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COMMENTS

LEVELING THE PLAYING FIELD— BALANCING STUDENT-ATHLETES’ SHORT- AND LONG-TERM FINANCIAL INTERESTS WITH EDUCATIONAL INSTITUTIONS’ INTERESTS IN AVOIDING NCAA SANCTIONS*

J. G. JOAKIM SOEDERBAUM**

I. INTRODUCTION

Johnny Manziel, the 2012 Heisman Trophy winner—who is also known as “Johnny Football”—generated \$37 million in media exposure for Texas A&M during his first year of playing, so far injury-free, but also per National Collegiate Athletics Association (NCAA) regulations, profit-free.¹ In contrast, with only nine minutes left of a game, Alabama junior wide receiver Tyrone Prothro, who had already caught seven balls for 134 yards and made

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** Third-year student at Texas A&M University School of Law and Editor-in-Chief of the *Texas A&M Law Review*. The Author would like to thank Professor of Law Frank Snyder for many thought-provoking and inspiring conversations; Patricia J. Askew, staff attorney to Justice Bob McCoy at the Court of Appeals, Second District of Texas, Fort Worth, for providing invaluable feedback and perspective; fellow Texas A&M law students Jessica Theriot and Andrew Middleton for proofreading; and the members of the National Sports Law Institute and the *Marquette Sports Law Review* for this opportunity and honor.

1. *Study: End of Football Season Produced \$37 Million in Media Exposure for Texas A&M*, AGGIEATHLETICS.COM (Jan. 18, 2013), http://www.aggieathletics.com/ViewArticle.dbml?SPSID=632660&SPID=93232&DB_LANG=C&DB_OEM_ID=27300&ATCLID=206020080 [hereinafter *Study*]. At the time this Comment was selected for publication, Johnny Manziel was not yet eligible to declare for the NFL draft; however, on January 8, 2014, he announced, “After long discussions with my family, friends, teammates, and coaches, I have decided to make myself available for the 2014 NFL Draft. The decision was not an easy one.” Chase Goodbread, *Johnny Manziel Announces Decision to Enter 2014 NFL Draft*, NFL.COM (Jan. 8, 2014), <http://www.nfl.com/news/story/0ap2000000310869/article/johnny-manziel-announces-decision-to-enter-2014-nfl-draft>; Billy Liucci, *To the 12th Man: A Personal Message from Johnny Manziel*, TEXAGS (Jan. 8, 2014), <http://texags.com/Stories/12609>; see *infra*, Parts II.C.1, III.B.2. Despite Manziel’s decision, his story—as used in this Comment—highlights many of the current regulatory shortcomings that must be addressed.

two touchdowns, snapped two bones when a defender crashed into him,² resulting in his fall from the Heisman watch list, several surgeries, two years of rehabilitation, and no reasonable hope of returning as a professional football player.³

Manziel, Prothro, and other student-athletes are at the mercy of strict NCAA regulations that favor the NCAA and its member institutions, even though developed to protect both the institutions *and* the student-athletes.⁴ The present system's focus on "amateurism" is poorly designed to protect all of the parties involved when a student-athlete's expectations of a future sports career can vanish in the blink of an eye—or the snap of a bone—with no real recourse. While no rules can completely prevent horrific injuries, some fundamental changes to current legislation and regulations would provide student-athletes a fair opportunity to make their own decisions about their careers and capitalize on their successes while they are physically capable of doing so and, at the same time, protect universities facing heavy NCAA sanctions as a result of violations, as well as prevent needless litigation.

This Comment will argue that a few changes can vastly improve the student-athletes' precarious situation while also protecting the educational institutions that are subject to the NCAA's sanctions in a straightforward four-part solution: (1) a student-athlete should not forfeit his or her amateur status until actually entering into an agreement with, or receiving benefits from, a professional team; (2) the professional leagues should lift any restrictions preventing student-athletes from signing with a professional team; (3) the legislation governing a student-athlete's transition from college to professional sports should directly include the professional team; and (4) the legislation

2. Clay Travis, *Tyrone Prothro, Former Alabama Star Turned Bank Teller*, AOLNEWS.COM (Sept. 30, 2010), <http://www.aolnews.com/2010/09/30/five-years-later-ex-alabama-star-tyrone-prothro-is-cashing-check/>.

3. Jason Galloway, *Prothro Still Believes*, CRIMSON WHITE (Sept. 30, 2010), <http://cw.ua.edu/2010/09/30/prothro-still-believes/>; Travis, *supra* note 2; *see also infra* Part II.D. (discussing the already limited chance for a college player to reach the professional leagues). Five years later, the twenty-six-year-old former college football star-turned-bank teller still hoped to play football again, however unlikely that dream might be. *See* Galloway, *supra*.

4. Richard Salgado, *A Fiduciary Duty to Teach Those Who Don't Want to Learn: The Potentially Dangerous Oxymoron of "College Sports,"* 17 SETON HALL J. SPORTS & ENT. L. 135, 147–48 (2007); *see also* W.J. TAUZIN, COMM. ON ENERGY & COMMERCE, H.R. REP. NO. 108-24, pt. 1, at 1–2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 1016, 1017; Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 172–74 (2013); 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, 12 (2005); 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, 279 (2001).

should impose a duty upon the professional team to report to the educational institution when one of the institution's athletes, or his or her representative, communicates with the team. Collectively, these changes would create a more balanced system that fosters compliance and, consequently, decreases the need for enforcement and the often-resulting litigation.⁵

II. MAIN PARTIES

On December 28, 1905, sixty-two educational institutions formed the Intercollegiate Athletic Association of the United States (IAAUS) to "protect young people from the dangerous and exploitive athletics practices of the time."⁶ In 1910, the IAAUS became the NCAA.⁷ As intercollegiate sports grew more popular, the NCAA, in 1948, established guidelines for recruiting and financial aid⁸ and later developed restrictions on student-athletes and educational institutions⁹ before it transformed into the multi-billion dollar franchise that exists today.¹⁰

In contrast to the development of student leagues on university campuses, characterized by voluntary, unpaid participation, professional sports ultimately became characterized by the payment of athletes for performance¹¹ and their

5. See *infra* notes 119–23 and accompanying text.

6. *History: Pre-1950*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History> (last updated August 13, 2012). The first intercollegiate football game took place in 1869 between Rutgers and Princeton. Early football, circa 1869, differed vastly from today's football: due to the game's physical character and minimal protective equipment, players suffered "wrenched spinal cords, crushed skulls and broken ribs that pierced their hearts." Christopher Klein, *How Teddy Roosevelt Saved Football*, HIST. HEADLINES (Sept. 6, 2012), <http://www.history.com/news/how-teddy-roosevelt-saved-football>; Dan Jenkins, *The First 100 Years*, SPORTS ILLUSTRATED, Sept. 15, 1969, at 46, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1146646/index.htm>. In 1904, there were eighteen recorded football deaths and 159 serious injuries, followed by 19 deaths and 137 serious injuries in 1905. Klein, *supra*.

7. *History: Pre-1950*, *supra* note 6.

8. *Chronology of Enforcement*, NCAA.ORG, <http://archive.is/Ea1B> (last updated Mar. 21, 2011). The NCAA had a "high standard of personal honor, eligibility and fair play" and a strong commitment to amateurism. *Id.* Originally allowing the member institutions to be self-regulatory created a conflict of interest and, in 1948, the NCAA adopted the "Sanity Code," which strictly regulated financial aid, recruiting, academic standards, institutional control, and amateurism. *Id.* The Sanity Code was repealed in 1951 due to concerns with the limits on financial aid, recruiting, and the severe consequences for violations. *Id.* In 1952, the NCAA adopted a new code, which then kept developing into the 2000s. *Id.*

9. *History Pre-1950*, *supra* note 6.

10. See *infra* Parts II.A.–B.; Chris Smith, *College Football's Most Valuable Teams*, FORBES (Dec. 22, 2011), <http://www.forbes.com/sites/chris-smith/2011/12/22/college-footballs-most-valuable-teams/>.

11. Compare *Chronology of Enforcement*, *supra* note 8 (emphasizing the "pure" amateur characteristics of collegiate sports), with Peter Morris, *From First Baseman to Primo Basso: The Odd*

concomitant need for representation by agents in negotiating with team owners.¹² As collegiate and professional sports grew, the primary parties relevant to student-athletes' transition between the two became the NCAA, the NCAA member institution, the agent, and sometimes a legal team.¹³

A. *The National Collegiate Athletic Association*

As a private organization, the NCAA has authority to regulate only its member institutions and its student-athletes.¹⁴ The NCAA's stated goal and fundamental purpose is to make a clear distinction between professional sports and intercollegiate sports by enforcing the "amateur" nature of intercollegiate sports.¹⁵ The NCAA oversees eighty-nine national championships covering

Saga of the Original Pirate King (Tra La!), 15 NINE: J. BASEBALL HIST. & CULTURE, 46, 48 (2007) (explaining how money soon became a regular part of professional sports). In 1859, the Excelsior Club of Brooklyn paid baseball pitcher James "Jim" Creighton, one of the first professional athletes in America, \$500 per year to sign with the team. Morris, *supra*, at 48; *Early Baseball Milestones: 1860.7*, MLB.COM: BASEBALL MEMORY LAB, <http://mlb.mlb.com/memorylab/chronology/index.jsp?start=1826&end=1870> (last updated Mar. 12, 2012). Other teams soon followed Excelsior's example, and players wanted their share of the money team owners made from the games. Bob Liff, *New Field and New Dreams Borough Has Rich Tradition*, NY DAILY NEWS (Aug. 29, 2000), <http://www.nydailynews.com/archives/boroughs/new-field-new-dreams-borough-rich-tradition-article-1.883241>. In 1869, the Cincinnati Red Stockings was the first team to openly admit that it paid all of its players. *Id.*

12. See Edelman, *supra* note 4, at 151–52. The first recorded case of outside representation dates back to 1925, when Charles Pyle, representing football running back Harold "Red" Grange, negotiated a contract with the Chicago Bears worth close to \$10,000 per game—plus a potential bonus based on an increase in the Bears' game attendance. Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 344 n.26 (2010). Not until the late 1960s, when the players gained leverage by unionizing and increased complexity to collectively negotiated agreements, did the role of the agent rapidly grow in importance. *Symposium: The Uniform Athlete Agents Act*, 13 SETON HALL J. SPORT L. 345, 355 (2003) [hereinafter *Symposium*].

13. See *Symposium*, *supra* note 12, at 368. Of course, other parties, such as state and federal government and professional player associations, coaches, alumni, and supporting booster clubs, may have individual and more attenuated interests in the regulation of student-athletes, but this Comment will focus solely on the parties directly involved in a college athlete taking the step from collegiate athletics to professional sports. See Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 526–28 (2011); *Symposium*, *supra* note 12, at 368.

14. Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 806–07 (2006) [hereinafter Davis, *Regulating the Athlete-Agent Industry*].

15. See 2013–14 NCAA DIVISION I MANUAL, art. 1.2–1.3 (2013) [hereinafter NCAA MANUAL] ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."). Although each of the three available NCAA divisions "creates its own rules governing personnel, amateurism, recruiting,

twenty-three sports and governs more than 430,000 student-athletes competing in three divisions at more than 1,000 colleges and universities.¹⁶

While allowing student-athletes to negotiate with professional teams,¹⁷ the NCAA has implemented regulations that render student-athletes ineligible for future participation in intercollegiate play after agreeing to be represented by an athletic agent or accepting gifts from an agent, based on the notion that doing so would violate its principle of amateurism.¹⁸ Ultimately, the NCAA regulations render student-athletes ineligible if they accept 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 or she has no interest in representing the student-athlete”¹⁹ Underlying the regulations is the presumption that any benefits received by student-athletes are based on athletic ability and therefore unavailable to the general student body.²⁰

To identify the limits to paying student-athletes that are necessary for the college sports model to succeed, the NCAA defines “pay” as “the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.”²¹ The NCAA may also render “a student-athlete ineligible if the [student-athlete’s] family or friends accept benefits from the agent.”²² The regulations also allow the NCAA to impose severe penalties on its member institutions for playing an ineligible athlete, including vacated wins and revenue forfeitures.²³

eligibility, benefits, financial aid, and playing and practice seasons – consistent with the overall governing principles of the Association,” this Comment focuses on the NCAA’s overall governing principle of amateurism and how it is portrayed in Division I. *About the NCAA*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW> (last updated Aug. 13, 2012).

16. *About the NCAA*, *supra* note 15.

17. See NCAA MANUAL, *supra* note 15, art. 12.2.4.3 (“[T]he individual, his or her legal guardians or the institution’s professional sports counseling panel may enter into negotiations with a professional sports organization without the loss of the individual’s amateur status.”).

18. Sudia & Remis, *supra* note 4, at 268–69; R. Alexander Payne, Note, *Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game*, 13 VAND. J. ENT. & TECH. L. 657, 662 (2011). The NCAA renders ineligible a student-athlete who “ever 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.” NCAA MANUAL, *supra* note 15, art. 12.3.1.

19. NCAA MANUAL, *supra* note 15, art. 12.3.1.2.

20. See *id.* art. 12.3.1.2(a).

21. *Id.* art. 12.02.7.

22. Davis, *Regulating the Athlete-Agent Industry*, *supra* note 14, at 806.

23. See NCAA MANUAL, *supra* note 15, art. 19.1, 19.9.5–19.9.8. In 2010, the NCAA imposed postseason bans, vacated wins, scholarship reductions, revenue forfeitures, and probation on the University of Southern California following then student-athletes Reggie Bush and O.J. Mayo

The scope of the regulations is broad: all agent contracts presumably apply to all sports in which a student-athlete participates and therefore cause a loss of remaining eligibility in all of those sports unless otherwise clearly stated in the contract.²⁴ The regulations also cover agreements regarding future representation, including by lawyers with regard to contract negotiations.²⁵ An exception to the rule allows student-athletes to retain an advisor to the extent that the advisor does not in any form represent the student-athlete in, or is present during, the negotiations.²⁶ These regulations create a situation in which student-athletes and their guardians may interact and even negotiate with professional teams on their own without risk losing any remaining eligibility, but without any professional guidance during the actual negotiations.²⁷ The regulations also allow NCAA member institutions to establish a professional sports counseling panel to aid student-athletes by providing traditional agent functions, and NCAA head coaches may perform many of the same services as long as the coach follows the NCAA's reporting requirements and receives no compensation from an agent for the services.²⁸

The NCAA's approach to defining amateurism does not address the core issue, "which is to identify the limits to paying student-athletes that are necessary for the college sports model to succeed."²⁹ The "college sports

interactions with athlete agents. Payne, *supra* note 18, at 659.

24. NCAA MANUAL, *supra* note 15, art. 12.3.1.

25. *See id.* art. 12.3.1.1.

26. *Id.* art. 12.3.2 (allowing student-athletes to secure advice from a lawyer concerning a proposed professional contract, provided that the lawyer does not actually represent the student-athlete in the negotiations); *id.* art. 12.3.2.1 (having a lawyer present during the discussion of a contract offer with a professional sports organization is considered agent representation).

27. *Id.* art. 12.3.2; Payne, *supra* note 18, at 663.

28. NCAA MANUAL, *supra*, note 15, art. 11.1.3.1, 12.3.4.

29. Jon Solomon, *Expert Report in Ed O'Bannon Lawsuit Argues NCAA Members Engage in 'Price Collusion'*, AL.COM (Oct. 22, 2012), http://www.al.com/sports/index.ssf/2012/10/expert_report_in_ed_obannon_la.html [hereinafter Solomon, *Expert Report in Ed O'Bannon Lawsuit*] (quoting Stanford University economics professor emeritus Robert Noll); *see also* NCAA MANUAL, *supra* note 15, art. 1.3 ("A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."). In September 2013, Electronic Arts Sports and Collegiate Licensing Company settled all claims over the use of college athletes' names, images, and likenesses, but the remaining defendant, the NCAA, announced that it was not interested in a compromise and would not hesitate to fight the matter all the way to the United States Supreme Court to defend its product. *See* Jon Solomon, *EA Sports and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains as Lone Defendant*, AL.COM, http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html (last updated Sept. 28, 2013) (quoting plaintiff's lead attorney Michael Hausfeld, "The NCAA has never made any indication that they are intent on doing anything other than taking their association over the cliff if necessary.").

model” requires a player to be a student first and athlete second,³⁰ despite the individual physical risks that a student-athlete takes.³¹ And it appears safe to say that the model is broken, at least from the spectator’s perspective. For example, “despite fans knowing Ohio State players violated NCAA rules and were playing in the game after receiving impermissible benefits, the Sugar Bowl drew twenty-five percent more viewers than the previous year.”³² The violations of rules deemed necessary to secure success for the college sports model “[did] not appear to have had any effect on the demand for this game.”³³ In contrast, the strict NCAA definition of amateurism appears to restrict student-athletes’ opportunities more than those of regular students and declares students entering into agreements with agents ineligible for purposes of athletic participation.³⁴ Because the current rules are so strict, many student-athletes, particularly those who come from poor economic conditions, feel forced to accept or even solicit benefits from agents.³⁵ Additionally, several student-athletes have chosen to challenge the NCAA’s strict regulations and eligibility requirements in court.³⁶

B. The NCAA Member Institution

Over 1,200 educational institutions hold some form of membership with the NCAA, which, as introduced above, places many restrictions on its member institutions and their student-athletes.³⁷ Many factors can motivate a university to field athletic teams and, consequently, to agree to comply with NCAA regulations. High-visibility athletic programs may increase the university’s reputation, and successful athletic programs may increase a university’s popularity among applicants, allowing the university to be more

30. *Remaining Eligible*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Eligibility/Remaining+Eligible/Amateurism> (last updated May 31, 2012) (“In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.”).

31. See Travis, *supra* note 2.

32. Solomon, *Expert Report in Ed O'Bannon Lawsuit*, *supra* note 29. Six Ohio State players were found to have violated NCAA rules by selling championship rings, jerseys and trinkets for reduced prices on tattoos and money. The NCAA suspended the players for the start of the 2011 season rather than immediately for the Sugar Bowl that ended the 2010 season. *Id.*

33. *Id.*

34. See NCAA MANUAL, *supra* note 15, art. 12.3.1.

35. Payne, *supra* note 18, at 687; see also Josh Luchs: States Must Enforce Laws, ESPN, <http://sports.espn.go.com/ncf/news/story?id=5681002> (last updated Oct. 13, 2010) (describing how sports agent Josh Luchs gave student-athletes money for food).

36. See *infra* notes 120–24 and accompanying text.

37. See 2008–09 NCAA MEMBERSHIP REPORT 4–5 (2009); *Enforcement*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/index.html> (last visited Dec. 18, 2013).

selective in admissions.³⁸ Further, popular and successful athletic programs generate significant revenue.³⁹ For example, The University of Texas football team ranks as college football's most valuable team, with a 2011 value of \$129 million.⁴⁰ Overall, the twenty highest-ranked teams had an average value of \$83 million, up from \$68 million in 2007.⁴¹ The increase is largely due to multi-million dollar TV-rights agreements.⁴²

The NCAA can sanction a member institution through fines, suspensions, forfeiture, or restrictions if it finds that the institution has violated NCAA regulations.⁴³ However, because the success of a university's former players who became professional athletes may affect its ability to recruit new student-athletes,⁴⁴ many universities, rather than isolating their student-athletes from agents, have enacted specific guidelines to exert varying degrees of control over student-agent contact.⁴⁵ Such guidelines may consist of requirements that an agent provide the university's compliance office with all materials the agent sends to the student-athlete; that the agent schedule meetings with a

38. Moore, *supra* note 13, at 524.

39. *Id.*; *see infra* notes 167–171 and accompanying text.

40. Smith, *supra* note 10. The University of Texas had a football profit of \$71 million for the 2010 season despite not making a bowl game and, thus, missing out on up to an additional \$22.3 million. *Id.*; Chris Greenberg & Chris Spurlock, *Bowl Game Payouts Map: Money Earned in 2011–2012 BCS and Other Football Bowls (INFOGRAPHIC)*, HUFFPOST SPORTS, http://www.huffingtonpost.com/2011/12/29/bowl-game-payouts-map-2011-2012-bcs_n_1174808.html (last updated Aug. 7, 2012). Its football program generated \$96 million in revenue. Smith, *supra* note 10. In addition, The University of Texas landed a landmark twenty-year deal, worth a total of \$300 million, to launch a cable channel with Disney-owned ESPN and IMG College. *Id.*

41. Smith, *supra* note 10. In 1994, colleges generated \$2.5 billion in retail sales of merchandise bearing their names, logos, and mascots; and many of the most successful college athletics programs entered into multi-million dollar deals with major apparel manufacturers such as Nike and Reebok. Timothy Davis, *African-American Student Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 214–15 (1996) [hereinafter Davis, *Marginalizing the NCAA Regulatory Structure*].

42. Smith, *supra* note 10. TV-rights agreements provided an average revenue growth of \$6 million per team over the last two seasons. *Id.* ESPN annually pays \$60 million to the Big 12 and \$10 million to the Big Ten for first-tier TV rights. *Id.* In 2008, CBS and the SEC agreed to a deal worth approximately \$825 million over fifteen years. *Id.* In 2011, FOX and the Big 12 revealed a new thirteen-year cable deal worth \$1.17 billion over the length of the agreement. *Id.* Also in 2011, the Pac-12 agreed to terms with both ESPN and FOX to establish the richest media rights deal in college sports—the contract is worth \$225 million per annum for twelve years. *Id.* The NCAA will be paid nearly \$11 billion over fourteen years just for the TV rights to March Madness. Ben Steverman et al., *The Real Cost of March Madness*, BLOOMBERG (Mar. 21, 2012), <http://www.bloomberg.com/consumer-spending/2012-03-21/the-real-cost-of-march-madness.html#slide10>. The NCAA then distributes money to its member institutions. *The NCAA Budget: Where the Money Goes*, NCAA.ORG (Oct. 15, 2013), <http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes>.

43. *See* NCAA MANUAL, *supra* note 15, art. 19.9.

44. Moore, *supra* note 13, at 544.

45. *Id.*

student-athlete through the head coach; that a member of the student-athlete's coaching staff is present during any meeting; and that agents may meet with student-athletes only on certain days or during designated windows during the spring semester.⁴⁶

C. Professional Leagues and Agents

1. The Professional Leagues

For purposes of this Comment, the most relevant professional leagues are the National Football League (NFL),⁴⁷ the National Basketball Association (NBA),⁴⁸ and Major League Baseball (MLB),⁴⁹ which collectively generated over \$19 billion in revenues in the 2011–2012 season—despite the NBA season being shortened due to a labor dispute.⁵⁰ Similar to the NCAA, these organizations also place restrictions on student-athletes, some of which generate litigation.⁵¹

The NFL requires an athlete to be either out of high school for three years or to have finished at least three college football seasons before entering the league,⁵² aiming to protect:

1. Players who are less physically and psychologically mature from heightened risk of injury;
2. The NFL's entertainment product from the negative consequences associated with such injuries;
3. The NFL teams from costs and liability associated with such injuries; and
4. Young players from self-abuse⁵³ in an attempt to reach the NFL early.⁵⁴

NFL regulations allow teams to sign players to their practice squads,⁵⁵ but a

46. *Id.* at 544–46.

47. *NFL*, NFL.COM, <http://www.nfl.com> (last visited Dec. 18, 2013).

48. *NBA*, NBA.COM <http://www.nba.com> (last visited Dec. 18, 2013).

49. *MLB*, MLB.COM <http://mlb.mlb.com/home> (last visited Dec. 18, 2013).

50. *Sports Industry Overview*, PLUNKETT RES., <http://www.plunkettresearch.com/sports-recreation-leisure-market-research/industry-statistics> (last visited Dec. 18, 2013).

51. *See infra* notes 58–60 and accompanying text.

52. *National Football League Eligibility Rules*, NFL REGIONAL COMBINES, <https://www.nflregionalscombines.com/Docs/Eligibility%20rules.pdf>. (last visited Dec. 18, 2013)

53. Namely, overtraining and steroid use. *Clarett v. NFL*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124, 125–26 (2nd Cir. 2004).

54. *Id.*; *see infra* notes 56–61 and accompanying text.

55. NFL, COLLECTIVE BARGAINING AGREEMENT, art. 33, § 1(a) (2011) [hereinafter NFL CBA].

player has to satisfy the fundamental draft requirements to qualify.⁵⁶ In 2003, after having been suspended by the university for accepting extra benefits,⁵⁷ then-Ohio State running back Maurice Clarett challenged the NFL eligibility rules on antitrust grounds.⁵⁸ The Second Circuit noted that it was undisputed that Clarett was “an accomplished and talented *amateur* football player”⁵⁹ and held in favor of the NFL, stating, “[t]his lawsuit reflects simply a prospective employee’s disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment.”⁶⁰

Other sports have less strenuous restrictions on players’ draft eligibility.⁶¹ For example, the NBA requires an athlete to be at least nineteen-years-old and to be at least one year removed from high school before the athlete may enter the draft.⁶² The MLB rules are even more lenient; players do not actively enter the draft.⁶³ Rather, high school graduates who have not yet attended college and college players who have completed their junior year or turned twenty-one are eligible to be drafted by a MLB team in the yearly draft.⁶⁴

2. Agents

Often labeled as “the bad guy,”⁶⁵ agents are familiar with the numbers discussed above and have experience in exploring the choices and leverage available to the student-athletes.⁶⁶ Student-athletes work with agents to bridge the gap in contract negotiation expertise between the athlete and a professional

56. *Id.* art. 6, § 2(d).

57. Mike Freeman, *Football; Buckeyes Suspend Clarett for Year*, N.Y. TIMES (Sept. 11, 2003), <http://www.nytimes.com/2003/09/11/sports/football-buckeyes-suspend-clarett-for-year.html>.

58. *Clarett*, 369 F.3d at 125.

59. *Id.* at 126, n.2 (emphasis added).

60. *Id.* at 143.

61. See NBA & NBPA, CBA 101: HIGHLIGHTS OF THE 2011 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION (NBA) AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION (NBPA) 25 (2012) [hereinafter NBA CBA 101]; *First-Year Player Draft: Official Rules*, MLB.COM: EVENTS, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last updated May 14, 2013).

62. NBA CBA 101, *supra* note 61, at 25; see also Salgado, *supra* note 4, at 146.

63. See *First-Year Player Draft: Official Rules*, *supra* note 61; Robert Rosner, *NCAA’s Stance on MLB Draft Is Its Best Towards the Big Three*, SEBASTIAN’S CORNER (June 21, 2011, 10:00 AM), <http://umesls.tumblr.com/post/6755412125/ncaas-stance-on-mlb-draft-is-its-best-towards-the-big>.

64. *First-Year Player Draft: Official Rules*, *supra* note 61.

65. See generally *Symposium*, *supra* note 12, at 346 (referring to legislation designed to protect “the welfare of both student athletes and academic institutions by policing the activities of athlete agents”).

66. *Id.* at 355.

club.⁶⁷ The athlete-agent market has grown increasingly competitive due to an increase in the number of agents,⁶⁸ an increase in professional player salaries,⁶⁹ and industry consolidation.⁷⁰ Given the many agents competing to represent a limited number of athletes and the earning potential for those agents who land clients, unethical, or even illegal, conduct has become more common.⁷¹ In an attempt to provide better protection for student-athletes and universities, many states began enacting legislation to govern the actions of athlete agents,⁷² but many of these statutes, which were rarely enforced,

67. *Id.*

68. Davis, *Regulating the Athlete-Agent Industry*, *supra* note 14, at 793. For example, in 2006, there were 350 agents and 400 players in the NBA; 150 agents and 700 players in the NHL; 900 agents and 1,900 players in the NFL; and 300 agents and 1,200 players in the MLB. *Id.* An NFL study showed that by 2003, 50% of the agents had no clients, and a 2006 estimate suggests that less than 10% of the NFL agents can make a living solely from agent representation. *Id.* at 794.

69. *Id.* at 794. Television contracts, merchandising, and union-negotiated favorable minimum salaries have led to a significant increase in player salaries. *Id.* In 1983, the number one NFL-draft pick, John Elway, received a \$1 million signing bonus. *Id.* In 2004, the number-one pick, Carson Palmer, received \$10 million. *Id.* at 795. As a direct result of the increasing player salaries, the potential earnings for an agent have greatly increased. *Id.* at 796. In 2005, the NFL, NBA, NHL, and MLB players earned a total of \$7.685 billion, of which agents received \$385 million. *Id.* at 797.

70. *Id.* at 799. As the athlete-agent industry has become part of the larger entertainment industry, the potential services provided by agents have increased both in number and complexity. *Id.* at 791. As athletes identify the particular services required—generally, well beyond the scope of negotiating a contract—many of them now look to work with more than one agent. *Id.* at 792. Today, typical agent functions include: contract negotiations; medical-needs assessment; career counseling, legal consultation; post-career planning; money management; and off-the-field counseling. Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349, 351–52 (1997) (“Regarding money management, the measure of success for an agent should be the athlete’s financial security at retirement.”).

71. Edelman, *supra* note 4, at 152–54; *see also* Davis, *Regulating the Athlete-Agent Industry*, *supra* note 14, at 801. Some agents would more or less do anything to gain an advantage, including offering money to induce amateur athletes to secure clients and a better cut of any professional earnings the athlete may collect down the road. Edelman, *supra* note 4, at 153. Others have prioritized their own cut before the athlete’s terms, negotiated with teams in which the agent had a direct financial interest, or even served as the president for the team with which the athlete was negotiating. *See* Brown v. Woolf, 554 F. Supp. 1206, 1207 (S.D. Ind. 1983) (agent negotiated down player’s benefits but retained his own full portion); *see also* Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542, 546 (E.D. Mich. 1984) (agent did not follow common practices because agent wanted player to sign with the team he owned).

72. Because of the increasing unethical behavior, ethical sports agents and NCAA were proponents of statutory law governing the sports agents. The drafting of the Uniform Athlete Agents Act (UAAA) began in 1996 at the urging of Florida State University president Sandy D’Alemberte. *Symposium*, *supra* note 12, at 359. Several of the seventeen drafters on the committee had direct ties to the NCAA; none of the committee members were professional athletes or recent college athletes. *Id.* at 360; Edelman, *supra* note 4, at 168–69. The sports agents recognized a need to stop the downward ethical spiral, and the NCAA recognized an opportunity to curtail payments between agents and student-athletes in violation of NCAA’s principle of amateurism. Edelman, *supra* note 4, at 166–67.

conflicted with NCAA regulations.⁷³ For example, by completely prohibiting agents and student-athletes from interacting with each other, some state statutes removed the few protections for student-athletes actually provided by the NCAA bylaws.⁷⁴ Nonetheless, by 2001, twenty-six states⁷⁵ had individually legislated civil and criminal penalties for athlete-agent misconduct; eleven classified some of the misconduct as a felony.⁷⁶

73. Payne, *supra* note 18, at 666–67.

74. See NCAA MANUAL, *supra* note 15, § 12.3.2. Relationships between student-athletes and agents or educational institutions were originally covered by the statutes and common law of agency and contract in each state. John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, 143–44 (2006); see, e.g., Dishman v. Jones, No. 2002-05380, 2003 WL 25466262 (Tex. Dist. Ct. Feb. 17, 2003) (awarding professional player \$396,000 plus interest against agent and financial advisor). Before present legislation, NCAA member institutions looked to recover against agents under the theory of tortious interference with contractual relations. See Moore, *supra* note 13, at 537 (citing *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991)). When any form of contractual agreement exists between a student-athlete and an educational institution, courts will presume that an agent is aware of the agreement, its terms, and any NCAA restrictions placed on the student-athlete, and any intentional action by the agent—such as offering a contract or a benefit—becomes a direct cause of any resulting ineligibility and consequential penalties against the institution. See *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that student-athlete breached contract with university when not complying with the training rules or physical eligibility requirements); *Williams v. Univ. of Cincinnati*, 752 N.E.2d 367, 375 (Ohio Ct. Cl. 2001) (holding that basketball player who signed a national letter of intent entered into a contract with the university and later violated the contract by failing to remain academically eligible); Payne, *supra* note 18, at 665. The problem with recovery in the rare civil actions brought against agents by student-athletes was that NCAA student-athletes are expected to know and adhere to the NCAA regulations, and the more-or-less automatic contributory negligence by the student-athlete could both mitigate the agent's liability and reduce any potential damages. *Id.* at 664; see, e.g., IND. CODE. § 34-51-2-6(a) (2013) (“[T]he claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.”). Criminal laws also did not deter illegal conduct. 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, 1237 (2004); see also *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). In *Walters*, a sports agent recruited student-athletes to enter into agreements with him for future representation in exchange for immediate benefits, post-dating the agreements to avoid interfering with the student-athletes' NCAA eligibility so that the student-athletes could continue to receive scholarships. *Id.* at 1221. After fifty-six of the fifty-eight student-athletes solicited in this manner later signed with other agents, the agent resorted to threats to collect his money. *Id.* He and his partner were charged with conspiracy, RICO violations, and fraud. *Id.* The Seventh Circuit ultimately held that the prosecution failed to prove fraud and reversed the initial conviction. *Id.* at 1221, 1227.

75. Specifically, Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, and Texas. Sudia & Remis, *supra* note 4, at 271–72 & n.32.

76. *Id.* The classifications differed widely from state to state, with eleven states classifying all or some agent misconduct as felonies, and twenty states classifying all or some agent misconduct as misdemeanors. *Id.* at 272–73. The typical state legislation covered at least the following aspects of athlete agent business: (1) restrictions on the agent's license; (2) posting and forfeiture of surety

Forty states ultimately adopted the Uniform Athlete Agents Act (UAAA), which encourages agents to voluntarily comply with registration, written agency agreements, and other requirements; outlines criminal and administrative penalties; and creates a civil remedy that provides NCAA member schools penalized for conduct arising from an agent's or a student-athlete's violation of the UAAA with a civil cause of action against both the agent and the student-athlete.⁷⁷ The UAAA turns the NCAA's private principles of amateurism into law by imposing requirements that pertain to the NCAA rules.⁷⁸ In 2004, Congress enacted the Sports Agents Responsibility and Trust Act (SPARTA), which is very similar to UAAA in many aspects and provides educational institutions with a federal cause of action against agents whose SPARTA violations result in institutional expenses arising from NCAA-imposed penalties.⁷⁹ Notwithstanding these statutes, legislative attempts to regulate agent behavior have largely been unsuccessful,⁸⁰ and although widely adopted among the states, the UAAA has been frequently criticized for subordinating the interests of student-athletes to those of the NCAA member institutions.⁸¹

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 and 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. *Id.* at 274.

77. ADAM EPSTEIN, *SPORTS LAW* 11, 11–12 (2013); Sudia & Remis, *supra* note 4, at 267, 279; *see also* UNIF. ATHLETE AGENTS ACT §§ 5, 10(b)–(c), 11, 15, 17 (2000) (requiring both agent and student-athlete to communicate any NCAA-violating agreement to the student-athlete's institution).

78. Edelman, *supra* note 4, at 172; Alan Scher Zagier, *Laws on Sports Agents Rarely Enforced*, HUFFPOST C. (Aug. 17, 2010), http://www.huffingtonpost.com/2010/08/17/laws-on-sports-agentsrar_n_685000.html?view=print&comm_ref=false.

79. *See* Sports Agency Responsibility and Trust Act (SPARTA), 15 U.S.C. §§ 7801–08 (2012); JAMES SENSENBRENNER, H.R. REP. NO. 108-24, pt. 2, at 4 (2003), *reprinted in* 2004 U.S.C.C.A.N. 1021, 1022. With much of its language remarkably similar to that of the UAAA, SPARTA has been criticized on many of the same grounds, including failing to provide a civil cause of action for student-athletes who are harmed by their agents; but, at least SPARTA—unlike the UAAA—does not grant a civil cause of action to NCAA member institutions against their own student-athletes. Edelman, *supra* note 4, at 177–79; *see* Remick & Cabott, *supra* note 4, at 12.

80. Edelman, *supra* note 4, at 24–26. Several factors contribute to this lack of enforcement: (1) lack of resources; (2) sports-agent issues are not a prosecutorial priority; (3) the NCAA is largely a passive enforcement body relying on information presented to it; (4) because of potential NCAA investigations or sanctions and the risk of being tagged with constructive knowledge, the NCAA member institutions are reluctant to investigate agents; (5) any potential damages award—supposed to make up for sanctions implemented by the NCAA—is financially unlikely to be recovered from an individual agent; and (6) an NCAA member institution would risk severe damage to its reputation if it brought suit against a current or former student-athlete. *Id.*; Willenbacher, *supra* note 74, at 1246–47.

81. Edelman, *supra* note 4, at 171–72, 179.

D. The Student-Athlete

While some student-athletes accept athletic scholarships to obtain a university education, many are driven by the fact that playing sports at the collegiate level is virtually a requirement to play professionally.⁸² Both football players and men's basketball players "identify themselves more strongly as athletes than as students . . . [and give] more weight in choosing [a] college to athletics than to academics."⁸³ In 2011,⁸⁴ the graduation rates (given six years to complete the degree) for football and basketball players were 16% and 25% below the college average, respectively.⁸⁵

College is often a necessary piece of the professional athletics puzzle⁸⁶ since, as set out above,⁸⁷ the NFL requires an athlete to be either out of high school for three years or to have finished at least three college football seasons before entering the league,⁸⁸ and the NBA sets out similar requirements.⁸⁹ As a result, student-athletes must place their chances to make it to the professional level in the hands of their coaches and educational institutions.⁹⁰ And despite the stepping stone that college provides, less than 2% of NCAA football and basketball players actually make it from NCAA to professional sports.⁹¹

82. Former professional football player Michael Strahan stated in an interview, "Most guys in college . . . major in sports because they've been told since they were kid [sic], you're going to be a professional athlete." *Symposium, supra* note 12, at 368. Former professional football and baseball player Deion Sanders, when asked while playing football for Florida State whether he wanted to be in college, answered: "No, but I have to be." Moore, *supra* note 13, at 520.

83. Gary Gutting, *The Myth of the 'Student-Athlete,'* NYTIMES.COM (Mar. 15, 2012, 8:30 PM), <http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/>.

84. The NCAA also released a report on graduation rates in 2012, but that report does not include the matched-gender ethnicity data breakdown by sport; but both the 2011 and the 2012 reports suggest that the overall student-athlete graduation rate was 65%. *Compare* NCAA RESEARCH, TRENDS IN GRADUATION-SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS 44 (2012), *with* NCAA RESEARCH, TRENDS IN GRADUATION-SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS 23 (2011).

85. Gutting, *supra* note 83.

86. Salgado, *supra* note 4, at 146.

87. *See supra* Part II.C.1.

88. *National Football League Eligibility Rules, supra* note 52 (allowing athletes to apply for special eligibility following beginning and completion of the third NFL season after the athlete's high-school graduation).

89. NBA CBA 101, *supra* note 61; *see also* Salgado, *supra* note 4, at 146.

90. Salgado, *supra* note 4, at 146.

91. *Id.* at 145. The number of NCAA student-athletes going professional, with the exception of baseball, is low across the different sports, per a September 2012 NCAA study, which suggests the following percentage of NCAA athletes taking the step from NCAA to professional sports: men's basketball: 1.3%, women's basketball: 0.9%, football: 1.6%, baseball: 9.7%, men's ice hockey: 1.2%, men's soccer: 0.7%. NCAA RESEARCH, ESTIMATED PROBABILITY OF COMPETING IN ATHLETICS BEYOND THE HIGH SCHOOL INTERSCHOLASTIC LEVEL (2012), *available at* <http://www.ncaa.org/wps/>

Further, many of these young student-athletes are unsophisticated⁹² and, for some, the socio-economic profile adds to their vulnerability.⁹³ For example, many student-athletes come from financially disadvantaged and substantially poorer backgrounds than the general college population.⁹⁴ For a vast majority of these college athletes, however, sports remain a dead end instead of an escape from life in poverty,⁹⁵ and the average “full scholarship” Division I athlete has to pay \$2,951 annually for school-related expenses that are not covered by scholarships and grants.⁹⁶ Several former student-athletes have admitted to receiving money in violation of NCAA regulations because their scholarships were insufficient to cover rent and food.⁹⁷

Many of the student-athletes who graduate but do not go professional⁹⁸ have been led “to believe the hours of training . . . and teamwork is more beneficial than any internship or job experience.”⁹⁹ They lack professional

wcm/connect/public/ncaa/pdfs/2012/estimated+probability+of+competing+in+athletics+beyond+the+high+school+interscholastic+level. The numbers are estimations of how many college athletes will be drafted by the professional leagues; a statistical breakdown suggests that the chance to play Major League baseball drops steeply in proportion to the draft round: first round, 66% chance; second round, 49% chance; third to fifth round, 32% chance; sixth to tenth round, 20%; eleventh to twentieth round, 11%; twenty-first round, 7%. Mike Rosenbaum, *Examining the Percentage of MLB Draft Picks Who Reach the Major Leagues*, BLEACHER REP. (June 12, 2012), <http://bleacherreport.com/articles/1219356-examining-the-percentage-of-mlb-draft-picks-that-reach-the-major-leagues>.

92. Salgado, *supra* note 4, at 144. Because the areas of the brain concerned with self-regulation and goal setting keep developing well into the twenties, student-athletes are highly susceptible to stimuli and stressful situations and are consequently vulnerable in such situations. See Geoffrey Rapp, *The Brain of the College Athlete*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 151, 153–54 (2012).

93. Salgado, *supra* note 4, at 145.

94. *Id.*

95. *Id.*

96. Associated Press, *Study: ‘Free Ride’ Still Costs Athletes*, ESPN (Oct. 26, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5728653>.

97. George Dohrmann, *Confessions of an Agent*, SI.COM (Oct. 12, 2010), <http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html>. However, roughly two-thirds of the class of 2010 (athletes and non-athletes included) took loans for college and owed an average of \$25,250 upon graduation, suggesting that the “full scholarship” athletes are far from disadvantaged compared to their fellow students. Justin Pope, *Average Student Loan Debt: \$25,250*, HUFFPOST C. (Nov. 3, 2011), http://www.huffingtonpost.com/2011/11/03/average-student-debt-2525_n_1073335.html. Other studies suggest that 72% of college athletes expect to owe student loan debt when they graduate—numbers aligning surprisingly well with the roughly two thirds of the class of 2010 graduating with student loans. See *id.*; Stacy A. Teicher, *College Athletes Tackle Their Financial Future*, CSMONITOR.COM (Oct. 3, 2005), <http://www.csmonitor.com/2005/1003/p13s02-legn.html>.

98. Recent NCAA numbers suggest that basketball and football players graduate at a rate of 74% and 70%, respectively. Erik Christianson, *DI Men’s Basketball, FBS Football Graduation Rates Highest Ever*, NCAA.COM (Oct. 25, 2012), <http://www.ncaa.com/news/ncaa/article/2012-10-25/di-mens-basketball-fbs-football-graduation-rates-highest-ever>.

99. Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY C.

experience and have comparatively little knowledge about their chosen fields of study upon graduation.¹⁰⁰ Chris Davis, an Ohio University graduate with a 3.6 GPA, a pre-medical degree, and leadership experience as the head of his Division I cross country team, graduated without connections and experience in his field.¹⁰¹ Now, he is behind his non-athletic peers when it comes to career preparation, college's ultimate purpose, stating, "I didn't do the volunteering because I didn't have the time focusing on athletics. I didn't do them and they're essential to get a job or get into grad school."¹⁰² Despite the many hurdles, however, 36% of student-athletes expect to become millionaires.¹⁰³

III. REGULATIONS AND THE COMPLEX RELATIONSHIP BETWEEN THE PARTIES

While a student-athlete voluntarily accepts an athletic scholarship, the relationship between a student-athlete and the program is considerably less voluntary than it appears.¹⁰⁴ Student-athletes must place their faith in the institution and its coach, who decides which players get the opportunity, exposure, renewed scholarships,¹⁰⁵ and playing time,¹⁰⁶ making the chance to go professional contingent largely on the coach and institution.¹⁰⁷ Despite the small likelihood of student-athletes going professional,¹⁰⁸ "coaches often emphasize and encourage such dreams by promising starting positions and playing time."¹⁰⁹ After student-athletes commit to a program, coaches expect

(Aug. 28, 2011), <http://www.usatodayeducate.com/staging/index.php/blog/college-athletes-suffer-the-greatest-injustice-from-ncaa>.

100. *Id.* Jon Gissing, former tight-end and a graduate from the University of Missouri, said that "[a] football player is not going to get a job over someone who worked and had internships . . . My résumé right now is football." *Id.*

101. *Id.*

102. *Id.*

103. Teicher, *supra* note 97. Nikki Thompson, a junior student-athlete at the University of Hartford, said that "[a] lot of the athletes don't really think about [planning for the future] because we're more focused on what we have to do now, day to day, rather than our financial situations after school." *Id.*

104. *See* Salgado, *supra* note 4, at 148.

105. *See* Agnew v. NCAA, 683 F.3d 328, 344, 346–47 (7th Cir. 2012) (noting that "a one-year limit to scholarships and a limit on scholarships per team . . . are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football," but holding that plaintiffs failed to identify a relevant cognizable market for its antitrust claim).

106. Salgado, *supra* note 4, at 146.

107. *See id.*

108. *See supra* Part II.D.

109. *See* Salgado, *supra* note 4, at 147.

them to maintain eligibility, academic or otherwise, and submit to all coaching demands.¹¹⁰ If a student-athlete fails to do so, the athlete will lose eligibility or be benched by the coach.¹¹¹

“While student-athletes can, in theory, walk away at any time,” returning to minimum wage jobs or unemployment is not enticing in comparison to the high risk-high reward prospect of professional play.¹¹² Often, the only option is to stay in a program, hoping for the best.¹¹³ In addition, NCAA regulations limit the student-athletes’ ability to leave one program for another.¹¹⁴ Further underscoring an institution’s power over its student-athletes, an athletic program director can cut a player from the program at his or her own discretion and be “liable to fulfill only the remainder of the scholarship for the year awarded.”¹¹⁵

Member institutions’ willingness to partake in the lucrative athletic endorsement field illustrates the “institutional commercial behavior that generates cynicism on the part of student-athletes and thereby undermines [from the inside] the amateurism and educational values professed to underlie NCAA rules and regulations.”¹¹⁶ This situation “fosters an environment in which athletes might be more tempted than ever to accept money or gifts . . . in violation of [NCAA] rules, or leave school well before their scheduled graduation dates.”¹¹⁷ In addition, the resulting “student-athlete attitudes concerning those charged with enforcement responsibilities significantly contribute to the devaluation of NCAA rules and the principles on which they are premised.”¹¹⁸ Meanwhile, the NCAA, employing 500 at its national office in Indianapolis, Indiana, recorded nearly \$872 million in

110. *Id.*

111. *Id.*

112. *Id.* at 148.

113. *Id.*

114. *Id.* A Division I athlete transferring to another program generally has to sit out an entire year. See NCAA MANUAL, *supra* note 15, art. 14.5.5.1.

115. Salgado, *supra* note 4, at 148–49; see also Agnew v. NCAA, 683 F.3d 328, 344, 347 (7th Cir. 2012) (upholding NCAA regulations capping athletic scholarships at one year following a lawsuit on antitrust grounds by former Rice football player Joseph Agnew, who suffered injuries and lost his athletic scholarship before his senior year, because he failed to properly identify a relevant market).

116. See Davis, *Marginalizing the NCAA Regulatory Structure*, *supra* note 41, at 214.

117. *Id.* at 215 (quoting Rob Zatechka, *Outright Pay Is Not the Only Alternative*, NCAA NEWS, Aug 3, 1994, at 4–5).

118. *Id.* at 214, 216. In 2011, any University of Texas football player had a “fair market value” of \$513,922, and any Duke basketball player had a fair market value of \$1,025,656. RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORTS* 16 (2012), available at <http://assets.usw.org/nca/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

revenue for the 2011–2012 year.¹¹⁹

As a result of the tension in the current situation, recent litigation directly or indirectly involving the NCAA only underlines the problem. The causes of action brought against the NCAA include: (1) declaring ineligible a student-athlete who had legal representation when meeting with representatives of professional teams;¹²⁰ (2) capping the number and length of scholarships;¹²¹ (3) permanently disqualifying a student-athlete who was determined to have received inappropriate tutoring assistance;¹²² (4) forcing prospective student-athletes to relinquish all rights to their likenesses in order to be eligible to play college sports;¹²³ and (5) requiring inconsistent academic standards from transferring student-athletes based on their high school performance.¹²⁴

A. Regulatory Inconsistencies

Current NCAA regulations generally do not distinguish between being professional and entering into a draft.¹²⁵ Following full-time collegiate enrollment, “an individual loses amateur status in a particular sport when the individual *asks* to be placed on the draft list or supplemental draft list of a

119. *The NCAA Budget: Where the Money Goes*, *supra* note 42; Steve Berkowitz, *NCAA had Recorded \$71 Million Surplus in Fiscal 2012*, USATODAY.COM (May 2, 2013) <http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/>.

120. *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, ¶¶ 9–13 (C.P.) (vacated pursuant to settlement) (describing the relevant NCAA rules as “arbitrary.”); *see infra* Part III.B.1.

121. *See Agnew v. NCAA*, 683 F.3d 328, 344, 346–47 (7th Cir. 2012) (noting that “a one-year limit to scholarships and a limit on scholarships per team . . . are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football” but holding that plaintiffs failed to identify a relevant cognizable market for its antitrust claim).

122. *McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811, 817 (N.C. Ct. App. 2013) (holding that a collegiate football player who suffered NCAA sanctions but later signed with the Baltimore Ravens did not have standing to sue the NCAA because the alleged injury to his football career was too speculative, and because he signed a professional contract, he obtained the relief sought, making his claim moot).

123. *Russell v. NCAA*, No. C 11–4938 CW, 2012 WL 1747496, at *2 (N.D. Cal. May 16, 2012) (alleging that the NCAA, through its rules and forms, requires student-athletes to relinquish the relevant rights in order to be eligible to participate in college basketball).

124. *Davis v. NCAA*, No. C 11–01207 WHA, 2011 WL 2531394, at *2, *4 (N.D. Cal. June 24, 2011) (holding that such differences survived a rational-basis review).

125. *Compare NCAA MANUAL*, *supra* note 15, art. 12.01.1 (“Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”), *with id.* art. 12.1.2(f) (“An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . [a]fter initial full-time collegiate enrollment, enters into a professional draft.”).

professional league in that sport,”¹²⁶ even if the individual later requests to be removed from the list prior to the actual draft, the individual is not drafted, or “the individual is drafted but does not sign an agreement with” a professional team.¹²⁷ This language highlights some of the major problems with the NCAA regulations when viewed in light of the drafting methods of the various professional leagues. While the NBA and NFL require student-athletes with remaining collegiate eligibility to declare for the draft, MLB does not.¹²⁸ Rather, if an individual meets MLB’s draft-eligibility rules,¹²⁹ the individual is available for selection.¹³⁰ The MLB teams can draft any eligible player.¹³¹ Then, the player may choose to remain in college if he feels he was drafted too low or if he simply wants to finish his collegiate career.¹³² In sum, a student-athlete baseball player drafted by and negotiating with a professional team remains an amateur under NCAA regulations, while his football counterpart more or less loses his amateur status by merely declaring for the draft, without either negotiations or the receipt of benefits.¹³³

While it would not be fair to baseball players if they could lose their amateur status and remaining collegiate eligibility without any action on their own, the fact that the NCAA allows baseball players to be drafted without affecting their collegiate eligibility suggests that the NCAA makes unfair distinctions based on particular sports.¹³⁴ Collegiate baseball players may be drafted and even negotiate for a professional contract without jeopardizing any remaining collegiate eligibility, while football and basketball players put all remaining eligibility at risk by entering the professional draft—regardless of whether they enter professional negotiations or are represented when doing so.¹³⁵ The difference arises from the fact that football and basketball players decide whether they want to be in the draft, suggesting that the NCAA sees a

126. *Id.* art. 12.2.4.2 (emphasis added).

127. *Id.* Exceptions basically allow student-athletes to enter a draft once—as long as they are not drafted and declare their intent to resume intercollegiate athletics shortly thereafter. *See id.* art. 12.2.4.2.3–12.2.4.2.4.

128. John Infante, *Draft Rules Fail Basics of Amateurism*, NCAA.ORG (Feb. 17, 2011), <http://www.ncaa.org/blog/2011/02/draft-rules-fail-basics-of-amateurism/>.

129. *See First-Year Player Draft: Official Rules*, *supra* note 61.

130. Infante, *supra* note 128.

131. Rosner, *supra* note 63.

132. *Id.*

133. *See* NCAA MANUAL, *supra* note 15, art. 12.2.4.2.

134. *See id.* art. 12.2.3.2 (“[A]n individual may compete on a tennis, golf, two-person sand volleyball or two-person synchronized diving team with persons who are competing for cash or a comparable prize, provided the individual does not receive payment of any kind for such participation.”).

135. *See id.* art. 12.2.4.2.

difference between a football player wishing to establish his market value by entering the draft and a baseball player doing the same by actually negotiating with a professional team.¹³⁶

B. Case Studies

1. Oliver's Twist: Challenging the No-Agent Rule

In the fall of 2005, Andrew Oliver signed a letter of intent to attend Oklahoma State University (OSU) to play baseball.¹³⁷ The following spring, Oliver retained the services of Robert and Tim Baratta as sports advisors and attorneys.¹³⁸ In June that year, the Minnesota Twins drafted Oliver and later that summer, during a meeting with Oliver and his father—a meeting Tim Baratta attended—the Twins offered Oliver \$390,000 to sign.¹³⁹ After consulting with his father, Oliver turned down the offer and decided to instead pursue a collegiate career with OSU.¹⁴⁰ Oliver played his first two years with OSU before he decided to terminate the services of the Barattas and instead retain a different advisor.¹⁴¹

Following an unsuccessful attempt to reconnect with Oliver, the Barattas sent Oliver an invoice for \$113,750 for legal services.¹⁴² Oliver claimed that he had received no services or benefits from the Barattas and contacted an attorney for assistance.¹⁴³ The Barattas then reported alleged bylaw violations by Oliver to the NCAA, specifically referring to the meeting that Tim Baratta attended.¹⁴⁴ As a result of the allegations, OSU found that Oliver had violated

136. *Id.* “Entering a draft and deciding any contract offered would not be worth leaving college is no more or less an indication of a student-athlete’s intent to professionalize themselves than deciding a contract offer is not sufficient to leave college and enter the draft in the first place.” Infante, *supra* note 128.

137. *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, ¶ 4 (C.P.) (vacated pursuant to settlement).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* ¶ 6.

142. *Id.*

143. *Id.*

144. *Id.* ¶7; *see also* NCAA MANUAL, *supra* note 15, art. 12.3.2.1. The Barattas promised to protect Oliver’s amateur status. *Oliver*, 155 Ohio Misc. 2d 17, ¶ 40. Despite this, Tim Baratta insisted to be present during Oliver’s meeting with the Twins, but no testimony suggested that Baratta did anything but merely observe during the meeting. *Id.* Under NCAA rules, “[a] lawyer may not be present during discussions of a contract offer with a professional organization A lawyer’s presence during such discussions is considered representation by an agent.” NCAA MANUAL, *supra* note 15, art.12.3.2.1.

the NCAA no-agent rule and suspended Oliver indefinitely.¹⁴⁵ After a temporary restraining order reinstated Oliver, the NCAA suspended him for one year and charged him a year of eligibility.¹⁴⁶ Oliver sued the NCAA and requested a declaratory judgment and injunctive relief.¹⁴⁷

The court held that “[i]t [was] unquestionable that [the NCAA] and OSU’s contractual agreement [was] created to confer a benefit in the student-athletes”¹⁴⁸ because the NCAA promises to “initiate, stimulate, and improve intercollegiate athletic programs for student-athletes.”¹⁴⁹ As a student-athlete, Oliver was an intended third-party beneficiary.¹⁵⁰ Because the parties to a contract must act in good faith and fair dealing, “there must be in fact honesty and reasonableness in the enforcement of the contract.”¹⁵¹

The NCAA purports to allow student-athletes to retain a lawyer, but its regulations prevent the lawyer from helping the student-athlete during contract negotiations.¹⁵² The court noted, “This surely does not retain a clear line of demarcation between amateurism and professionalism. . . . [I]t allows for exploitation of the student-athlete by ‘professional and commercial enterprises’ in contravention of [the NCAA’s intention to protect the amateur character of college athletics].”¹⁵³ The court concluded that NCAA bylaw 12.3.2.1 was capricious and arbitrary before addressing what sort of relief might be available to Oliver.¹⁵⁴

The court reviewed NCAA bylaw 19.7,¹⁵⁵ which imposes penalties on student-athletes and institutions that rely on court orders that are later overturned.¹⁵⁶ The court pointed out that, under this rule, educational institutions face a dilemma: they can either play the student-athlete and risk sanctions by the NCAA if the court order is later overturned, or they can try to

145. *Oliver*, 155 Ohio Misc. 2d 17, ¶ 7.

146. *Id.* ¶ 8.

147. *Id.* ¶¶ 9–11.

148. *Id.* ¶ 27.

149. *Id.*

150. *Id.* ¶ 28.

151. *Id.* ¶ 30.

152. Compare NCAA MANUAL, *supra* note 15, art. 12.3.2 (allowing student-athlete to retain advice from lawyer concerning a professional contract), with *id.* art. 12.3.2.1 (prohibiting such lawyer from being present during actual negotiations).

153. *Oliver*, 155 Ohio Misc. 2d 17, ¶ 38. The court used an analogy to elaborate: “[This] is akin to a patient hiring a doctor, but the doctor is told by the hospital board and the insurance company that he cannot be present when the patient meets with a surgeon because the conference may improve his patient’s decision-making power.” *Id.* ¶ 42.

154. *Id.*

155. Now Bylaw 19.13. See NCAA MANUAL, *supra* note 15, art. 19.13.

156. *Id.* art. 19.13.

avoid future NCAA sanctions by not playing the student-athlete and instead risk finding themselves in contempt of court.¹⁵⁷ The court described the regulation as “arbitrary and indeed a violation of the covenant of good faith and fair dealing”¹⁵⁸ Concluding that Oliver “would suffer loss of his college baseball experience, impairment or loss of his future professional baseball career, loss in being available for the upcoming draft, and ongoing damage to [his] reputation and baseball career,” the court granted the injunctive relief.¹⁵⁹

2. “Johnny Football”—A Hypothetical Case Study

For student-athletes, the only given is that their chosen schools may benefit tremendously from their success.¹⁶⁰ While Texas A&M may not use Johnny Manziel’s name, likeness, or nickname, it “can make money off of [him] by selling jerseys, T-shirts and hats with No. 2 on them.”¹⁶¹ Even before Manziel led A&M to victory against first-ranked Alabama in 2012, unlicensed “Johnny Football” merchandise circulated.¹⁶² After the huge win, the market exploded.¹⁶³ When Manziel became the first freshman in history to win the Heisman trophy, it exploded again.¹⁶⁴ Manziel generated \$37 million in media exposure for Texas A&M during his first year playing.¹⁶⁵

As a result of Manziel’s “inject[ing] excitement and hope into the Aggies’

157. *Oliver*, 155 Ohio Misc. 2d 17, ¶ 46.

158. *Id.* The court noted that the relevant NCAA bylaw was named “Restitution” and went on to say that “[t]he old adage, that you can put lipstick on a pig, but it is still a pig, is quite relevant here.” *Id.* ¶ 45.

159. *Id.* ¶¶ 59, 60. *But see* *McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811 (N.C. Ct. App. 2013) (holding that collegiate football player who suffered NCAA sanctions but later signed with the Baltimore Ravens did not have standing to sue the NCAA because the alleged injury to his football career was too speculative, and because he signed a professional contract, he obtained the relief sought, making his claim moot).

160. *See* *Davis, Marginalizing the NCAA Regulatory Structure*, *supra* note 41, at 214–15.

161. Darren Rovell, *Will Johnny Manziel Ever Cash in?*, ESPN (Dec. 7, 2012, 10:47 AM), http://espn.go.com/blog/playbook/dollars/post/_/id/2547/will-johnny-manziel-ever-cash-in [hereinafter *Rovell, Manziel Ever Cash in?*].

162. Allen Reed, *Manziel Mania Prompts Quarterback’s Family to Trademark ‘Johnny Football.’* EAGLE, http://www.theeagle.com/news/local/article_85bb1ade-1e0e-5a26-a492-d1d598b87e29.html (last updated Nov. 13, 2012) [hereinafter *Reed, Manziel Mania Prompts Family to Trademark*]. “One seller on eBay who claims to be selling the original ‘Johnny Football’ shirt lists that he’s sold 625 of them.” *Rovell, Manziel Ever Cash in?*, *supra* note 161.

163. *Rovell, Manziel Ever Cash in?*, *supra* note 161.

164. *Id.* (“The business surrounding his number, name and likeness went from a cottage industry to a small economy.”).

165. *Study*, *supra* note 1.

football program,” A&M’s football revenues will likely increase.¹⁶⁶ During the 2011–2012 academic year, “when [A&M was] still a member of the Big 12 [Conference], the Aggies generated \$44.4 million in football revenues and \$79 million in overall athletic revenues.”¹⁶⁷ The excitement generated by Johnny Football,¹⁶⁸ combined with the greater expectations of what is to come in his subsequent years in College Station, will likely boost (1) merchandise sales; (2) ticket sales; (3) alumni donations;¹⁶⁹ (4) stadium advertising; (5) athletic recruiting; and (6) A&M undergraduate applications.¹⁷⁰

In February 2013, Manziel, through JMAN2 Enterprises, filed an application with the United States Patent & Trademark Office seeking to register “Johnny Football.”¹⁷¹ With the trademark comes the responsibility for policing the name, sending the cease-and-desist letters, and paying the legal fees.¹⁷² As long as Manziel plays college football, neither he nor his family can make money from the trademark “Johnny Football,” as doing so would endanger his collegiate eligibility.¹⁷³ But they can pay to protect it.¹⁷⁴

166. Patrick Rische, *Johnny Football, Texas A&M, and Brand Penetration: The Power of One*, FORBES (Nov. 28, 2012), <http://www.forbes.com/sites/prishe/2012/11/28/johnny-football-texas-am-and-brand-penetration-the-power-of-one/> [hereinafter Rische, *Brand Penetration*].

167. *Id.*

168. *Study, supra* note 1.

169. See Allen Reed, *Texas A&M Breaks Fundraising Record with \$740 Million in Donations*, EAGLE, http://www.theeagle.com/news/local/article_82266d1a-11c0-543b-b75a-4c3613357abe.html (last updated Sept. 17, 2013) (stating that between September 1, 2012, and August 31, 2013, Texas A&M University took in nearly \$300 million more in donations than any previous fiscal year and that Johnny Manziel, the football program’s success, and the move to the SEC played significant part in the increase). Texas A&M University’s football-related donations increased from \$15.7 million to \$17.7 million in 2012 and are expected to increase to \$18.6 million in 2013. George Schroeder, *Why Texas A&M Is ‘The Best It’s Ever Been,’* USATODAY.COM (Sept. 13, 2013), <http://www.usatoday.com/story/sports/ncaaf/sec/2013/09/12/texas-am-rise-since-joining-sec/2805701/>.

170. Patrick Rische, *Magnificent Johnny Manziel Is Money at Cotton Bowl, but HIS Money Is Years Away*, FORBES (Jan. 5, 2013), <http://www.forbes.com/sites/prishe/2013/01/05/magnificent-johnny-manziel-is-money-at-cotton-bowl-but-his-money-is-years-away/> [hereinafter Rische, *Money at Cotton Bowl*]. Boston College saw a “Flutie Effect” on their applications (30% increase) for two years after Heisman winner Doug Flutie’s famous Hail Mary throw that secured the win against Miami in 1984. Rische, *Brand Penetration, supra* note 166; Dena Potter, *‘Flutie Effect’ Is Real, Study Shows*, SEATTLEPI.COM (Mar. 23, 2008), <http://www.seattlepi.com/sports/article/Flutie-Effect-is-real-study-shows-1268039.php>. Texas A&M University saw a 10% increase in applications for 2013, but the most noticeable effect occurred in the number of acceptances: more than 10,000 acceptances—as compared to the estimated 8,700—led to the largest freshman class in school history. Schroeder, *supra* note 169.

171. Darren Rovell, *Suit Claims Nickname Infringement*, ESPN, http://espn.go.com/college-football/story/_/id/8977054/lawsuit-filed-claims-johnny-football-infringement (last updated Feb. 23, 2013) [hereinafter Rovell, *Nickname Infringement*].

172. Rovell, *Manziel Ever Cash in?*, *supra* note 161.

173. Reed, *Manziel Mania Prompts Family to Trademark, supra* note 162; Rovell, *Manziel Ever Cash in?*, *supra* note 161. Under NCAA rules, “[a]n individual loses amateur status and thus shall

For Manziel to fully capitalize on his own success, he cannot peak too early, the players around him cannot drop in quality, and—most importantly—he must avoid serious injuries.¹⁷⁵ Everyone except Manziel gains monetarily now.¹⁷⁶ Even assuming that Manziel intends to declare for the draft as soon as he is eligible to do so, he *has* to wait at least until May 2014 before an NFL team can draft him and he can become a professional football player.¹⁷⁷ If he, for any of the above reasons, never has the opportunity to go professional, he will never receive his share for making A&M's football program bloom.¹⁷⁸

Of course, Manziel may choose to purchase “career-ending” insurance.¹⁷⁹ Private insurers offer premiums ranging from \$7,000 to \$80,000 for \$1 million to \$10 million of coverage, respectively, to insure student-athletes.¹⁸⁰ In addition, the NCAA offers the Exceptional Student-Athlete Disability Insurance program, with premiums ranging from \$5,000 to \$40,000 for \$500,000 to \$5 million of coverage.¹⁸¹ But, “[b]ecause career-ending injuries are rare, . . . fewer than 10 [student-athletes] have received payouts in the history of the program,” even though about 100 student-athletes participate

not be eligible for intercollegiate competition . . . if the individual . . . [u]ses his or her athletics skill (directly or indirectly) for pay” NCAA MANUAL, *supra* note 15, art. 12.1.2. “Pay” includes “[a]ny direct or indirect salary, gratuity or comparable compensation.” *Id.* art. 12.1.2.1.1.

174. Rovell, *Manziel Ever Cash in?*, *supra* note 161. In a pending suit against an individual selling Johnny Football apparel, filed on February 15, 2013, JMAN2 Enterprises asks for injunctive relief, compensatory damages, and exemplary damages. Complaint at 7, 21, JMAN2 Enters. L.L.C. v. Vaughan, No. 6:13CV00158 (E.D. Tex. Feb. 15, 2013), 2013 WL 582308, at *3.

175. Rovell, *Manziel Ever Cash in?*, *supra* note 161; Mike Ozanian, *Heisman Trophy Winner Manziel Punished by NCAA and NFL*, FORBES (Dec. 9, 2012), <http://www.forbes.com/sites/mikeozanian/2012/12/09/winning-heisman-trophy-winner-manziel-punished-by-ncaa-and-nfl/>.

176. Rishe, *Money at Cotton Bowl*, *supra* note 170.

177. See Will Brinson, *2014 NFL Draft Date Set for May 8–10 at Radio City in New York*, CBSSPORTS.COM (May 28, 2013), <http://www.cbssports.com/nfl/eye-on-football/22314468/2014-nfl-draft-date-set-for-may-8-10-at-radio-city-in-new-york>; *National Football League Eligibility Rules*, *supra* note 52; Ozanian, *supra* note 175. But see Goodbread *supra*, note 1 and accompanying text (stating that on January 8, 2014, Manziel made the choice to declare for the 2014 NFL draft and forfeit the remaining two years of NCAA eligibility). However, while Manziel appear to reap his rewards, other student-athletes are likely to find themselves trapped by the very same shortcomings of the current regulations.

178. Ozanian, *supra* note 175. Forbes' Patrick Rishe suggests that, at the very least “student-athletes who are largely responsible for spikes in licensing revenues at their school be allowed to earn royalties with interest in a fund set aside for them to be redeemed upon graduation or departure from the school, with the amount redeemed being conditional upon how close the student-athlete came to completing their degree.” Rishe, *Money at Cotton Bowl*, *supra* note 170.

179. Gary Klein, *USC's Matt Barkley Weighs Costs, Benefits of Injury Insurance*, L.A. TIMES (Dec. 23, 2011), <http://articles.latimes.com/2011/dec/23/sports/la-sp-nfl-insurance-20111224>.

180. *Id.*

181. *Id.*

annually.¹⁸² If Manziel suffers a severe injury that is not career-ending¹⁸³ but that leaves him a different player after recovering, he would fall between the coverage gaps and be out of luck.¹⁸⁴ In addition, even a \$10 million policy fades compared to the \$50 million Sam Bradford secured following the 2010 NFL draft.¹⁸⁵ If Manziel is injured and loses the opportunity to write the professional chapter¹⁸⁶ in the Johnny Football story, the collusive NCAA and NFL rules will have deprived him of considerable opportunities.¹⁸⁷

D. Perspective: A Global View on Amateurism

1. International Regulatory Bodies

Many global regulatory bodies have successfully drawn clear lines between “amateur” and “professional” without financially penalizing the athletes that play their sports. According to Fédération Internationale de Football Association (FIFA), the controlling body of the world’s most popular sport, soccer,¹⁸⁸ “[a] professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs.”¹⁸⁹ Similarly, according to the International Ice Hockey Federation (IIHF), “[a] professional player shall be an ice hockey player who is paid more for his ice hockey player activity than the expenses he directly incurs through playing ice

182. *Id.* (noting that true career-ending injuries are rare).

183. *See id.*

184. University of Oklahoma quarterback Jason White won the Heisman trophy—after having gone through reconstructive surgery on each knee. Associated Press, *Ex-Sooners’ QB Says Knees Won’t Let Him Play*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2131507> (last updated Aug. 11, 2005) [hereinafter Associated Press, *Ex-Sooner’s Knees Won’t Let Him Play*]. Following his injuries, White went undrafted despite his extensive college achievements and was competing for third quarterback with the Tennessee Titans. *Id.* While with the Titans, White felt that his knees did not allow him to chase the dream of playing professionally and decided to retire. *Id.*

185. Rovell, *Manziel Ever Cash in?*, *supra* note 161. Two other Heisman-winners, Tim Tebow and Matt Leinart, have already made more than \$13 million and \$23 million, respectively. *Id.*

186. As compared to professional golfer Michelle Wie, who forfeited her NCAA eligibility by going professional and made close to \$20 million in endorsements in 2006 alone. Doug Ferguson, *Michelle Wie Accepted to Stanford*, WASHINGTONPOST.COM (Dec. 19, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/19/AR2006121901240_pf.html.

187. Ozanian, *supra* note 175. It seems foreseeable that student-athletes placed in this situation are more tempted to violate NCAA rules by accepting benefits, especially those student-athletes who are unlikely to go professional and who want to get their money while they can. *See supra* Part II.D.

188. ERIC DUNNING, SPORT MATTERS: SOCIOLOGICAL STUDIES OF SPORT, VIOLENCE AND CIVILISATION 103 (1999) (“During the twentieth century, soccer emerged as the world’s most popular team sport.”).

189. FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS art. 2, ¶ 2 (2012).

hockey. All other players are considered non-professionals”¹⁹⁰

The governing bodies of predominantly individual sports have taken a similar, if more financially restrictive, approach. The International Boxing Association (AIBA) renders ineligible for competition “[a]ny Boxer who enters into a contract, memorandum of understanding, pre-agreement or any other form of agreement, with an entity or individual other than AIBA . . . , related to such Boxer’s future participation in professional boxing or any other professional individual physical contact sport than boxing”¹⁹¹

The Royal and Ancient Golf Club of St. Andrews (R&A) and United States Golf Association (USGA) regulate golf.¹⁹² Under R&A regulations, “an amateur golfer of golf skill or reputation must not use that skill or reputation for any financial gain.”¹⁹³ Further, “[a]n amateur golfer must not play golf for prize money or its equivalent in a match, competition or exhibition.”¹⁹⁴ The R&A and the USGA explicitly allow amateur golfers to enter into agreements with professional agents, provided that

the contract or agreement is solely in relation to the golfer’s future as a professional golfer and does not stipulate playing in certain . . . events as an amateur golfer, and . . . the amateur golfer does not obtain payment, compensation or any financial gain, directly or indirectly, whilst still an amateur golfer.¹⁹⁵

Further, the Rules state that “[a]n amateur golfer may enquire as to his likely prospects as a professional golfer, including applying unsuccessfully for the position of a professional golfer”¹⁹⁶ Finally, provided that the golfer, in writing and before playing, waives all rights to any prize money, an amateur golfer may—without risking amateur status—enter and compete in any qualifying competitions required to be eligible for membership of a professional tour.¹⁹⁷

190. 2013 IIHF INTERNATIONAL TRANSFER REGULATIONS § II (2012).

191. AIBA OPEN BOXING COMPETITION RULES § 2.3.2 (2013) (emphasis omitted).

192. *The R&A*, RANDA.ORG, <http://www.randa.org/en/RandA.aspx> (last visited Dec. 20, 2013).

193. R&A, RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2012–2015 r. 6-1 (32nd ed. 2011) [hereinafter RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2012–2015] (emphasis omitted).

194. *Id.* r. 3-1 (emphasis omitted).

195. *Id.* r. 2-2(b) (emphasis omitted).

196. *Id.* r. 2-1, n.1 (emphasis omitted).

197. *Id.* r. 2-1, n.2.

2. The Olympic Games

Jim Thorpe, winning two gold medals in the 1912 Olympics, was stripped of his medals because he in the summer of 1910 had played semi-professional baseball for \$2.00 a game.¹⁹⁸ In 1955, Avery Brundage, President of the International Olympic Committee (IOC), expressed his firm support for amateurism: “We can only rely on the support of those who believe in the principles of fair play and sportsmanship embodied in the amateur code in our efforts to prevent the Games from being used by individuals, organizations or nations for ulterior motives.”¹⁹⁹ But it was widely suspected that many Olympic athletes were in fact professionals, supported by their governments to train and compete.²⁰⁰ By the end of the 1980s, the movement away from amateurism had gained substantial support²⁰¹ and, in 1991, the IOC eliminated the requirement that all participating athletes of the Olympic Games must be amateurs.²⁰²

Opening the door for professional athletes had no adverse effect on interest in the Olympic Games; rather, it turned the Games into a multi-billion dollar enterprise.²⁰³ Between 1988 and 2010, the broadcasting revenue generated by the games increased from \$402.6 million to \$1.74 billion for the summer games, and from \$324.9 million to \$1.28 billion for the winter games.²⁰⁴ In addition, the overall revenue generated by the various Olympic programs increased from a total of \$2.63 billion in 1993–1996 to \$5.45 billion in 2005–2008.²⁰⁵ By departing from its long-held strict view on amateurism,

198. Earl Gustkey, *Bones of Contention: Children of Jim Thorpe Want Namesake Town in Pennsylvania to Return Their Father’s Remains for Indian Burial in Oklahoma*, L.A. TIMES (Feb. 16, 2001), <http://articles.latimes.com/2001/feb/16/sports/sp-26220>. The medals were reinstated in 1983—30 years after Thorpe’s death. *Id.*

199. Bob Greene, *What Changed the Olympics Forever*, CNN.COM (July 23, 2012), <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs>.

200. *Id.* Other Olympians were paid under the table. Jeré Longman, *Juan Antonio Samaranch, Who Transformed the Olympics, Dies at 89*, NYTIMES.COM (April 21, 2010), http://www.nytimes.com/2010/04/22/sports/22samaranch.html?pagewanted=all&_r=0.

201. Greene, *supra* note 199.

202. Compare OLYMPIC CHARTER 44 (1990) (“All competitors . . . may participate in the Olympic Games, except those who have . . . been registered as professional athletes or professional coaches in any sport[.] . . . signed a contract as a professional athlete or professional coach in any sport before the official closing of the Olympic Games[.] . . . [or] accepted . . . material advantages for their preparation or participation in sports competition”), with OLYMPIC CHARTER 44 (1991) (leaving it to each international sports association to establish its own criteria for eligibility, as long as such criteria conforms to the Olympic Charter).

203. Longman, *supra* note 200.

204. INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC MARKETING FACT FILE 26 (2012),

205. *Id.* at 6.

the Games have increased in popularity while reducing the very problem currently faced by student-athletes with regard to lack of choice and potentially career-destroying injuries before profitability.²⁰⁶

IV. DESIGNING A SOLUTION: BRIGHT-LINE RULES

While the federal and state governments and the NCAA may state similar goals with regard to protecting student-athletes, the existing legislation and regulations do more harm than good.²⁰⁷ Government regulations focus on protecting educational institutions.²⁰⁸ Meanwhile, the NCAA appears primarily concerned with protecting its financial stronghold through its concept of amateurism,²⁰⁹ ironically creating the very situation that requires government involvement to provide remedies for the educational institutions.²¹⁰ And because each body has its own set of regulations pertaining to the agent-athlete relationship,²¹¹ these complicate the problem instead of solving it and do little to actually protect student-athletes.²¹²

A. Draw a Consistent Line Between “Amateur” and “Professional”

A bright line between “amateur” and “professional” is accepted worldwide, but not by the NCAA.²¹³ NCAA’s own regulations make it clear

206. See generally INTERIM REPORT TO THE 114TH IOC SESSION, OLYMPIC GAMES STUDY COMMISSION 2 (Nov. 2002) (“The Olympic Games, particularly over the last 20 years, have experienced unparalleled growth and universal popularity. . . . Olympic spectators and cumulative television audiences for the Summer Games have increased 112% and 117% respectively in the twelve years from Seoul in 1988.”); see also Adam Taylor, *Here’s How Much Olympic Athletes Really Get Paid*, BUS. INSIDER (July 19, 2012), <http://www.businessinsider.com/heres-how-much-olympic-athletes-really-get-paid-2012-7> (noting that while the IOC does not pay the Olympic athletes, successful Olympians may reap revenue from various sources).

207. See Payne, *supra* note 18, at 691.

208. See *supra* notes 78–81 and accompanying text.

209. See *supra* Parts II.A.–B.

210. See *supra* Part II.C.2.

211. See *supra* Part III.A.

212. Payne, *supra* note 18, at 691–92. On September 21, 2013, several NCAA football players had the letter combination “APU” (All Players United) written on their gear during their games to advocate for NCAA reform. Associated Press, *All Players United: College Football Players Show Solidarity with Letters ‘APU,’* HUFFINGTON POST (Sept. 21, 2013), http://www.huffingtonpost.com/2013/09/21/all-players-united-ncaa-college-football-players-apu_n_3968876.html?view=screen. The campaign was launched by the National College Players Association, a student-athlete advocacy group founded by former UCLA football player Ramogi Huma with the goal of uniting student-athletes to push for improved conditions. *Id.* An in-depth analysis of the player movement is beyond the scope of this Comment.

213. Compare AIBA OPEN BOXING COMPETITION RULES, *supra* note 191, and 2013 INTERNATIONAL IIHF TRANSFER REGULATIONS, *supra* note 190, and FIFA REGULATIONS ON THE

that being drafted is not the same as giving up amateur status.²¹⁴ Nothing supports the conclusion that a football player who declares himself available for the draft is less of an amateur than a baseball player actually drafted—or a golfer who plays in a professional competition but waives any prize money.²¹⁵ By adding the prohibitions regarding drafts and agents,²¹⁶ the NCAA has created arbitrary inconsistencies between sports. Instead, the NCAA should redraw the bright line between “amateur” and “professional” at entering into an agreement with or receiving benefits from a professional team,²¹⁷ not when a player is drafted, enters into a draft, or signs with an agent.²¹⁸ The biggest athletic event in the world, the Olympic Games, departed from strict amateur restrictions only to see the Games grow even more popular.²¹⁹ The NCAA does not even have to take it that far; it only has to remove its arbitrary restraints that do not protect its principle of amateurism.

B. Let Student-Athletes into the Professional Leagues

The professional leagues, such as the NFL, should change their rules to allow student-athletes to sign with professional teams. Despite not satisfying the current eligibility requirements to actually play in the NFL, promising

STATUS AND TRANSFER OF PLAYERS, *supra* note 189, and RULES OF GOLF AND THE RULES OF AMATEUR STATUS 2012–2015, *supra* note 193, with NCAA MANUAL, *supra* note 15, art. 12.1.2. See also NCAA MANUAL, *supra* note 15, art. 12.02.8(a) (“A professional team is any organized team that . . . [p]rovides any of its players more than actual and necessary expenses for participation on the team, except as otherwise permitted by NCAA legislation.”). Before its 2013 amendments, the NCAA bylaws defined a professional athlete as an “athlete . . . who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.” 2008–09 NCAA DIVISION I MANUAL art. 12.02.3. This definition was omitted in the 2013 version, but a student-athlete still loses his or her amateur status for various reasons unrelated to payment and, consequently, must gain either professional or some intermediate status that, at best, blurs the line between “amateur” and “professional.” See NCAA MANUAL, *supra* note 15, art. 12.1.2; see also Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 49–50 (2012) (“By and through the evolution of intercollegiate athletics, student-athletes as a class fall somewhere between a professional athlete and an amateur, i.e., someone competing as an avocation.”).

214. See *supra* Part III.A.

215. See Infante, *supra* note 128.

216. See *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, ¶ 36 (C.P.) (vacated pursuant to settlement).

217. As a starting point, any team that, including through a third party, provides payment beyond necessary expenses for athletic abilities would have to be considered a “professional team.” See NCAA MANUAL, *supra* note 15, art. 12.02.4.

218. The NCAA has already drawn this line. NCAA MANUAL, *supra* note 15, art. 12.1.2(c)–(e). But see *id.* art. 12.1.2(f)–(g) (eliminating a student-athlete’s eligibility for entering a professional draft or entering into an agreement with an agent).

219. See *supra* Part III.C.2.

student-athletes could benefit from having the opportunity to choose to make the move to professional sports, train with professional athletes under the supervision of professional coaches, and make some money while doing so²²⁰—without risk of losing market leverage or suffering a career-ending injury in college.²²¹

C. *The Missing Party: The Professional Sports Team*

Without professional sports, there would be no professional athletes, and consequently, an amateur player would never risk losing his or her amateur status. Current legislation and regulations focus on the student-athlete, its institution, and any athlete agent who represents the student-athlete—representation that would be irrelevant if the student-athlete does not intend to go professional or otherwise profit from his or her sport. But they largely ignore the fact that without the professional team, the student-athlete can never become a professional athlete. Rather, student-athletes risk finding themselves in a gray zone in which they are neither amateurs nor professionals.²²² For any legislation to be truly effective, it must not only consider but also directly include the professional teams.²²³

D. *Checks-and-Balances: Duties and Consequences of Breach*

The student-athletes, agents, institutions, and professional teams all need to be regulated and protected from each other.²²⁴ With the focus of the legislative restrictions on institutions and agents, student-athletes are not afraid to abuse the system, i.e., by entering into contracts they know the agent will not be able to enforce under the UAAA or by accepting benefits from an agent who has more to lose than the player.²²⁵ The legislation currently in place is unbalanced and imposes upon student-athletes and agents disproportionate restrictions and unrealistic consequences²²⁶ for violations but fails to similarly

220. See NFL CBA, *supra* note 55, art. 33, § 1(a) (allowing NFL teams to maintain a practice squad).

221. See Travis, *supra* note 2.

222. See *supra* note 213 and accompanying text.

223. Several scholars have expressed concern over the fact that UAAA and SPARTA do not sufficiently regulate the agent-professional player relationship, and others have suggested that professional teams must educate student-athletes. See Glenn M. Wong et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 605–06 (2011). That discussion is beyond the scope of this Comment.

224. See *supra* Parts II.C, III.

225. See *United States v. Walters*, 997 F.2d 1219, 1221 (7th Cir. 1993).

226. See *supra* Parts II.C.2, III.A.

impose responsibilities on the professional teams.²²⁷

Student-athletes and agents already have a duty to report any communication between them to the student-athlete's educational institution.²²⁸ The purpose of this requirement is to protect the institutions from unknowingly violating NCAA regulations and the often severe consequences for doing so.²²⁹ But the purpose can be even better served if the NCAA amends its definition of "amateur" to allow the student-athletes to retain their amateur status without risking their eligibility until they actually sign with a professional team,²³⁰ accompanied by a parallel amendment to the legislation that requires every professional team to inform a student-athlete's institution about the contact with a student-athlete before entering into any form of negotiation of a contract or providing any form of benefit.²³¹ The institution will then be responsible to communicate with the NCAA and ultimately make sure that no NCAA violations take place, a duty that fits well within the already severe scheme of regulations imposed on the institutions for violations.²³²

Placing this responsibility on the professional team makes sense because they can easily satisfy the duty by contacting the institution and—as in many cases, such as those involving the NBA and the NFL—the professional league has restrictions in place to prevent promising athletes from going professional until certain minimum conditions are satisfied, while exposing promising athletes like Johnny Manziel and Tyrone Prothro to a prolonged risk of being injured in college and missed opportunities to capitalize on their success.²³³ Under this approach, NCAA would still be able to sanction an NCAA institution for playing a student-athlete who has entered into negotiations with or received benefits from a professional team regardless of whether the institution received notice from the professional team.²³⁴

227. See Sports Agency Responsibility and Trust Act (SPARTA) 15 U.S.C. § 7805(a) (2012); UNIF. ATHLETE AGENTS ACT § 11 (2000).

228. See UNIF. ATHLETE AGENTS ACT § 11.

229. See NCAA MANUAL, *supra* note 15, art. 19.9.5–19.9.7; see also *Reggie Bush to Forfeit Heisman*, ESPN, <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827> (last updated Sept. 15, 2010) (describing the severe sanctions the NCAA passed down on USC after Reggie Bush had accepted improper benefits while playing for the institution).

230. See *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, ¶¶ 38–41 (C.P.) (vacated pursuant to settlement).

231. Such duty can be modeled after current SPARTA notice obligations for student-athletes and agents. See 15 U.S.C. § 7805(a).

232. See NCAA MANUAL, *supra* note 15, art. 19.9.5–19.9.8.

233. See Associated Press, *Ex-Sooner's Knees Won't Let Him Play*, *supra* note 184.

234. See NCAA MANUAL, *supra* note 15, art. 12.1.2 (loss of amateur status and, consequently, eligibility); *id.* art. 14.01.1 ("An institution shall not permit a student-athlete to represent it in

But while the risk of NCAA sanctions remains, the codification of applicable negligence standards could cause the financial consequences to differ significantly. In Texas, for example, negligence consists of three elements: (1) a legal duty; (2) a breach of that legal duty; and (3) damages proximately caused by that breach.²³⁵

Codifying the professional team's duty to communicate any student-athlete contact to the student-athlete's educational institution establishes the first element. If the professional team fails to properly communicate with the institution, it satisfies the second element. And if the unknowing institution plays the student-athlete and consequently is subject to NCAA sanctions, damages resulting from the breach, and the institution can recover its financial losses from the professional team.²³⁶ Of course, this cause of action rests on the premise that the institution did not receive reliable information regarding the student-athlete's potential eligibility issue from any other source, including the student-athlete and the agent, because such notice would negate the causation element.²³⁷ However, the simultaneous failure of the agent and the student-athlete to communicate the professional negotiations to the institution should not be considered an independent cause that relieves the professional team from liability.²³⁸ Rather, considering the agent and student-athlete's failure to provide adequate information to the institution foreseeable by the professional team would render such failure irrelevant in determining the team's potential liability.²³⁹

intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements, and the institution has certified the student-athlete's eligibility."); *id.* art. 19.9.5–19.9.8 (NCAA may penalize institutions for playing ineligible student-athletes).

235. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant to establish liability in tort. Moreover, the existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question." (citation omitted)).

236. The professional team can likely afford to indemnify the institution. See *Sports Industry Overview*, *supra* note 50 and accompanying text. Besides, all the professional team would have to do to avoid facing liability is to provide notice to the institution before providing any benefit to, or entering into negotiations with, the athlete.

237. See *Lesieur v. Fryar*, 325 S.W.3d 242, 249 (Tex. App. 2010) (holding that "despite the slight variations in the technical terminology used by the two inspectors in the reports, the information provided . . . afforded [Lesieur] the same level of warning . . .").

238. See *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) ("A new and independent cause is one that intervenes between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.").

239. *Id.* at 451 (quoting SALES AND EDGAR § 1.04[4][b] at 1–55 ("Generally speaking, if the intervening force was foreseeable at the time of the defendant's negligence, the force is considered to be a 'concurring cause' of the plaintiff's injuries," and "the defendant remains liable for the original negligence.")); see also *J. Wigglesworth Co. v. Peebles*, 985 S.W.2d 659, 665 (Tex. Ct. App. 1999) ("[I]f an intervening cause was reasonably foreseeable by the defendant in the exercise of ordinary

Tasking professional teams with the duty to report contact with student-athletes to their institutions does not mean relieving the student-athlete or any agent of the student athlete of the same duty.²⁴⁰ An agent who fails to provide notice should face a fine or suspension and, repeated violations should cause the agent to be stripped of the right to represent athletes in any capacity.²⁴¹ A student-athlete in violation of these rules should face consequences particular to the student-athlete's situation, such as suspension from playing at the professional level,²⁴² based on the premise that an athlete does not become professional until having received a benefit or entered into a contract with a professional team.²⁴³ And if a student-athlete's conduct causes the unknowing represented institution to suffer negative consequences, it is only fair to not allow the student-athlete to benefit therefrom—by affecting his or her eligibility to play professionally.²⁴⁴

A system with this structure would not only equitably distribute the responsibility between the major parties involved in a student-athlete's transition from collegiate to professional sports but also place reasonable consequences of violations with each party based on the particular party's interests and ability to perform.²⁴⁵

Of course, for this system to work well, the NCAA must recognize that hiring agents is clearly distinguishable from receiving benefits for athletic abilities,²⁴⁶ and the professional leagues must be willing to at least allow student-athletes to sign on a practice-squad basis.²⁴⁷ The rules that are in place to protect Johnny Manziel²⁴⁸ allow him to trademark “Johnny

care, it cannot be considered a new and independent cause”).

240. See Sports Agency Responsibility and Trust Act (SPARTA), 15 U.S.C. § 7805(a) (2012).

241. See Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 581–82 (2011); see also Willenbacher, *supra* note 74, at 1250 (suggesting that agents should risk being stripped of their right to represent athletes and lose the right to contracts already entered in to with athletes).

242. See Glenn M. Wong et al., *supra* note 223, at 606.

243. See Moore, *supra* note 13, at 555.

244. *Id.* at 554–55. This is intended only as a worst-case scenario and should not be interpreted to mean that any student-athlete found in violation of any NCAA rule causing negative consequences to the represented institution should lose the chance to play professionally.

245. See *supra* Parts II.C.2, III.A.

246. See *Oliver v. NCAA*, 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, ¶¶ 38–41 (C.P.) (vacated pursuant to settlement).

247. See *NFL CBA*, *supra* note 55, art. 33, § 1(a).

248. See *Clarett v. NFL*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124, 125–26 (2d Cir. 2004); see also *National Football League Eligibility Rules*, *supra* note 52; NCAA MANUAL, *supra* note 15, art. 12.1.2(f).

Football”²⁴⁹ but restrict him from entering the draft. Tyrone Prothro was a college star with an extremely bright future.²⁵⁰ A gruesome injury, exactly what the NFL states that it wants to protect the young players from, cost him his chance to play professionally, and all he did was play by the rules that were supposed to protect him.²⁵¹

V. CONCLUSION

The NCAA must acknowledge that its arbitrary line between “amateur” and “professional” does little but protect its own moneymaking machine. A bright line should be drawn in the only place where it makes sense: an athlete does not become professional until he or she signs a professional contract or receives such benefits. The professional leagues must open their doors for athletes to actually sign with the teams, even if they are not eligible to actually play in the league yet. Each major party involved in a student-athlete’s transition from college to professional sports—the athlete, the agent, the NCAA institution, and the professional team—must all take on the appropriate duty and face proportionate consequences for any violations. Strict restrictions on the agents alone work only as a Band-Aid to cover the underlying issue: a system skewed heavily in favor of the NCAA and its member institutions. A proper checks-and-balances system holds everyone accountable but also offers appropriate protection.

The regulatory scheme should not focus on severely punishing those who violate the rules but rather helping the involved parties to abide by them. By placing appropriate duties on each party involved—including the professional teams—severe sanctions would only fall on those truly deserving punishment. Along with a bright line between the NCAA definitions of “amateur” and “professional,” this system would provide incentives for all of the involved parties to play by the rules, making enforcement much easier and giving Johnny Football and his fellow student-athletes a better position from which to make a decision based on what is best for them individually—and not for the NCAA or the professional teams.

249. Rovell, *Nickname Infringement*, *supra* note 171.

250. *See* Travis, *supra* note 2.

251. *See* Clarett, 306 F. Supp. 2d at 408; NCAA MANUAL, *supra* note 15, art. 1.2–1.3, 2.9.