, following this line of thought, departed from its long-standing policy of judicial deference to NCAA regulations, declaring the NCAA’s “no agent rule” arbitrary and capricious and issuing a permanent injunction reinstating the eligibility of Oklahoma State pitcher Andrew Oliver.<sup>252</sup> Although the preliminary order was vacated when the case settled, and the NCAA continues to enforce its “no agent rule,” the presiding judge warned the NCAA that its rule may be void.<sup>253</sup> Whatever effect the ruling in *Oliver* may have moving forward, its analysis of the “no

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246. *Id.*

247. *Id.*

248. *See id.* at 224.

249. Fitt, *supra* note 4, at 572.

250. Karcher, *supra* note 34, at 224.

251. *Id.*

252. T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA’s “Veil of Amateurism,”* 35 U. DAYTON L. REV. 175, 177–78 (2010).

253. *Id.* at 178.

agent rule” provides an excellent building-block for effective reform. Specifically, Judge Tone wrote:

For a student-athlete to be permitted to have an attorney and then to tell that student-athlete that his attorney cannot be present during the discussion of an offer from a professional organization, is akin to a patient hiring a doctor but the doctor is told . . . that he cannot be present when the patient meets with a surgeon because the conference may improve his patient’s decision-making power. . . . If the [NCAA] intends to deal with . . . any athlete in good faith, the student athlete should have the opportunity to have the tools present . . . that would allow him to make a wise decision without automatically being deemed a professional.<sup>254</sup>

The NCAA’s purported maintenance of amateurism currently does little more than protect the NCAA’s primary economic interests and isolate student-athletes from competent representation, maintaining a climate in which unethical agents thrive and take advantage of unsophisticated young adults.<sup>255</sup> A broader, more permissive definition of amateurism would enable student-athletes to pursue their self-interest outside of the black market, permitting actual oversight rather than occasional enforcement. Armed with better information and without the prospect of punishment upon discovery, a student-athlete’s interactions with an agent should become more of a legitimate business relationship. The NCAA has established a very narrow definition of amateurism within the permissible bounds of the law; for a more effective, liberalized definition, it need only look to its fellow amateur organizations, including the U.S. Olympic Association and Fédération Internationale de Basketball (FIBA), the governing body of international basketball.<sup>256</sup>

The NCAA should adopt amateurism bylaws similar to those of FIBA, which permits amateur athletes to receive stipends, living expenses, housing, and scholarships, as well as sign agency contracts with straightforward terms.<sup>257</sup> Notably, by removing many of the restrictions that currently plague the system, the NCAA will actively promote informed decision making by its student-athletes and ethical conduct by agents. In place of the current paternalistic rules, the NCAA can better protect both its athletes and its amateur ideal by permitting student-athletes to enter into agency contracts with federally licensed agents, subject to standard terms and conditions.<sup>258</sup>

Standardized contractual forms, such as those maintained by the NFLPA, would serve to replace black-market transactions and

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254. *Oliver v. NCAA*, 920 N.E.2d 203, 214–15 (Ohio Ct. Comm. Pl. 2009).

255. *See Morgan, supra* note 214, at 315.

256. *See Fitt, supra* note 4, at 584.

257. INT’L BASKETBALL FED’N, INTERNAL REGULATIONS: REGULATION H, RULES GOVERNING PLAYERS, COACHES, SUPPORT OFFICIALS, AND PLAYERS’ AGENTS (2010), available at [http://www.fiba.com/downloads/Regulations/170310\\_FIBA\\_Internal\\_Regulations.pdf](http://www.fiba.com/downloads/Regulations/170310_FIBA_Internal_Regulations.pdf).

258. *See Karcher, supra* note 34, at 224.

loose understandings between student-athletes and agents or runners that exist today.<sup>259</sup> Likewise, mandatory reporting requirements would grant NCAA member institutions greater oversight and protect student-athletes, rather than merely seeking to protect the institution from NCAA investigation and sanctions. Colleges and universities would then be able to educate student-athletes and help guide their decisions, rather than forcing them to make decisions on their own, often leading to unscrupulous activities.<sup>260</sup> Prominent sports agent Scott Boras has defended the proposition, stating:

Student athletes and their families rarely understand the complexity of the NCAA and professional sports rules. In most instances, athletes are only left with the information that is given to them by a university or outside counsel. The decision whether to forego a college scholarship and pursue a professional career requires sophisticated analysis and legal counsel.<sup>261</sup>

A related change to current NCAA regulations that would preserve amateurism, protect student-athletes, and recognize the reality of modern intercollegiate athletics would be to permit student-athletes with agency agreements to receive a private loan, cosigned by their agent, not in excess of \$15,000 per year. Although this would not eliminate the provision of improper benefits, it would provide a legitimate outlet to student-athletes with both needs and wants beyond the money provided by their scholarships. The maximum loan amount, albeit arbitrary, would serve two major purposes. First, capping the loan amount would offer some protection to student-athletes by limiting the amount of financial liability incurred while enrolled. Second, the cap would enable the NCAA to maintain some traditional conception of amateurism, as the maximum would realistically mirror a loan amount available to any other student for living expenses.<sup>262</sup>

By cosigning a student-athlete's loan, the agent would enable the student to receive a line of credit, which realistically would make little difference compared to the opportunities available to many other students from wealthier families. Although allowing agents to cosign

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259. *Id.*

260. See UAAA Symposium, *supra* note 138, at 373 (statement of Craig Fenech, sports agent).

261. *Judiciary Subcomm. Hearing, supra* note 22, at 12–13 (statement of Scott Boras).

262. In calculating student eligibility for federal financial aid, the U.S. Department of Education considers a student's cost of attendance, including tuition, room and board (living expenses), books and supplies, etc. U.S. Dep't of Educ., *Student Aid Eligibility*, STUDENT AID ON THE WEB, <http://studentaid.ed.gov/PORTALSWebApp/students/english/aideligibility.jsp> (last updated July 12, 2010). The College Board's base (average) moderate student living expense budget for 2011–12 was \$17,820 for 9 months. *Living Expense Budget 2011*, COLLEGEBOARD, <http://professionals.collegeboard.com/data-reports-research/trends/living-expense> (last visited Mar. 4, 2011).

loans could create new pressures on student-athletes and permit agents to manipulate athletes, as long as the lending process itself is transparent, the loans may counteract some of these pressures. Because the loan would come from a bank, rather than from the agent directly, there would be less potential for abuse: The athlete would owe money to the bank, and the agent would only become responsible for the transaction if the athlete failed to pay the loan. In contrast to contemporary under-the-table payments, there would be nothing in the loan transaction providing the agent leverage vis-à-vis the athlete. The external source of the loan would create greater transparency, ensure repayment of the loan once the student-athlete began his professional career, and render it less of a direct benefit and more of an indirect pre-professional salary.

Additionally, student-athletes and NCAA member institutions should not be punished for an agent's provision of improper benefits to an athlete's family members because, absent proof that the athlete knows about these benefits, they have very little effect on the athlete's amateur status. Instead, the NCAA should turn over such evidence to the appropriate enforcement body to pursue charges. Overall, "the slight differences between student-athletes and other uniquely talented individuals do not justify the NCAA's micromanagement of student-athletes." Only by foregoing measures that tend to stifle the development of proactive self-interested behavior by student-athletes can the NCAA truly provide meaningful regulation.<sup>263</sup>

#### *D. Necessary Reciprocity*

A final part of the solution is for each of the relevant regulatory bodies—Congress, states, the NCAA, and professional players associations—to recognize that their uncoordinated efforts have been largely ineffectual, if not counterproductive. Although each body has similar goals, their competing means, worldviews, and deterrents have contributed to the current reality of non-compliance and non-enforcement.<sup>264</sup> Congress and the states are primarily focused on protecting educational institutions, and, to a lesser extent, athletes.<sup>265</sup> The NCAA's primary interest is in maintaining the ideals of amateur competition.<sup>266</sup> Professional players associations are primarily concerned with protecting the interests of current members.<sup>267</sup> In

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263. See Fitt, *supra* note 4, at 592.

264. See *supra* Part I.B

265. See *supra* Part I.B.3–4.

266. See NCAA BYLAWS, *supra* note 25.

267. See Davis, *supra* note 13.

pursuit of these goals, each body has created disincentives for individuals to comply with its own athlete-agent regulations, for fear of violating a provision of a competing actor in the marketplace.

A recent proposal from the NCAA recommended post-collegiate financial penalties and potential suspensions during a player's rookie year for individual student-athletes who violate the NCAA's eligibility bylaws.<sup>268</sup> Although the NFLPA opposes the imposition of such penalties,<sup>269</sup> the proposal raises interesting possibilities regarding the reciprocity of resources, investigators, and enforcement across all major regulatory actors. The first step is for all major professional players associations to expressly mandate that violators of the amended SPARTA be decertified as union-approved contract advisors.<sup>270</sup> Likewise, the players associations should disqualify any agent who causes an NCAA violation.<sup>271</sup> Essentially, the players associations would act as an enforcement body for both SPARTA and the NCAA, serving both the players' interests in preserving athletic integrity and the quality of union-certified agents.<sup>272</sup> The NCAA, players associations, and state and federal law enforcement officials should memorialize a commitment to share information and resources in investigating agent misconduct.

To ensure effective enforcement, the proposed legal scheme should also provide whistleblower protection. Although NCAA institutions, student-athletes, and other agents may suffer the harm of agent misconduct, the potential drawbacks of bringing the misconduct to light currently outweigh the benefits in most situations.<sup>273</sup> As previously discussed, athletes are reluctant to bring agent misconduct to the attention of their players' union, for fear of NCAA investigations and sanctions imposed on their former schools.<sup>274</sup> NCAA institutions hesitate to pursue criminal charges, for fear of NCAA reprisal.<sup>275</sup> Agents rarely report NCAA violations, for fear of retribution.<sup>276</sup> In the absence of public and private coordination, agent misconduct will continue to escape punishment. As such, current or former student-athletes and NCAA institutions that expose agent misconduct should at least face reduced sanctions

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268. Joe Schad, *Financial Penalties for Players Possible*, ESPN.COM (Oct. 26, 2010, 6:22 PM), <http://sports.espn.go.com/nfl/news/story?id=5725836>.

269. *Id.*

270. *See Gray, supra* note 48, at 154.

271. *Id.*

272. *See id.*

273. *See Willenbacher, supra* note 12, at 1246.

274. Davis, *supra* note 13, at 823.

275. *See Yanda, supra* note 148.

276. Davis, *supra* note 13, at 823.

from the NCAA due to their cooperation. However, post-NCAA financial penalties should be recoverable from former student-athletes who refuse to cooperate with NCAA investigations. Professional sports franchises should take it upon themselves to report to the NCAA and the SALOC any dealings they have with student-athletes and agents. Finally, the SALOC and the players unions should develop an anonymous reporting mechanism for agents wishing to report the misconduct of their peers, so as to initiate investigations without fear of reprisal. Until the relevant actors “come together and decide that they’re going to share information and find one common goal, they’re going to be working against each other.”<sup>277</sup>

#### IV. CONCLUSION

The myriad of rules developed by the NCAA, state and federal legislatures, and professional players unions regulating athlete-agents have resulted in a disproportionate burden on unsophisticated student-athletes and ineffective enforcement of agent misconduct.<sup>278</sup> The current system effectively curtails student-athlete autonomy, while creating disincentives for agents to comply with the relevant regulations.<sup>279</sup> The problems posed by the current system are only compounded by the media scrutiny of modern intercollegiate athletics, with relatively minimal coverage of unscrupulous agents.

Modern society holds student-athletes in high regard for their on-field accomplishments; however, it also seems to hold student-athletes to higher standards than their peers for their off-field conduct.<sup>280</sup> Because of this concurrent coddling and scrutinizing, college athletes are subjected to pressures above and beyond the classroom and playing field that often contribute to unwise decisions.<sup>281</sup> Unsophisticated and unprotected, student-athletes must avoid compensation to maintain eligibility, while earning money for the NCAA and their universities.<sup>282</sup> Unless the realities of modern intercollegiate athletics replace outdated ideals as the basis for regulation, regulatory schemes will continue to leave student-athletes

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277. *Josh Luchs, supra* note 137.

278. *See supra* Part II.

279. *Id.*

280. *See* Robinson, *supra* note 206, at 1323 (noting that “the media have become more critical and are now quick to tear down the pedestals on which they help place . . . athletes.”).

281. *See* SOPHIA JOWETT ET AL., SOCIAL PSYCHOLOGY IN SPORT 270–71 (Human Kinetics 2007) (describing the importance of social norms and environment in moral decision making of athletes).

282. *See* Morgan, *supra* note 214, at 315.

unprotected from unscrupulous agents, regardless of the source of regulation or available penalties.

The current regime regulating athlete-agent registration, recruitment practices, and student-athlete amateurism needs a full-scale overhaul. Current regulations signal that all agents are dirty, but that young, unsophisticated student-athletes must stand as beacons of integrity. By centralizing the registration process and providing greater transparency and autonomy in the agent selection and retention process, regulators may begin to reflect reality in the law. Until that point, intercollegiate athletics will continue to be an elaborate lie, and the biggest losers are the ones who play the games.

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