

Comment

PERMITTING STUDENT-ATHLETES TO ACCEPT ENDORSEMENT DEALS: A SOLUTION TO THE FINANCIAL CORRUPTION OF COLLEGE ATHLETICS CREATED BY UNETHICAL SPORTS AGENTS AND THE NCAA'S REVENUE-GENERATING SCHEME

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I. INTRODUCTION

They’re not allowed to do it but we all did it. We wanted some money. Colleges weren’t giving you any money. I wanted some things too. I wanted a nice pair of slacks. I might’ve wanted a coat during the winter. I might’ve wanted to help my mom pay some bills. These colleges, they’re not giving you any money. They’re making tons of money. They’re making tons more now, I might add.¹

—Charles Barkley

The recent scandal concerning Reggie Bush’s acceptance of improper benefits from a sports agent while a student-athlete at the University of Southern California (“USC”) has only served to intensify the spotlight on the National Collegiate Athletic Association’s (“NCAA”) longstanding policy of preventing college athletes from financially benefiting from their athletic prowess.² Although the NCAA asserts that it “promote[s] and develop[s] educational leadership, physical fitness, athletics excellence and athletics participation as a *recreational* pursuit,” there is a severe imbalance between the revenue generated by the NCAA from these recreational events and the few benefits afforded to college athletes.³ This scheme,

1. *Charles Barkley Admits to Taking Agent Money While at Auburn*, DAN ON THE STREET (July 23, 2010), <http://danonthestreet.com/news/2010/07/23/charles-barkley-admits-to-taking-agent-money-while-at-auburn/>.

2. See Jim Tanner, *Athletes, Agents and the NCAA: It’s Time for a Fix*, USA TODAY (Aug. 4, 2010), http://www.usatoday.com/news/opinion/forum/2010-08-04-column04_ST1_N.htm (discussing NCAA’s recent investigations into improper agent relationships with student-athletes and suggesting steps NCAA needs to take to stop improprieties).

3. 2009-2010 NCAA Division I Manual, Constitution § 1.2 [hereinafter NCAA Operating Bylaws], available at <http://www.ncaapublications.com/productdownloads/D110.pdf> (emphasis added). See Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 278 (1994) (“The amateur/education model of intercollegiate athletics fails to acknowledge the forces

which has been protected under the NCAA's stated ideals of amateurism, has been a major factor in creating the problems associated with student-athletes and sports agents today.⁴

Although the NCAA has condemned improprieties such as accepting money from sports agents, journalists and legal scholars have ridiculed the NCAA for issuing harsh suspensions to student-athletes and simultaneously generating billions of dollars in revenue from college athletics.⁵ Not surprisingly, a number of legal scholars have proposed methods to diminish the discrepancy between the money generated by the NCAA and the benefits afforded to individual student-athletes.⁶ Many of these proposals, however, have serious flaws and would likely be rejected by the NCAA and universities.⁷ Moreover, as the beneficiary of a profitable revenue-generating scheme that enjoys tax-exempt status, the NCAA has had little reason to create a revenue sharing system where players

and interests at play within modern day college sports. This model's disregard for a university's financial motive in promoting the success of its athletes and of its programs generally is simply one illustration.”).

4. See Tom Farrey, *Is Minimum Wage Too Much to Pay Players*, ESPN (Feb. 19, 2004), http://a.espn.com/nf/columns/farrey_tom/1509049.html (discussing Nebraska Legislative Bill 688, which was passed to compensate college football players who generate millions of dollars but are vulnerable to sports agents because players do not see money generated from on-field accomplishments); see also Jason Beaulieu, *The NCAA Racket Challenge*, DAILY RECORD (Mar. 24, 2010), <http://mddailyrecord.com/generationjd/2010/03/24/the-ncaa-racket-challenge/> (arguing that NCAA has tremendous “racket” where it generates billions in revenue, but does not pay for athletes’ talent); Frank Therber, *Agent Issues in College Athletics Reflects NCAA Flaw*, INDIANA DAILY STUDENT (Oct. 19, 2010, 11:24 P.M.), <http://www.idsnews.com/news/story.aspx?id=77808> (arguing that main reason behind players accepting money from agents is industry of commercialized college athletics created by NCAA and universities by accepting multi-million dollar TV deals and merchandising contracts).

5. See Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L. REV. 307, 307 (1998) (“Lost in the pomp and circumstance of traditional rivalries and growing profits is the exploitation of the most important members of collegiate sports—the student-athletes.”); see also Marc Edelman, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REFORM 861, 861 (2002) (stating Duke University Bookstore can generate money from selling sweat suits bearing likeness of Grant Hill who would lose eligibility if he profited from sales); see also Michael Rosenberg, *Change is Long Overdue: College Football Players Should Be Paid*, SI.COM (Aug. 26, 2010, 9:43 A.M.), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/08/26/pay.college/index.html (arguing that change is long overdue for NCAA’s policy of not allowing college athletes to benefit from success they bring to NCAA).

6. For a further discussion of the other proposed solutions to the discrepancy between the NCAA’s revenue and the lack of benefits afforded to student-athletes, see *infra* notes 212-273 and accompanying text.

7. For a further discussion of the flaws and complications that arise from other solutions to the NCAA revenue discrepancy, see *infra* notes 214-275 and accompanying text.

could financially benefit from the commercial giant that college sports has become.⁸

Each week, new reports surface about different college football players engaging in inappropriate relationships with sports agents.⁹ In an attempt to remedy this situation, the NCAA and its coaches have begun the process of reevaluating the rules regarding agents, student-athletes, and amateurism.¹⁰ Therefore, the NCAA, now more than ever, may be open-minded to lowering its stance on amateurism and allowing student-athletes to receive some type of compensation.¹¹ If deemed valid by the NCAA, such a proposal would significantly reduce or eliminate the desire of college athletes to seek benefits from sports agents.¹²

Accordingly, this comment contends that permitting student-athletes to accept financially beneficial endorsement deals would significantly diminish the occurrences of student-athletes seeking secret compensation from sports agents without reducing the NCAA's revenue stream.¹³ Section II of this comment examines the NCAA bylaws regarding amateurism, the laws governing sports agents, the laws concerning the NCAA, the increasingly commercialized state of college athletics, past attempts to challenge the NCAA's amateur rules, and the plague of agents offering compen-

8. See *infra* notes 149-164 and accompanying text for further discussion of the Nebraska Legislative Bill 688 and *Bloom v. National Collegiate Athletic Association*, 93 P.3d 621 (Colo. Ct. App. 2004).

9. See e.g., *Josh Luchs: States Must Enforce Laws*, ESPN (Oct. 14, 2010, 10:54A.M.), <http://sports.espn.go.com/nfl/news/story?id=5681002&campaign=rss&source=NCFHeadlines> (discussing suspended sports agent Josh Luchs' allegations that he gave money to more than thirty college football players from 1990-1996); see also Robbie Gillies, REAL CLEAR SPORTS (July 22, 2010, 2:46 A.M.), http://www.realclearsports.com/blognetwork/rcs_sidelines/2010/07/a-solution-to-ncaas-agent-problem.html (noting various college football players recently found to have accepted money from sports agents and exploring several possible solutions to NCAA agent problem); *Report: John Blake Introduced Agent*, ESPN (Oct. 19, 2010), <http://sports.espn.go.com/nfl/news/story?id=5704064> (announcing allegations that former University of North Carolina assistant coach John Blake introduced former Oklahoma players to agent Gary Wichard).

10. See Ronnie Ramos, *What Happens Next*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/july+latest+news/what+happens+next> (announcing that NCAA Amateurism Cabinet began looking into agent problem at June 2010 meeting).

11. See Tanner, *supra* note 2 ("Student-athletes who violate the rules can slip in the professional drafts, receive smaller contracts and lose endorsements. In light of recent events, the time is right for real and positive change.").

12. See *id.* (commenting on benefits of changing student-agent relationship).

13. For a further discussion of the focus of this Note, see *infra* notes 276-325 and accompanying text.

sation to student-athletes who readily accept such benefits.¹⁴ Section III of this comment details the proposals suggested by prominent head coaches to fix the agent problem in college sports while also discussing the steps currently being taken by the NCAA to resolve this issue.¹⁵ Section III then examines three past proposals for a payment system between the NCAA and student-athletes—the pay-for-play proposal, the laundry money model, and the revenue-sharing suggestion—all of which attempted to reconcile the revenue discrepancy between the NCAA and student athletes.¹⁶ Finally, Section III provides a comprehensive analysis of the endorsement deal proposal while explaining how this proposal avoids the downfalls of the other revenue sharing suggestions and also effectively combats the current agent problem in the NCAA more effectively than any of the possible solutions offered by NCAA officials and head coaches.¹⁷ Section IV ultimately asserts the premise that the NCAA will not eliminate the current agent epidemic without implementing the endorsement deal proposal.¹⁸

II. BACKGROUND

A. The NCAA's Current Amateur Bylaws

The NCAA's bylaws regarding student-athletes were developed under the amateur/education model.¹⁹ This model enables the NCAA to fall under the Internal Revenue Code's ("IRC") classification of a tax-exempt status.²⁰ The current model also allows the NCAA to avoid workers' compensation claims and vicarious liabil-

14. For a further discussion of the increased commercialization of college sports and the current problem of agents in the NCAA, see *infra* notes 111-148 and accompanying text.

15. For a further discussion of the NCAA's and head coaches' solutions to the agent problem, see *infra* notes 185-206 and accompanying text.

16. For a further discussion of the other proposals attempting to solve the discrepancy between the NCAA's revenue and the lack of benefits given to student-athletes, see *infra* notes 214-275 and accompanying text.

17. For a further discussion of why the endorsement deal plan is currently the NCAA's best option to eliminate the agent problem, see *infra* notes 274-320 and accompanying text.

18. For concluding remarks on player-agent relationships, see *infra* notes 321-325 and accompanying text.

19. See Davis, *supra* note 3, at 273 (declaring that NCAA adheres to amateur/education model, which alleges clear line between amateur and professional athletes).

20. See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 576-85 (2009) (explaining how NCAA maintains amateur rules to keep its tax-exempt status).

ity.²¹ To justify this amateur model, the NCAA bylaws assert that school athletic programs are “an integral part of the educational program” because student-athletes are essential to the student body, and thus quite different from professional athletes.²²

Under this system, schools can give students full tuition scholarships that include the cost of room and board.²³ Moreover, the NCAA permits college athletes to work part-time to earn additional compensation to pay for expenses associated with going to college.²⁴ At these part-time jobs, employers of student-athletes can only pay these college students wages that are “the going rate in that locality for similar services.”²⁵ In addition, student-athletes may not receive more financial aid than the cost of attendance.²⁶

The NCAA also mandates that student-athletes cannot receive compensation for their athletic prowess from people not associated with the school in which the student-athlete attends.²⁷ College athletes cannot accept the promise of money from any type of person not associated with the school, even if the student-athlete would not receive the compensation until after graduation.²⁸ Furthermore, student-athletes lose all remaining college eligibility once they sign with a sports agent, even if the students do not accept any money when signing with an agent.²⁹ Moreover, NCAA guidelines prohibit student-athletes from accepting awards related to their athletic

21. For further discussion of why the NCAA’s current format avoids workers’ compensation claims and vicarious liability, see *infra* notes 76-101 and accompanying text.

22. See NCAA Operating Bylaws, *supra* note 3, § 12.01.2 (“Member institutions’ athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”).

23. See *id.* § 12.01.4 (declaring that permissible grant-in-aid includes that which “does not exceed the financial aid limitations set by the Association’s membership”).

24. See *id.* § 12.4.1 (stating that student-athletes may receive compensation “only for work actually performed”).

25. *Id.*

26. See *id.* § 15.01.6 (“An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.”).

27. See *id.* § 12.1.2(a)-(g) (listing ways in which student-athletes can lose eligibility).

28. See *id.* § 12.1.2(b) (stating how student-athlete can lose eligibility even if athlete does not accept immediate compensation while in college).

29. See *id.* § 12.1.2(c) (noting that contract does not even need to be legally enforceable or include consideration for student-athlete to lose eligibility).

skills from organizations or people unassociated with the student-athlete's school.³⁰

Although these by-laws may seem quite restrictive, the NCAA provides for several exceptions.³¹ One such exception is that a student-athlete can speak to and socialize with an agent.³² To maintain compliance with NCAA by-laws, however, a student-athlete must ensure that the agent does not provide the student with transportation or pay for any meals during such an encounter.³³ Section 12.1.2.4.2 of the by-laws details that "a student-athlete may accept prize money based on his or her place finish or performance in an open athletics event" in an individual sport.³⁴ Nevertheless, the amount of prize money cannot exceed the individual athlete's expenses for performing in the event.³⁵ Student-athletes may also try out with a professional team, and be reimbursed for the needed expenses to do so, as long as the trip does not extend past forty-eight hours, and the student-athlete does not participate in any scrimmages as a representative of the professional team.³⁶ Under certain circumstances, student-athletes may play professionally in one sport and receive compensation while participating in a different collegiate sport.³⁷ In regard to college basketball players con-

30. *See id.* § 16.01.1 ("A student-athlete shall not receive any extra benefit. Receipt by a student-athlete of an award, benefit or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible for athletics competition in the sport for which the improper award, benefit or expense was received.").

31. *See infra* notes 32-38 and accompany text (detailing NCAA's exceptions for student-athletes communicating with sports agents).

32. *See Overview of NCAA Bylaws Governing Athletic Agents*, NCAA (Jul. 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/july+latest+news/overview+of+ncaa+bylaws+governing+athlete+agents> (demonstrating where NCAA rules possess some flexibility on stance against relationship between agents and students).

33. *See id.* (noting restrictions placed on student-athletes' ability to meet with sports agents); *see also* NCAA Operating Bylaws § 12.3.1.2 (describing actions that result in ineligibility when student-athletes meet with agents).

34. *See* NCAA Operating Bylaws, *supra* note 3, § 12.1.2.4.2 (asserting that exceptions exist to NCAA's general rule that student-athletes cannot be financially compensated for participation in athletic events).

35. *See id.* (listing exceptions to student-athlete's capability of receiving prize money in competition and further declaring that award money cannot come from source other than competition sponsor).

36. *See id.* § 12.2.1.2 (explaining that professional teams can pay student-athlete for expenses incurred when student-athlete traveling to try-out for professional team).

37. *See id.* § 12.1.3 ("A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport."); *see also* Chris Isidore, *Amateurs at Work: NCAA Looks Foolish Cracking Down on Football Player Seeking Sponsorship to Compete as World Cup Skier*, CNN MONEY (Feb. 27, 2004, 3:30 PM), <http://money.cnn.com/2004/02/27/com->

templating a professional career, the NCAA explicitly states that college basketball players may declare for the NBA draft and return to school if they do not sign with an agent and remove their name from the draft by a certain date.³⁸

There are also specific rules regarding when encounters between college athletes and sports agents render a student-athlete ineligible for collegiate play.³⁹ Section 12.3 states that a student-athlete will be ineligible “if he or she ever has agreed . . . to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport.”⁴⁰ This section also states that student-athletes will lose all remaining eligibility in any collegiate sport if the student-athlete agrees to allow a sports agent to represent the student in contract negotiations with professional sports teams.⁴¹ To avoid any improper relationships with agents, the NCAA permits “an authorized institutional professional sports counseling panel” to help student-athletes contemplate future career decisions related to professional sports, review contracts with professional sports teams, and “meet with the student-athlete and representative of professional teams.”⁴²

B. Laws Regulating Agent Behavior in College Athletics

In an attempt to curtail the improper relationships between sports agents and student-athletes, numerous states, along with the federal government and the National Football League Players Asso-

mentary/column_sportsbiz/sportsbiz/ (“The NCAA allows athletes to be professional in one sport and still be eligible to play in college as an amateur in another sport.”).

38. See NCAA Operating Bylaws § 12.2.4.2.1.1(a)-(c) (noting that NCAA basketball players do not become ineligible simply by declaring for NBA draft); see also *Harangody Withdraws from NBA Draft, Returns to Irish*, CBS SPORTS (June 15, 2009), <http://www.cbssports.com/collegebasketball/story/11859370> (noting that Notre Dame junior forward Luke Harangody decided to return for senior season at Notre Dame after declaring for 2009 NBA Draft).

39. See NCAA Operating Bylaws, *supra* note 3, § 12.3 (explaining various NCAA provisions restricting contact between agents and student-athletes and also stating permissible actions by college athletes that can take place without student losing athletic eligibility).

40. See *id.* § 12.3.1 (noting primary restriction that student-athletes cannot hire agent while playing college sports).

41. See *id.* § 12.3.1.1 (“An individual shall be ineligible per Bylaw 12.3.1 if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.”).

42. See *id.* § 12.3.1.4 (“It is permissible for an authorized institutional professional sports counseling panel to: (a) advise a student-athlete about a future professional career; (c) review a proposed professional sports contract; (d) meet with the student-athlete and representatives of professional teams . . .”).

ciation (“NFLPA”), have passed laws designed to punish agents for inappropriate contact with college athletes.⁴³

1. *The UAAA and SPARTA*

In 2000, a committee at the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) established the Uniform Athlete Agents Act (“UAAA”) to standardize state laws regulating sports agents.⁴⁴ After the creation of the UAAA, forty states adopted these measures to curtail “secret payments or gifts to the athlete, [and] undisclosed payments or gifts to friends and relatives who may be in a position to influence the athlete”⁴⁵ The act contains numerous provisions that were similar to other state laws regulating sports agents, and also provided for reciprocity among states that enacted the UAAA.⁴⁶

The UAAA generally requires an individual to register as a sports agent in each state that the individual conducts business as an agent.⁴⁷ Once registered, states “may suspend, revoke, or refuse to renew a registration for conduct that would have justified denial of registration.”⁴⁸ In addition, Section 11 specifies that agents must alert university athletic directors within seventy-two hours of signing a student-athlete from the athletic director’s school.⁴⁹ Furthermore, a student-athlete may cancel a contract with a sports agent

43. For a further discussion of the state and federal laws passed in order to regulate the behavior of sports agents, see *infra* notes 66-108 and accompanying text. For a specific discussion on the regulations established by the NFLPA, see *infra* notes 58-65 and accompanying text.

44. See *Uniform Athlete Agents Act (UAAA) History and Status*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Agents+and+Amateurism/Uaaa/history.html (last visited Oct. 21, 2011) (asserting that NCAA originally asked NCCUSL to consider drafting model law in 1997, and describing how NCCUSL finished UAAA in 2000); see also UNIFORM ATHLETE AGENTS ACT, Prefatory Note (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uaaa/aaa1130.htm> (giving background of UAAA before listing all of its provisions and rules).

45. See *Uniform Athlete Agents Act (UAAA) History and Status*, *supra* note 45 (listing all forty states that have adopted UAAA in addition to District of Columbia and U.S. Virgin Islands, and asserting justification for UAAA’s adoption in forty states).

46. See *id.* (notifying readers of state laws concerning sports agents that influenced the creation of UAAA).

47. See UNIFORM ATHLETE AGENTS ACT § 5(a) (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uaaa/aaa1130.htm> (“An applicant for registration shall submit an application for registration to the [Secretary of State] in a form prescribed by the [Secretary of State].”).

48. See *id.* § 7(a) (describing power held by state after sports agent has registered in state and needs to renew agent license in state).

49. See *id.* § 11(a) (explaining provision intended to protect student-athletes and limit ability of agent to carry on secret relationship with college student).

within fourteen days of signing the contract without fear of paying any financial consideration for terminating the contract.⁵⁰ Section 14 of the UAAA identifies agent conduct prohibited by the UAAA, which includes providing student-athletes with “anything of value . . . before the student-athlete enters into the agency contract” and “fail[ing] to notify a student-athlete before the student-athlete signs . . . that the signing . . . may make the student-athlete ineligible to participate as a student-athlete in that sport.”⁵¹ To enforce this provision, section 15 declares that violators of section 14 are subject to criminal penalties adopted by the states.⁵² Moreover, section 16 allows universities to sue agents who violate the UAAA.⁵³

Following the adoption of the UAAA, Congress passed the Sports Agents and Responsibility Trust Act (“SPARTA”) in 2004 with the hopes that it would provide sufficient regulation over sports agents conducting business in the eight states that have not implemented the UAAA or promulgated their own state sports agent laws.⁵⁴ Like the UAAA, SPARTA attempts to regulate the “unfair and deceptive acts and practices in connection with the contact between an athlete agent and a student athlete.”⁵⁵ SPARTA contains provisions that are nearly identical to the UAAA, as it outlines proper procedures for agents to follow and allows universities

50. *See id.* § 12(a) (listing another method incorporated by UAAA to ensure that sports agents do not take advantage of student-athletes).

51. *Id.* § 14.

52. *See id.* § 15 (creating means of enforcing provisions established in UAAA). Although section 15 provides that violations of the UAAA can result in state criminal penalties, this section allows the individual states that adopt the UAAA to establish the severity of the criminal penalties. *See id.* (granting states discretion to determine severity of criminal penalties). As a result, criminal penalties for UAAA violations vary widely from state to state. *See id.* (noting varying severity of criminal penalties state to state).

53. *See id.* § 16 (providing method for universities to hold agents accountable for improper actions with student-athletes).

Damages of an educational institution under subsection (a) include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this [Act] or was penalized, disqualified, or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference, or by reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by such an organization.

Id. § 16(b).

54. *See* Melissa Steedle Bogad, *Maybe Jerry Maguire Should Have Stuck with Law School: How the Sports Agent Responsibility and Trust Act Implements Lawyer-Like Rules for Sports Agents*, 27 *CARDOZO L. REV.* 1889, 1889-92 (2006) (discussing SPARTA and examining its affects on sports agents attempting to communicate and form relationships with student-athletes).

55. Sports Agent Responsibility and Trust Act, 15 U.S.C.A. § 7802 (2004) (“SPARTA”).

to sue agents for violations set out in the statute.⁵⁶ The statute also designates the Federal Trade Commission to enforce the provisions of SPARTA as if it were the Federal Trade Commission Act.⁵⁷

2. *NFLPA Regulations Governing Contract Advisors and the NFL CBA*

While the UAAA and SPARTA monitor the behavior of sports agents on state and federal levels, the NFLPA also regulates agents who represent athletes seeking contracts with National Football League (“NFL”) teams through the NFLPA Regulations Governing Contract Advisors (“NFLPA Regulations”) and the NFL Collective Bargaining Agreement.⁵⁸ Under the 2006 Collective Bargaining Agreement (“CBA”), all sports agents (or contract advisors) were required to be certified by the NFLPA to conduct contract negotiations with NFL franchises.⁵⁹ In order to assimilate the NFLPA regulations with state and federal laws governing sports agents, section 3(a)(14) of the NFLPA Regulations mandates that sports agents must “fully comply with applicable state and federal laws.”⁶⁰ Through this language, the NFLPA attempts to reinforce the UAAA and SPARTA with the goal of preventing further misconduct between sports agents and student-athletes.⁶¹

56. *See id.* (listing sports agent conduct prohibited by SPARTA that mirrors prohibitions established in UAAA).

57. *See id.* § 7803(b) (“The Commission shall enforce this chapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.”) (citation omitted); *see also* Bogad, *supra* note 54, at 1906 (explaining that Federal Trade Commission has authority to enforce SPARTA and intervene when sports agents violate SPARTA).

58. For a further discussion of the regulations created by the NFLPA to monitor the behavior of sports agents, *see infra* notes 62-65 and accompanying text.

59. *See* NFL Collective Bargaining Agreement, Article VI, § 1 (2006) (“NFL CBA”) <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf> (declaring that all sports agents must register with NFLPA before signing athletes and engaging in contract negotiations with NFL franchises); *see also* NFLPA Regulations Governing Contract Advisors § 1 (amended March 2007) [hereinafter NFLPA Regulations], <http://www.title17.org/scott/NFL.pdf> (reiterating rules established by 2006 CBA and noting how NFLPA Regulations Governing Contract Advisors and CBA work in conjunction with one another). At the time of this article, the 2006 CBA was the last finalized bargaining agreement between the NFL owners and the NFLPA. *See* Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN (July 25, 2011, 12:14 AM), http://espn.go.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say (discussing NFL collective bargaining agreement history). The newest finalized CBA occurred in 2011. *See id.* (reporting finalized NFL collective bargaining agreement for 2011).

60. *See* NFLPA Regulations § 3(a)(14) (demonstrating how NFLPA regulations were intended to supplement state and federal rules prohibiting certain conduct by sports agents in connection with student-athletes).

61. *See id.* (requiring compliance with SPARTA and UAAA); *cf.* SPARTA, *supra* note 55 § 7802 (revealing similar SPARTA goal). For a further discussion of the

In addition to averting improper actions by compelling agents to comply with state and federal laws, the NFLPA also limits agent conduct with several of its own provisions.⁶² Section 3(b)(2) of the NFLPA Regulations specifically targets agents giving financial compensation to prospective professional athletes, forbidding sports agents from “providing or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services.”⁶³ Expanding upon this provision, section 3(b)(3) also prohibits contract advisors from providing money to family members of student-athletes or any other person that could potentially influence the student-athlete to sign with the agent.⁶⁴ Sections 3(b)(30)(a) and (b) even restrict agents from speaking to individual college-athletes who are ineligible for the NFL and “groups of prospective players in a setting where prospective players who are ineligible for the NFL Draft . . . are present at such presentation.”⁶⁵

C. Laws Involving the NCAA and Student-Athletes

Although the various student-athlete payment systems that have been suggested by legal scholars would allow college athletes to benefit financially from their athletic endeavors, such proposals would ultimately create certain legal difficulties.⁶⁶

1. Title IX

Congress passed Title IX of the Education Amendments in 1972 with the expectation that this piece of legislation would pro-

similarities in purpose of the UAAA, SPARTA, and the NFLPA, see *supra* notes 54-56 and accompanying text.

62. See SPARTA, *supra* note 55 § 3(b) (listing numerous agent actions prohibited by NFLPA).

63. *Id.* § 3(b)(2).

64. See *id.* § 3(b)(3) (attempting to eliminate any ambiguities by which agents could still influence student-athletes into signing contract without any potential repercussions for sports agents from NFLPA).

65. See *id.* § 3(b)(30)(a)-(b) (eliminating any potential contact between sports agents and student-athletes that are not yet eligible for NFL Draft). The 2006 NFL CBA declares that a student-athlete is only eligible for the NFL draft after three full NFL seasons have been completed since the time of the student-athlete's graduation from high school. See *id.* (noting that NFLPA Regulations base eligibility of student-athletes to enter NFL Draft on definition established in Article XVI of NFL CBA). In other words, the NFLPA classifies college football seniors as NFL draft-eligible, but does not consider college football juniors as eligible for the NFL draft until after both their junior season and that year's NFL season have concluded. See *id.* (concluding sports agents may only speak with college juniors at completion of NFL season after student-athlete's third year out of high school).

66. See *infra* notes 67-108 and accompanying text.

vide women with greater employment opportunities in federally financed colleges and universities.⁶⁷ Although Title IX does not expressly mention women's athletics, courts have broadened the scope of its application to include women's sports in high school and college.⁶⁸ Title IX states, in part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁶⁹

To comply with Title IX standards, schools must meet one of three requirements stated in *Cohen v. Brown University*.⁷⁰ First, schools may provide opportunities for athletics that are "substantially proportionate" to the gender demographic figures.⁷¹ Second, schools may demonstrate that they are continually striving for equal athletic opportunities between both genders.⁷² Third, schools may ensure that "the athletic interests and abilities of male and female students must be equally effectively accommodated."⁷³ In short, colleges must provide female student-athletes with the same athletic opportunities as male athletes, and schools must give equal treatment to both men's and women's sports.⁷⁴ Courts usually declare that a school has violated Title IX if the proportionality prong of the three-part test has not been met because schools, in most cir-

67. See *Legislative History of Title IX*, NATIONAL ORGANIZATION FOR WOMEN, http://www.now.org/issues/title_ix/history.html (last visited Oct. 21, 2011) (creating timeline of events dealing with Title IX from 1972 to 2006 and demonstrating how Title IX has influenced United States during time period).

68. See Acain, *supra* note 5, at 346 (examining how courts have interpreted meaning of Title IX since its inception).

69. 20 U.S.C. § 1681 (2011).

70. 101 F.3d 155 (1st Cir. 1996). See *Title IX 1979 Policy Interpretation on Intercollegiate Athletics*, U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Sept. 10, 2011) (listing requirements for compliance with Title IX).

71. See *Title IX 1979 Policy Interpretation on Intercollegiate Athletics*, *supra* note 70 ("Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.").

72. See *id.* ("Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.").

73. *Id.*; see also Acain, *supra* note 5, at 346 ("In coming to this conclusion, the District Court [in *Cohen v. Brown University*] developed the 'policy interpretation' test consisting of three prongs: (1) substantial proportionality; (2) continuing practice of program expansion; and (3) full and effective accommodation.").

74. See Acain, *supra* note 5, at 346 (discussing how courts have interpreted Title IX).

cumstances, would not be able to satisfy the other two prongs while failing the proportionality test.⁷⁵

2. *Employment Law and Issues*

a. Workers' Compensation

Although workers' compensation statutes vary from state to state, courts do not hold colleges and universities responsible for making workers' compensation payments for injuries incurred by student-athletes in the field of play.⁷⁶ In *State Compensation Insurance Fund v. Industrial Accident Commission*,⁷⁷ the Colorado Supreme Court concluded that the contractual agreement between a school and a student, in which the student committed to play a certain sport for the school in exchange for a full tuition scholarship, did not amount to an employment contract.⁷⁸ As the Court noted, one can only collect workers' compensation as a result of an injury if an employer-employee relationship exists.⁷⁹ Therefore, because the school did not enter into an employment contract with the student to play football, the institution had no responsibility to make workers' compensation payments after the injury occurred.⁸⁰ The Court held the employer-employee relationship did not exist because the state institute was not running a business for profit by fielding a college football team.⁸¹ The Court further asserted that it could not "believe that the legislature, in creating the compensation fund,

75. *See id.* at 346-47 ("Under present conditions it is difficult to effectively accommodate women without first achieving gender equality. Therefore, if an institution does not comply with the proportionality aspect of the three-prong test, the institution likely violates Title IX.").

76. *See* Michael J. Mondello & Joseph Beckham, *Workers' Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295-99 (2002) (providing timeline of judicial cases involving college athletics and workers' compensation claims and how, over time, judicial precedent has established that universities are not responsible to make workers' compensation payments).

77. 314 P.2d 288 (Colo. 1957).

78. *See id.* at 573-74 (declaring that even though student also received compensation from university for separate job given to him by university once he came to school to play football, job was not contingent on his ability to play football, and therefore, no employment contract existed in regard to playing school sport).

79. *See id.* at 573 (citing *University of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953)) (distinguishing prior case, which held that student was entitled to workers' compensation because student's employment in separate job was dependent on his continued participation on school's football team).

80. *See id.* (noting difference between *Nemeth* case and student-athlete at Fort Lewis A&M College).

81. *See id.* (asserting that college did not receive direct benefit from player because school did not field football team primarily to generate money as business).

intended that it be in the nature of a pension fund for all student athletes attending our state educational institutions.”⁸²

In the 1983 case, *Rensing v. Indiana State University Board of Trustees*,⁸³ the Indiana Supreme Court also concluded that an athletic scholarship is not the equivalent of an employment contract.⁸⁴ The Court reasoned that the football player’s scholarship was not contingent on his athletic play because the student maintained his scholarship despite injuries that inhibited him from performing.⁸⁵ Moreover, the scholarship given to the student-athlete to play football did not constitute a method of payment, as the Internal Revenue Service (“IRS”) did not require the student to report such benefits as gross income.⁸⁶ The Court also noted that there is no distinction between athletic and academic scholarships.⁸⁷ The university did not provide the student-athlete with a scholarship because of his “services” on the football field.⁸⁸ Instead, universities give athletic and academic scholarships because of “past demonstrated ability in various areas” with the hope that such financial assistance will allow students to “pursue opportunities for higher education as well as to further progress in their own fields of endeavor.”⁸⁹ In other words, the contract between a student-athlete and a university is not an employment contract or a contract to render certain services, but rather a contract involving education.⁹⁰

82. *Id.* at 574.

83. 444 N.E.2d 1170 (Ind. 1983).

84. *See id.* (declaring that college scholarships to play football do not create employer-employee relationship between schools and student-athletes).

85. *See id.* at 1171 (describing agreement). The Court found:

The ‘agreement’ provided . . . the aid would continue even if Rensing suffered an injury during supervised play which would make it inadvisable, in the opinion of the doctor-director of the student health service, ‘to continue to participate,’ although in that event the University would require other assistance to the extent of his ability.

Id.

86. *See id.* at 1173 (providing further evidence that employee-employer relationship does not exist between school and student-athlete, as IRS has never recognized scholarships as income).

87. *See id.* (explaining that IRS also did not see any difference between scholarship given by university for academic reasons versus scholarship given for athletic reasons).

88. *See id.* at 1174 (providing justification for scholarship given to student-athlete and demonstrating that athletic participation did not constitute reason for scholarship any more than academically talented student receives scholarship to perform well in classroom).

89. *Id.*

90. *See id.* (noting that school would be responsible for making workers’ compensation payments if school gave scholarship to student for reasons unrelated to educational mission of institute).

Thus, universities are not required to compensate student-athletes under workers' compensation.⁹¹

b. Vicarious Liability

In its simplest terms, the doctrine of respondeat superior states that employers are vicariously liable for the acts of their employees that occur within the scope of their employment.⁹² Similarly, a principle may also be found liable under a principle-agent relationship where the agent has been authorized to act on behalf of the principle.⁹³ As evidenced by the *State Fund* and *Rensing* cases, courts have traditionally viewed athletic scholarships as educational contracts rather than employment agreements.⁹⁴ Therefore, courts have not found schools vicariously liable for the on-field actions of its student-athletes that result in the injury of other players because the students are not employees of the schools.⁹⁵

Although the court in *Hanson v. Kynast*⁹⁶ held that a school was not liable for the reckless act of a lacrosse player because the athlete did not receive a scholarship or any other type of benefit from the school for participating in the sport, Justice Holmes's concurring opinion declared that a principle-agent relationship would still not exist if the school gave the student-athlete a scholarship or charged fees to watch the athletic event.⁹⁷ Holmes noted, however, that payment given to the college player from the university for the athlete's participation in the event would represent a contractual agreement sufficient to hold the university vicariously liable for the

91. *See id.* (demonstrating that person can only receive workers' compensation if he enters into employment contract). "Rensing [the injured student] did not receive 'pay' for playing football at the University within the meaning of the Workmen's Compensation Act; therefore, an essential element of the employer-employee relationship was missing in addition to the lack of intent." *Id.*

92. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743-44 (1998) (providing general definition of vicarious liability and exemplifying when employer is liable for actions of employee).

93. *See id.* at 742-44 (noting that principle-agent relationship has many of same duties and responsibilities as employer-employee relationship, including ability of principle to be liable for actions of agent).

94. For a further discussion of why colleges and universities are not considered employers of student-athletes who are given athletic scholarships, see *supra* notes 76-91 and accompanying text.

95. For a further analysis of how courts have determined that schools are not liable for the on-field actions of their student-athletes, see *supra* notes 92-94 and *infra* notes 96-101 and accompanying.

96. 494 N.E.2d 1091 (Ohio 1993).

97. *See id.* at 1098 (asserting that school profiting from student-athlete playing sports would not change holding that employment relationship did not exist between student-athlete and school).

student's actions.⁹⁸ Holmes's reasoning aligns with the First Circuit's decision in *Manning v. Grimsley*,⁹⁹ which declared that professional sports franchises, as employers of professional athletes, are vicariously liable for the intentional torts of any players that occur during the "scope of employment."¹⁰⁰ In *Manning*, the court remanded the case to the district court and noted the possibility that the Baltimore Orioles could be held liable for the actions of an Orioles pitcher who threw a baseball and hit a fan.¹⁰¹

3. *Exemption from Federal Income Tax*

The NCAA, as an entity that qualifies under section 501(c)(3) of the IRC, enjoys an exemption from paying income taxes on money generated from college athletics.¹⁰² Section 501(c)(3) states that the IRC provides a federal income tax exemption for entities created to exclusively operate "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition" in accordance with the IRC's definition of an amateur sports organization in section 501(j).¹⁰³ The IRS exempts organizations from income taxes if they meet one or more of the classifications listed in section 501(c).¹⁰⁴ Presumably, the IRS provides the NCAA with a section 501 tax exemption because it qualifies as an entity that exclusively operates for "educational purposes" and "to foster national or international amateur sports competition."¹⁰⁵ Under section 501(j), the IRS defines an amateur sports organization as an entity exclusively

98. *See id.* (stating that actual payment to student-athletes from school for sole purpose of playing sports would result in employment contract between student-athletes and school).

99. 643 F.2d 20 (1st Cir. 1981)

100. *See id.* at 24 (applying Massachusetts' vicarious liability law to professional sports franchise).

101. *See id.* (determining that employer, or professional sports franchise, could be held vicariously liable for action of its pitcher because "assault was in response to [heckling] which was presently interfering with [pitcher's] ability to perform his duties successfully") (citation omitted).

102. *See* Brett T. Smith, *The Tax-Exempt Status of the NCAA: Has the IRS Fumbled the Ball?*, 17 SPORTS LAW. J. 117, 119-20 (2010) (explaining that IRS classifies NCAA as tax-exempt organization because it falls under criteria established in I.R.C. § 501(c)(3)).

103. I.R.C. § 501(c)(3) (2006) (describing how entities can attain tax-exemptions).

104. *See id.* (declaring that organizations that do not meet criteria established in section 501(c)(3) must pay taxes on money generated after expenses).

105. *See* Fitt, *supra* note 20, at 577 (alleging that NCAA's best argument for tax-exempt status is under amateur athletics organization). *But see* Smith, *supra* note 102, at 121-22 (asserting that NCAA enjoys tax-exempt status because of its educational mission and purpose).

created to facilitate national or international amateur sporting events and develop amateur athletes for these events.¹⁰⁶

Tax-exempt entities may be subject to an unrelated business tax when the entity engages in a trade or business that is regularly carried on and “not substantially related to further the exempt purposes of the organization.”¹⁰⁷ Despite the tremendous amount of money generated by college athletics, the high salaries of coaches, and the low graduation rates of football and basketball players, the IRS continues to exempt the NCAA from the unrelated business income tax (“UBIT”).¹⁰⁸

D. The Commercialized State of College Sports

Although the NCAA enjoys tax exemptions as a non-profit amateur athletics organization, college sports is a major commercial entity with schools, coaches, and NCAA officials earning millions of dollars per year.¹⁰⁹ In fact, the NCAA generates nearly \$650 million in revenue per year from television and marketing fees, championship games, and investment fees and services.¹¹⁰ The overwhelming majority of this revenue comes from the NCAA’s television contract with CBS, which is worth \$11 billion over six years.¹¹¹ Moreover, at the existing rate agreed upon by CBS and the NCAA, the men’s

106. See I.R.C. § 501(j) (2006) (“[A]ny organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports.”).

107. *Id.* §§ 501(b), 511-14. “Except as otherwise provided in this subsection, the term ‘unrelated business taxable income’ means the gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it” *Id.* § 512(a)(1).

108. See Smith, *supra* note 102, at 128-29 (noting that NCAA has survived various challenges from IRS in regard to whether NCAA revenue generated from athletic events qualifies as “substantially related” to NCAA’s educational purpose).

109. See Steve Wieberg, *NCAA’s Tax-Exempt Status Questioned*, USA TODAY (Oct. 5, 2006), http://www.usatoday.com/sports/college/2006-10-04-ncaa-tax-status_x.htm (discussing Congress asking NCAA to defend its tax-exempt status); see also Tom Van Riper, *The Highest-Paid College Basketball Coaches*, FORBES.COM (Mar. 8, 2010), <http://www.forbes.com/2010/03/05/calipari-donovan-pitino-business-sports-college-basketball-coaches.html> (naming NCAA basketball’s highest paid coaches and explaining schools’ need to pay high salaries to remain competitive).

110. See *NCAA Budgeted Revenue Chart*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/budget+and+finances/budget+information/current+budgeted+revenue+chart (last visited Oct. 18, 2011) (breaking down portions of NCAA revenue).

111. See *Where Does the Money Go?*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/answers/nine%20oints%20to%20consider_one (last visited Oct. 18, 2011) (detailing NCAA’s revenue stream, sources of income, and expenses and allocation of revenue).

basketball national championship game has the highest cost per viewer of any sporting event in the United States, including the Super Bowl.¹¹²

Many individual universities and colleges also make a substantial amount of money from college athletics.¹¹³ In 2010, the University of Texas's football program earned net revenue of over \$65 million.¹¹⁴ Additionally, universities such as Georgia, Florida, Penn State, Louisiana State, Notre Dame, and Alabama all generated net revenues of over \$38 million.¹¹⁵ In contrast, only four Division I Bowl Championship Series ("BCS") football programs – Connecticut, Syracuse, Wake Forest, and Duke – lost money.¹¹⁶ Moreover, these figures do not include the indirect financial benefits that schools receive from possessing successful athletic programs.¹¹⁷ Wealthy alumni of schools often reward their alma maters with huge sums of money when the schools' sports teams have successful seasons.¹¹⁸ Reports estimate that making the NCAA basketball tournament field of sixty-eight increases alumni donations by an average of \$450,000 per college.¹¹⁹ For example, after winning the 2006 and 2007 NCAA basketball championships, and the 2006 National Championship in football, the University of Florida's athletic department received \$38 million from its alumni.¹²⁰

112. *See id.* (explaining benefits of NCAA's current television deal with CBS).

113. *See* Brett McMurphy, *For Longhorns, Money Grows on Football Program, Not Trees*, AOL NEWS, (June 30, 2010), <http://ncaafootball.fanhouse.com/2010/06/30/for-longhorns-money-grows-on-football-program-instead-of-trees/> (listing all BCS football program revenues in 2009); *see also* Matt Woolsey, *It Can Pay to Lose in College Football*, FORBES.COM (Dec. 5, 2006), http://www.forbes.com/2006/12/04/college-football-profits-biz-cx_mw_1205football.html (declaring that Texas football program grossed over \$60 million in 2005, and even schools such as Washington, Illinois, and Kentucky all generated over \$19 million in revenue despite last place finishes in their respective conferences).

114. *See id.* (noting that Texas's football program generates more money than any other team by \$20 million).

115. *See id.* (listing football programs that generate most money after Texas).

116. *See id.* (stating that nearly every BCS football team turned profit during 2008-09 football season, though only seventeen non-BCS teams turned profit).

117. *See* Brian O'Keefe, *How Florida Cashed in on College Football*, CNN MONEY (Oct. 19, 2007), http://money.cnn.com/2007/10/18/news/companies/florida_gators.fortune/index.htm (discussing how Florida is most successful sports program in country and alumni have given generous donations despite not having "Boone Pickens-level sugar daddy"—Pickens pledged \$165 to alma mater Oklahoma State University).

118. *See id.* (explaining that boosters fund many building projects for athletic facilities with costs amounting to hundreds of millions).

119. *See* Van Riper, *supra* note 109 (conducting cost-benefit analysis of hiring high-paid college basketball coaches and financial return that schools experience).

120. *See* O'Keefe, *supra* note 117 (discussing "team behind the team" in reference to boosters who help pay for University of Florida facilities).

Successful sports programs and famous student-athletes can also increase the popularity of a school, which frequently leads to increased enrollment and tuition payments to the school.¹²¹ Since emerging as America's favorite Cinderella team during the 1999 NCAA basketball tournament and continuing its success with trips to the NCAA tournament in each of the last twelve years, Gonzaga University has become a much more popular school to attend.¹²² Enrollment increased from 4,500 students in 1999 to over 7,000 students in 2010.¹²³ In addition, universities that win a Division-IA football national championship have experienced, on average, an eight percent increase in enrollment for the following school year.¹²⁴

Schools and conference officials around the nation have been well aware of the potential money to be made in college sports, but the pursuit to capitalize on such revenue has become more evident in recent years.¹²⁵ Under the NCAA's alignment, there are six automatic qualifying BCS conferences – the Big Ten, the Big XII, the Southeastern Conference (“SEC”), the Atlantic Coast Conference

121. See Dena Potter, *'Flutie Effect' Is Real, Study Shows*, HEARST (Mar. 23, 2008), http://www.seattlepi.com/cbasketball/356135_flutie24.html (explaining 'Flutie Effect' named after Doug Flutie because enrollment increased at Boston College by roughly thirty percent after Flutie threw famous 'Hail Mary' pass to beat Miami in 1984 Orange Bowl).

122. See *id.* (“Inquiries [from prospective students] have jumped from about 20,000 per year to 50,000, and Gonzaga attracts students from Eastern states where it doesn't recruit.”).

123. See *id.* (stating that Gonzaga would not have grown in enrollment if not for success of basketball team).

124. See *id.* (explaining that successful sports programs are great marketing tool for colleges and universities to attract students). *But see* Mondello, *supra* note 76, at 301-02 (asserting that there is no strong correlation between successful sports teams and increased enrollment and money given to universities). Monello posits:

Those few research studies addressing these issues, particularly the relationship between athletic success and increased enrollments and endowments, have been inconclusive. For example, researchers examining links between athletics, academics, and educational contributions to institutions could establish no relationship between athletic success and total educational contributions in a study of eighty-seven universities covering a ten-year period.

Id.

125. See Chase Ruttig, *Why Conference Realignment Will Kill College Sports*, BLEACHER REPORT (June 14, 2010), <http://bleacherreport.com/articles/406177-why-conference-realignment-will-kill-college-sports> (arguing that potential conference realignment is “money grab” at expense of student education and non-revenue sports); see also Woolsey, *supra* note 113 (asserting many economists' notion that “[t]elevision revenue distribution is key” to financially successful teams even if college football teams do not have any on-field success).

(“ACC”), the Pacific 12 (“Pac-12”), and the Big East.¹²⁶ Additionally, there are a number of other conferences with traditionally smaller schools that also participate in the Football Bowl Division (formerly referred to as Division I-A).¹²⁷

In the summer leading into the 2010 college football season, the Big XII Conference nearly imploded when the Pac-10 attempted to create a super-conference featuring sixteen teams.¹²⁸ Furthermore, in an attempt to secure their financial positions in the college football world, both the Big Ten and SEC discussed potential conference expansion.¹²⁹ Realizing that a sixteen team super-conference would offer its member schools a multi-million dollar increase in revenue through expanded television coverage and a televised conference championship game, the Pac-10 attempted to persuade Texas – the most profitable college football team in the country – into joining the conference.¹³⁰

Although Texas, Texas Tech, Texas A&M and Oklahoma considered deals with both the Pac-10 and the SEC, the Big XII was ultimately able to entice Texas to stay by giving Texas more television revenue for its games.¹³¹ Oklahoma, and Texas Tech also elected to stay in the Big XII.¹³² Colorado and Nebraska, however,

126. See *BCS Conferences*, BCS (Jan 21, 2010, 3:07 PM), <http://www.bcsfootball.org/news/story?id=4809755> (explaining formation of BCS conferences).

127. See *id.* (noting that all eleven football conferences in FBS are BCS conferences).

128. See Pete Thamel, *Uncertainty Marks Start of Expansion*, N.Y. TIMES, June 11, 2010, at B12, available at <http://www.nytimes.com/2010/06/11/sports/11colleges.html> (stating that after Colorado announced its move to Pac-10, Texas, Texas Tech, Oklahoma, and Oklahoma State seemed likely to join them); see also Ted Miller, *Source: CU Already Has Pac-10 Invite*, ESPN (June 10, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5270048> (stating that Big XII is likely to collapse now that Nebraska will join Big Ten).

129. See Erick Smith, *SEC Will React if Big Ten Expansion Shifts Landscape of College Sports*, USA TODAY (Apr. 27, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/04/sec-will-react-if-big-ten-expansion-shifts-landscape-of-college-sports/1> (stating that SEC may attempt to add several teams to conference if Big 10 creates fourteen to sixteen team conference).

130. See Miller, *supra* note 128 (“With that large population base, the new conference would start its own network and, along with other broadcast partners, likely would distribute around \$20 million per member, comparable broadcast revenue to the Big Ten (\$22 million) and SEC (\$17 million).”); see also McMurphy, *supra* note 113 (stating that Texas made approximately \$20 million more than any other college football program last year).

131. See Steve Wieberg, *Television Deal Allows Big XII to Survive; Pac-10 Needs New Plan*, USA TODAY (June 15, 2010), http://www.usatoday.com/sports/college/2010-06-14-texas-staying-big-12_N.htm (discussing how increased television revenues given by Big XII to Texas prevents, for now, any conference realignments).

132. See *Texas Move Helps Big XII Survive*, ESPN (June 15, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5286672> (announcing that Texas Tech,

both left the Big-12 XII, as Nebraska left for the Big Ten and Colorado joined the Pac-10.¹³³ Furthermore, despite its initial decision to stay, Texas A&M ultimately announced its decision in 2011 to move to the SEC.¹³⁴ For remaining in the Big XII, Texas and Oklahoma received new contracts that provide each school with \$20 million a year in television revenues.¹³⁵ The Big XII also provides the remaining six teams in the conference with \$14-17 million per year, an increase of \$4 to \$6 million in just one season.¹³⁶

The BCS conferences' realignment attempts were driven solely by the goal of monetary gain with little regard for the pressures that these new alignments could cause student-athletes, such as increased travel time to reach opponent schools in a different region of the country.¹³⁷ As one legal sports scholar noted, NCAA universities "have become economic competitors that collectively possess monopsony power over the demand for college athletes and monopoly power over the supply of college games."¹³⁸

Oklahoma, and Texas A&M promised to stay in Big XII after Texas declared that it would stay in Big XII).

133. See Wieberg, *supra* note 131 (stating that both Nebraska and Colorado left Big XII before television contracts renegotiated with other Big XII schools); see also *Nebraska, Colorado Paying Millions to Leave Big 12 by '11*, CBS SPORTS (Sept. 21, 2010), <http://www.cbssports.com/collegefootball/story/13990865/nebraska-colorado-paying-millions-to-leave-big-12-by-11> (explaining that Nebraska and Colorado will give up millions of dollars by leaving Big XII Conference). After the Pac-10 added Utah to its conference in addition to Colorado, the Pac-10 officially renamed itself the Pac-12 Conference on July 1, 2011. See *Colorado and Utah Officially Join the Pac-12*, CBS SPORTS (July 1, 2011), <http://www.calbears.com/genrel/070111aac.html> (confirming official date Pac-10 became Pac-12).

134. Ralph Russo, *Texas A&M to SEC: Aggies to Join Conference in July 2012*, HUFFINGTON POST (Sept. 30, 2011), http://www.huffingtonpost.com/2011/09/25/texas-am-sec-conference-sec_n_980244.html (announcing Texas A&M's decision to leave Big 12 and join SEC, effective July 2012).

135. See Wieberg, *supra* note 131 (stating that increased television revenue and promise that Big XII would be same or more financially lucrative than Pac-10 with sixteen teams convinced Texas to stay in Big XII).

136. See *id.* (recognizing that other Big XII schools also received significant increase in television revenues).

137. See Ruttig, *supra* note 125 ("How much class do you think the Texas Longhorns basketball team would get during a West Coast swing in this hypothetical Pac-16."); See also Donald H. Yee, *A Pro Agent's Case for Privatizing College Football*, WASHINGTON POST (Aug., 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/19/AR2010081904202.html> ("The Pacific-10 Conference's luring of teams from the Mountain West and Big 12 conferences, which caused some scrambling in June, had nothing to do with education or amateur sports. It really didn't have anything to do with football or its traditions, either. It had everything to do with money.").

138. Edelman, *supra* note 5, at 871-72 (discussing various aspects of college sports from economic standpoint).

NCAA officials and coaches also benefit tremendously from college athletics.¹³⁹ Former NCAA Director Cedric Dempsey made \$647,000 per year before he retired in 2002.¹⁴⁰ Additionally, in 2006, the now deceased Myles Brand earned \$895,000 as President of the NCAA.¹⁴¹ Salaries for head coaches are even more staggering.¹⁴² As of 2010, twenty-five Division I basketball coaches made more than \$1 million per year.¹⁴³ John Calipari, who left both of his former college teams amidst NCAA allegations of improper conduct, signed an eight-year, \$32 million contract in 2009 with the University of Kentucky to become the highest paid head coach in college basketball.¹⁴⁴ Even several college athletic directors, including Ohio State's Gene Smith, make approximately \$1 million per year.¹⁴⁵ With such large discrepancies between the amount of money generated by college athletics and the amount of financial benefits student-athletes receive in return, it is not difficult to see why high profile college athletes are drawn to sports agents who can offer them money while still in school, especially while those

139. *See id.* (stating that NCAA administrators receive windfall because they do not pay athletes); *see also Coaches' Salaries Main Issue at NCAA Convention*, ATHENS BANNER-HERALD (Jan. 13, 2010), http://www.onlineathens.com/stories/011310/foo_547411225.shtml (noting that Texas coach Mack Brown and Alabama coach Nick Saban had combined salary of nearly \$10 million in 2009).

140. *See* Edelman, *supra* note 5, at 874 (discussing Dempsey's high salary and use of private jet).

141. *See* Beaulieu, *supra* note 4 (stating that student-athletes fund large salaries of NCAA directors).

142. *See* Edelman, *supra* note 5, at 874 (stating in 2002 that "many men's basketball coaches earn[ed] more than one million dollars in total compensation per year").

143. *See* Van Riper, *supra* note 109 (stating that high executive CEOs make little money compared to salaries of college coaches and time spent on job).

144. *See id.* (explaining that leading Memphis to National Championship Game increased Calipari's attractiveness to competitive schools and enabled him to receive highest paid contract for coach in NCAA); *see also Calipari Deal Has Many Perks*, ESPN (Apr. 1, 2009), <http://sports.espn.go.com/ncb/news/story?id=4034862> (declaring that Calipari's contract also includes country club membership of his choice, two cars, and bonuses for reaching Sweet Sixteen, Final Four and National Championship Game).

145. *See Gene Smith Could Earn 1.2M Annually*, ESPN (Sept. 30, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5634022> (announcing that Ohio State recently made changes to Athletic Director Gene Smith's contract, which could be worth as much as 1.2 million); *see also* Richard Moore, *Despite Cutbacks, Collegiate Athletics Boom (For a Few)*, LAKELAND TIMES (Aug. 18, 2009), <http://www.lakelandtimes.com/main.asp?SectionID=9&SubSectionID=9&ArticleID=9996&TM=36791.19> (noting Wisconsin athletic director Barry Alvarez made \$781,250 during the 2008-2009 school year).

preaching ideals of amateurism are receiving millions of dollars at the expense of student-athletes.¹⁴⁶

E. Previous Challenges to the NCAA's Amateurism Rule and Revenue-Generating Scheme By Government Officials and Litigants

Over the course of the last quarter century, the NCAA has encountered numerous types of opposition to the NCAA's revenue system and rules prohibiting college athletes from receiving financial compensation.¹⁴⁷ Jeremy Bloom, perhaps the most famous example of such opposition, was a high school football star and a highly rated recruit who eventually accepted a scholarship to play football at the University of Colorado.¹⁴⁸ In addition to his talent on the football field, Bloom was also a star skier, participating in the 2002 Winter Olympics and finishing ninth overall in the men's freestyle moguls.¹⁴⁹ To finance his training and preparations for the 2002 Olympics, Bloom accepted a number of endorsements.¹⁵⁰ Bloom was forced to drop his sponsors, however, because the

146. See Rosenberg, *supra* note 5 (stating that millions of dollars generated by NCAA without compensation to student-athletes has resulted in players like Reggie Bush accepting money from agents); see also Lonnie White, *Solution Long Overdue for Problem of Agents and College Sports*, AOL NEWS (July 21, 2010), <http://ncaafootball.fanhouse.com/2010/07/21/solution-long-overdue-for-problem-of-agents-and-college-sports/> (asserting that players mainly accept money because they see substantial amounts of money being made by coaches and NCAA officials for work they do without much compensation). "Without getting too deep, the main reason why athletes get caught up accepting illegal benefits is because they feel exploited. With the NCAA generating more money than ever, skillful agents find it easy to lure athletes with cash, gifts and other perks." *Id.*

147. See *Pros/Cons on Pay for Play*, USA TODAY (Aug. 31, 2004), http://www.usatoday.com/sports/2004-08-31-pros-cons-pay_x.htm (quoting Nebraska Senator Ernie Chambers); see also *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. Ct. App. 2004) (arguing that college athletes should be able to receive endorsements to finance training for winter Olympics).

148. See *Jeremy Bloom Biography*, KIDZWORLD, <http://www.kidzworld.com/article/7560-jeremy-bloom-biography> (last visited Sept. 30, 2011) (detailing Bloom's accomplishments in football).

149. See Steve Dilbeck, *Two-Sport Star Ready to Bloom*, DAILY NEWS, Feb. 10, 2006, available at <http://www.thefreelibrary.com/TWO-SPORT+STAR+IS+READY+TO+BLOOM.%28Sports%29-a0142025560> (discussing Bloom participating in then-upcoming 2006 Winter Olympics and looking back on his 2002 Winter Olympic accomplishments); see also Isidore, *supra* note 37 (noting that Bloom won World Cup in freestyle skiing in 2002 and participated in Winter Olympics during same year).

150. See Joel Eckert, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 907 (2006) (discussing events that lead to Bloom filing suit against NCAA); see also Isidore, *supra* note 37 (mentioning that Bloom had originally attempted to seek endorsement deals when he began school at Colorado).

NCAA refused to grant him a waiver of prohibition to continue financing his skiing pursuits while playing football. After a trial court would not offer Bloom a preliminary injunction against the NCAA, he chose to focus solely on football for the 2002 and 2003 seasons.¹⁵¹

During his time at Colorado, Bloom received All-American freshman honors and broke several Colorado school records, including catching the longest touchdown pass in school history.¹⁵² The endorsement issue re-surfaced, though, when Bloom decided to train for the upcoming 2006 Winter Olympics and accepted a number of endorsement deals to finance his training.¹⁵³ Bloom lost his appeal of the trial court's refusal to issue a preliminary injunction and was deemed ineligible to play college football because the acceptance of compensation through endorsements violated the NCAA's bylaws on amateurism.¹⁵⁴

In light of such issues, the Nebraska state legislature passed Nebraska Legislative Bill 688 as an attempt to pressure the NCAA into providing better compensation for student-athletes.¹⁵⁵ The bill, which Governor Mike Johanns signed into state law on April 16, 2003, mandated the University of Nebraska-Lincoln to further compensate football players.¹⁵⁶ To justify the legislation, the bill declared that student-athletes, especially football players coming from economically poor backgrounds, are susceptible to NCAA-deemed

151. See Eckert, *supra* note 150, at 907 (discussing Bloom dropping sponsorship); see also Isidore, *supra* note 37 (explaining that Bloom attempted to overturn case from 2002 where he sought permission to accept endorsement deals to finance skiing training while also playing football at Colorado).

152. See Dilbeck, *supra* note 149 (describing Bloom's accomplishments at Colorado when he focused exclusively on football).

153. See Eckert, *supra* note 150, at 907 (stating that Bloom realized he could not train for Olympics without financing training through endorsements); see also Isidore, *supra* note 37 (mentioning Bloom's first endorsement deal to appear in advertisements for Equinox chain of health clubs).

154. See Eckert, *supra* note 150, at 907 (explaining that Bloom lost appeal of trial court decision but court recognized that student-athletes are third party beneficiaries to NCAA and, therefore, have standing to sue NCAA).

155. See Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 322-23 (2004) (explaining Nebraska state legislature's initiative to pass bill potentially mandating payment to Nebraska football players); see also *Athletes Pay Plan in Works in Nebraska: State's Legislature Approves Proposal*, ENQUIRER (Apr. 12, 2003), http://www.enquirer.com/editions/2003/04/12/spt_wwwsptfoot1a12.html (announcing Bill Sponsor Senator Ernie Chambers's intention to "pressure NCAA to change its rules limiting how much a student can receive").

156. See *id.* (listing requirements of Nebraska bill); see also Skidmore, *supra* note 155, at 324 (stating that Bill did contain provision allowing compensation of other student-athletes in addition to football players).

improprieties such as receiving compensation from sources outside the NCAA.¹⁵⁷

Consequently, the bill called for a university-established stipend intended to range between \$200 and \$400 per month.¹⁵⁸ Alternatives to the compensation options in the bill existed, however, allowing Nebraska to refrain from paying stipends to its football players if the University reduced the number of practice hours.¹⁵⁹ Critically, Bill 688 stipulated that these types of compensation requirements would only take effect if four other states with Big XII Conference schools ratified similar provisions.¹⁶⁰ After Nebraska passed its legislation against the NCAA, the California state legislature also introduced a bill that would allow student-athletes to be compensated for the rights to their names, and hire agents to help in such endeavors.¹⁶¹ Despite its efforts, the Nebraska legislature and Governor Johanns were unable to enforce this legislation upon the NCAA and the University of Nebraska, as it could not attain the requisite four other states to allow its legislation to take effect.¹⁶²

F. The Current Problem with Agents in the NCAA

Current Miami Dolphins running back Reggie Bush starred on the USC football team from 2003 to 2005, amassing 5,992 all-purpose yards and winning the 2005 Heisman Trophy for being the

157. See Skidmore, *supra* note 155, at 323 (stating that Bill 688 also focused mainly on football because college football generates most money out of college sports).

158. See *id.* at 324 (asserting that stipend should protect students against “abuse by universities”); see also Kevin Maywood, *Pay for Play: Should NCAA Athletes Get Paid*, CHARLESTON HERALD, July 29, 2003, available at <http://www.recruitzone.com/news.asp?ArticleID=172> (“In its original form, the bill was to pay Nebraska football players only the minimum federal wage (\$5.15 an hour). Each player would have been paid for 14 hours per season (\$3,749).”).

159. See NEB. REV. STAT. §§ 85-1, 132 (1), (10) (2003); see also Skidmore, *supra* note 155, at 324 n.45 (explaining that this alternative to pay would allow student-athletes to attain part-time job to make money while in school); see Maywood, *supra* note 158 (“The university was given the option to decide if the athletes should be paid instead of it being mandatory.”).

160. See Farrey, *supra* note 4 (“A key provision of Legislative Bill 688 is that the university can only start doling out the cash if three other states with Big 12 teams pass similar bills.”); see also Skidmore, *supra* note 155, at 325-26 (determining that four-state requirement would protect Nebraska from NCAA eligibility issues).

161. See Farrey, *supra* note 4 (discussing extreme difficulty of getting NCAA to change its policies).

162. See *id.* (stating that legislature would not be able to force NCAA and Nebraska to comply with statute); see also Matt Aaronson, *Pay for play: Why Colleges Should, Probably Can't and Most Likely Won't Pay Student-Athletes*, MICHIGAN DAILY, Oct. 11, 2010, <http://www.michigandaily.com/content/pay-play-feature> (discussing Sen. Chambers attempt to provide payments to Nebraska football players through state legislation, and failure of bill).

best college football player in the country.¹⁶³ In addition to winning the Heisman Trophy, Bush was also named the AP Player of the Year and selected as a First Team All-American in 2005.¹⁶⁴ During his three years at USC, Reggie Bush and his teammates won three Pac-10 Championships and two national titles.¹⁶⁵ After investigating Bush and his family for nearly five years, however, the NCAA placed USC on probation for four years, banned the Trojans from post-season bowl games for two years, and limited the number of scholarships the university could extend to future student-athletes.¹⁶⁶ The NCAA's June 10, 2010 announcement also stated that USC had to vacate all fourteen victories that Bush played in while deemed ineligible by the NCAA.¹⁶⁷ In justifying its sanctions against USC, the NCAA determined that USC should have supervised Bush more closely to prevent him from receiving gifts totaling approximately \$300,000 from a sports agent.¹⁶⁸

The NCAA's investigation against USC was not only focused on Bush's improprieties.¹⁶⁹ NCAA officials concluded that O.J. Mayo, who played basketball at USC for one season before entering the 2008 NBA Draft, also received benefits and gifts from a "runner" named Rod Guillory who was associated with the sports agency

163. See *Bio*, REGGIEBUSH.COM, <http://www.reggiebush.com/#bio> (last visited Sep. 4, 2010) (noting Bush's statistics while at USC that helped earn him Heisman Trophy).

164. See *id.* (listing Bush's other awards and accolades that he received while at USC).

165. See *id.* (displaying championships Bush and teammates won when he was at USC).

166. See *NCAA Delivers Postseason Ban*, ESPN.COM (June 11, 2010, 3:03 AM), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615> (discussing sanctions placed on USC's sports programs).

167. See *id.* (stating that USC must vacate wins from December 2004 and 2005 seasons, including BSC title game win in 2005); see also *University of Southern California Public Infractions Report*, NCAA (June 10, 2010), <http://www.ncaa.org/wps/wcm/connect/d28c898042cdd2bc958fd5a6e282e000/20100610+USC+Public+Report.pdf?MOD=AJPERES&CACHEID=d28c898042cdd2bc958fd5a6e282e000> (listing penalties against USC for improper conduct of student-athletes); see also Charles Robinson & Jason Cole, *Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2006), <http://rivals.yahoo.com/ncaa/football/news?slug=yshushprobe> (noting that investigation against Bush and his family began in 2005).

168. See *Bush, Family by Sports Marketer for Nearly \$300,000 in Cash, Gifts*, ESPN (Nov. 1, 2007), <http://sports.espn.go.com/ncf/news/story?id=3087571> (stating sports agency, which gave Bush and his family nearly \$300,000 worth of improper benefits, is suing Bush to recover assets after Bush signed with different sports agency prior to NFL Draft).

169. See Lance Pugmire, *NCAA Combines Investigations into USC Athletics*, L.A. TIMES (Apr. 9, 2009), <http://articles.latimes.com/2009/apr/09/sports/sp-ncaa-usc9> (stating that NCAA has expanded investigation of USC's violations to include O.J. Mayo alleged misconduct with agent).

firm, Bill Duffy Associates (“BDA”).¹⁷⁰ In fact, then basketball head coach Tim Floyd allegedly paid Rod Guillory \$1,000 because Guillory convinced O.J. Mayo to attend USC.¹⁷¹ Fortunately for USC, the NCAA did not impose any further sanctions on USC’s basketball program because USC had previously vacated all victories during the 2007–2008 basketball season and banned itself from postseason play for one season.¹⁷²

Student-athletes accepting money from agents, boosters, and alumni is not a recent development in college sports.¹⁷³ This problem, though, has become increasingly more pervasive in recent years.¹⁷⁴ The USC scandal involving Reggie Bush and O.J. Mayo are only two examples of the recent problems that the NCAA has been facing.¹⁷⁵ In fact, the NCAA is currently investigating the foot-

170. See *id.* (reporting on USC violations). A “runner” is a person who is paid by a sports agency to influence and persuade a college athlete to sign with that sports agency. See *Floyd Reportedly Paid Cash for Mayo*, ESPN (May 13, 2009, 2:00 PM), <http://sports.espn.go.com/ncb/news/story?id=4162444> (stating that BDA allegedly paid Guillory approximately \$250,000 to persuade Mayo to join BDA).

171. See *Floyd Reportedly Paid Cash for Mayo*, ESPN (May 13, 2009, 2:00 PM), <http://sports.espn.go.com/ncb/news/story?id=4162444> (recounting story of Louis Johnson, former colleague of Mayo, telling federal authorities and NCAA that Floyd paid Guillory “a grand” to get Mayo to come to USC).

172. See *NCAA Delivers Postseason Ban*, *supra* note 166 (announcing that NCAA would take no further action in punishing USC’s basketball program).

173. See *Charles Barkley Admits to Taking Agent Money While at Auburn*, *supra* note 1 (stating that agents giving money to college-students was common practice in 1980s); see also Brandon Larrabee, *Charles Barkley Took Money From an Agent 25 Years Ago. Do We Care?*, SB NATION (Sept. 17, 2010, 9:28 PM), <http://www.sbnation.com/2010/9/17/1695673/charles-barkely-money-agent-ncaa> (mentioning Barkley’s recent announcement that he took money from agent while in college and then repaid agent when he earned money in NBA); see also Jeremy Fowler, *College Football Has an Agent Problem, But What Does the NCAA Do About It?*, ORLANDO SENTINEL (July 28, 2010), http://articles.orlandosentinel.com/2010-07-28/sports/os-college-football-agents-20100727-14_1_agent-alabama-nick-saban-college-football (mentioning agent tempted Ricky Nattiel, University of Florida’s star receiver in mid-1980s, with \$50,000 cash); See Mike and Mike in the Morning, ESPN (July 23, 2010, 9:00 PM), http://espn.go.com/blog/sportscenter/post/_/id/68666/cris-carters-biggest-regret (providing Cris Carter’s discussion of improper agent interaction as biggest regret in college); see also *Judge Orders Webber to Pay \$100,000*, ESPN, (Aug. 31, 2005, 6:09 PM), <http://sports.espn.go.com/nba/news/story?id=2148232> (stating judge ordered Webber to pay \$100,000 for lying to authorities about receiving money from booster while at Michigan).

174. See Pat Forde, *Cooperation Key to Solving Agent Issue*, ESPN (July 30, 2010), http://sports.espn.go.com/ncf/columns/story?columnist=forde_pat&id=5422508 (arguing that there are several reasons why agent problem, which has seemingly always existed in NCAA, has become “ice-berg sized” in last couple years); see also White, *supra* note 146 (describing events concerning NCAA agent problems as “recent rush of rule violations allegedly committed at several major football programs”).

175. See Tanner, *supra* note 2 (listing all recent revelations of agent and student-athlete improprieties).

ball programs at Alabama, Florida, Georgia, South Carolina, and North Carolina, where agents allegedly gave improper gifts to several of the teams' players.¹⁷⁶ Furthermore, in a recent survey conducted by ESPN, twenty prominent college basketball coaches declared that the involvement of unethical sports agents with student-athletes is the biggest problem plaguing NCAA basketball today.¹⁷⁷

Moreover, Oklahoma football coach Bob Stoops asserted in 2010 that communications between agents and student-athletes are more prevalent now than at any time during his twelve years as a head coach.¹⁷⁸ Former Florida Head Coach Urban Meyer issued similar sentiments, declaring that the contact between agents and student-athletes is currently an "epidemic" in college football.¹⁷⁹ Alabama head coach Nick Saban, whose players have been suspended in the past for receiving improper benefits from sports agents, has also been extremely vocal about the NCAA's problem with sports agents.¹⁸⁰ In one interview, Saban even referred to sports agents as "pimps."¹⁸¹ While the acknowledgement of this problem by the

176. See Stewart Mandel, *NCAA Turns up Heat on Agent-Player Relations with More Investigations*, SPORTS ILLUSTRATED (July 20, 2010, 10:32 PM), http://sportsillustrated.cnn.com/2010/writers/stewart_mandel/07/19/ncaa.agents/index.html (stating that agent involvement with USC was just beginning of NCAA unearthing improper relations with agents at North Carolina, Oklahoma State, Florida, South Carolina, and others); see also Fowler, *supra* note 173 (discussing NCAA investigations against several college football teams for improper contact between student-athletes and sports agents).

177. See Tanner, *supra* note 2 (arguing that NCAA needs to make substantial changes to fix agent problem, including allowing agents to openly meet with college athletes and NCAA paying student-athletes monthly stipend).

178. See *Bob Stoops: Amnesty for Some Players*, ESPN (Sept. 2, 2010, 12:55 PM), <http://sports.espn.go.com/ncf/news/story?id=5522685> ("Stoops said the problem with agents is worse than at any time he can remember in his 12 years as a head coach.").

179. See Forde, *supra* note 174 (describing disgust felt by Urban Meyer over so many agents approaching college football players and offering them gifts and money).

180. See Kevin Scarbinsky, *Scarbinsky: Another Year, Another Alabama Football Suspension*, BIRMINGHAM NEWS (Sept. 3, 2010), http://www.al.com/sports/index.ssf/2010/09/scarbinsky_another_year_anothe.html (listing several football players who have been suspended at Alabama while Nick Saban has been head coach); see also Kelly Whiteside, *Alabama Will Not Appeal Marcell Dareus' Two Game Suspension*, USA TODAY (Sept. 6, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/09/alabama-will-not-appeal-marcell-dareus-two-game-suspension/1> (announcing Alabama will not appeal NCAA's suspension of Marcell Dareus as Saban originally stated); see also *Tide's Dareus Ruled Ineligible for 2 Games*, ESPN (Sept. 3, 2010), <http://sports.espn.go.com/ncf/news/story?id=5525330> (stating that Saban has "led a movement to find ways to punish shady agents").

181. See John Zenor, *Saban Compares Unscrupulous Agents to Pimps*, NBC SPORTS (July 21, 2010), <http://nbcsports.msnbc.com/id/38347909/ns/sports-col>

coaches is certainly an important first step, sources close to the NCAA's investigations concerning student-athletes and sports agents state that this problem will not end anytime soon without drastic changes by the NCAA.¹⁸²

III. ANALYSIS

A. Solutions to the Agent Problem by the NCAA and Head Coaches

As recent events have demonstrated how invasive the money-exchanging relationship between sports agents and college athletes has become, the NCAA and its coaches have finally realized that serious changes need to be made to combat this problem.¹⁸³ In the hopes of decreasing the number of agents contacting student-athletes to offer them improper benefits, Saban – along with the assistance of Meyer, Stoops, and Mack Brown of Texas – has been spearheading discussions about this problem with the NFL, the NCAA and the NFLPA.¹⁸⁴ Further, the NCAA's Amateurism Cabinet began discussions about changing the NCAA's policy concerning student-athletes and agents.¹⁸⁵ The deliberations between these respective groups have not led to a publicized solution to the agent problem, yet Saban, Stoops, and various NCAA officials have spoken to the media about the potential changes.¹⁸⁶

lege_football/ (discussing Saban's reaction to recent events involving agents and student-athletes).

182. See Forde, *supra* note 174 (“Most observers seem convinced that the ripples touched off by the July revelations of agent-funded parties and planes will continue to spread.”).

183. See George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED (Oct.18, 2010), <http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html?eref=sihp> (telling story of sports agent John Luchs's recent revelation that he paid thirty college football players); see also *John Luchs: States Must Enforce Laws*, *supra* note 9 (summarizing Mike & Mike in Morning's interview with Luchs and his claim that he paid dozens of college players, and that other agents and runners commonly use this strategy as well).

184. See *Nick Saban: Coaches Discussing Agents*, ESPN (Aug. 26, 2010), <http://sports.espn.go.com/nfl/news/story?id=5501737> (stating Saban made first call to various coaches and NFL officials to organize discussion in hopes of ending agent problem in NCAA).

185. See Ramos, *supra* note 10 (announcing meetings held by Amateurism Cabinet and future meeting dates); see also Dana O'Neil, *Will Agents Get an Invite to the Table*, ESPN (July 30, 2010), http://sports.espn.go.com/nfl/columns/story?columnist=oneil_dana&id=5421033 (“Agent/Advisor Discussion: The cabinet began initial discussions regarding current agent and advisor legislations. The staff provided the group background information related to current issues and trends involving prospective and current student-athletes' use of agents and advisors.”).

186. See O'Neil, *supra* note 185 (noting declarations made to media by various NCAA officials). For a further discussion of the proposals by Stoops, Saban, and

1. *Permitting Contact Between Student-Athletes and Agents with Serious Penalties to Unethical Agents for Violations*

In the summer of 2010, Saban stated that the NFLPA should increase its involvement in the regulation of agents tempting college athletes with money by suspending agents conducting these deceitful operations.¹⁸⁷ Saban further declared that the current NFLPA rules preventing agent communication with underclassmen should be discarded.¹⁸⁸ Juniors in college football, as mandated by the NFLPA, are unable to have contact with agents even though they are eligible to enter the NFL draft after the completion of their junior year season.¹⁸⁹ As Saban alleged, allowing agents to speak with juniors about their professional prospects would eliminate much of the illegal communication that currently transpires between many college juniors and NFL agents, which often results in agents providing gifts or money to juniors.¹⁹⁰

Expanding on Saban's suggestion, the NCAA Amateurism Cabinet, while working in conjunction with the NFLPA, has strongly considered the possibility of implementing guidelines to allow agents to have increased access to all student-athletes.¹⁹¹ Indeed, Amateur Cabinet Chair and Baylor law professor Mike Rogers indicated that legislative proposals involving changes in the NCAA's agent policies could come as early as 2011 even though discussions only began in June 2010.¹⁹² Although the NFLPA forbids sports

the NCAA to combat the number of agents contacting student athletes and offering them money, see *infra* notes 187-204 and accompanying text.

187. See Zenor, *supra* note 181 (discussing recent increased zeal for punishing agents improperly contacting college football players).

188. See Bob Stoops: *Amnesty for Some Players*, *supra* note 178 (stating Saban's belief that current NFLPA rules concerning agents create more problems for college coaches and NCAA). "I don't think we should have a junior rule. That's where we have most of our problems because they're not allowed to talk to agents." *Id.* For a further discussion of the NFLPA guidelines regulating agent communication with student-athletes, see *supra* notes 58-65 and accompanying text.

189. For a further discussion of the NFLPA's eligibility rules regarding student-athletes, see *supra* notes 65-65 and accompanying text.

190. See Bob Stoops: *Amnesty for Some Players*, *supra* note 178 (stressing need to prevent "street corner" deals); see also *Alabama Football and the Sports Agent Problem*, SB NATION (July 20, 2010, 9:01 AM), <http://www.rollbamaroll.com/2010/7/20/1578199/alabama-football-and-the-sports> (explaining moves made by Saban in last year such as hiring Cornerstone Sports Consulting to advise players about future in NFL and finding good agents, and bringing certain respectable agents on campus to meet with seniors).

191. See O'Neil, *supra* note 185 ("Translation courtesy of the NCAA Speak to English Dictionary: The NCAA is considering ways to perhaps allow its athletes to have agents.").

192. See *id.* ("[T]here's a good chance that there will be some legislative proposals in next year's cycle.").

agents from contacting any college students other than seniors, current “NCAA rules allow conversations and information gathering between agents and student-athletes,” while “agreements and receiving extra benefits are not permitted.”¹⁹³ As interim NCAA President Jim Isch stated, any future policy changes regarding student-athletes and agents would focus on guaranteeing “that those student-athletes with professional athletic opportunities have the best information at the right time to make informed decisions.”¹⁹⁴ Permissible contact between agents and student-athletes would be purely advisory so that student-athletes with professional aspirations might be able to make the most informed decisions about their future.¹⁹⁵ Despite having contact with student-athletes and potentially having a roster full of undergraduate student-athletes as clients, agents would still not be able to offer these students any type of compensation or gifts.¹⁹⁶ SEC commissioner Mike Silve and Big XII commissioner Dan Beebe both agree that these are the types of changes the NCAA needs to make to eliminate the problem of agents giving student-athletes improper benefits.¹⁹⁷ Beebe has even proposed providing schools with liquidated damages clauses if agents having contracts with student-athletes act inappropriately.¹⁹⁸

193. See Rachel Newman Baker, *NCAA Statement on Agents Issues*, NCAA (July 22, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010-ews%stories/July+latest-ews/NCAA%statement+on+agents%issues> (discussing how student-athletes can effectively pursue a professional career); see also NCAA Operating Bylaws § 12.3.4 (declaring that student-athletes may consult with professional sports counseling panel to discuss “future professional career” and help student-athletes in the “selection of an agent by participating in communication with those individuals who can comment about the abilities of an agent”); see also NCAA Operating Bylaws § 12.3.1.2 (explaining that student-athletes cannot receive benefits from sports agents or loss of eligibility will result); see also *Alabama Football and the Sports Agent Problem*, *supra* note 190 (“According to NCAA guidelines an agent can make unlimited contact with a player with the caveat no gifts or benefits are exchanged and there is no firm commitment made to sign.”).

194. Jim Isch, *Statement from Interim President Jim Isch on Agents Issues*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010-ews%stories/July+latest-ews/Statementfrom+NCAA+Interim+President+Jim+Isch+on+agents%issues>.

195. See *id.* (stating intended plans for dealing with agents in NCAA).

196. See *id.* (“[T]he membership is not likely to change its opposition to student-athletes receiving benefits from agents and advisors.”).

197. See O’Neil, *supra* note 185 (noting proposals and suggestions from other high level NCAA officials as to how to solve influx of agents in NCAA); see also Dana O’Neil, *NCAA Studying Agent/Athlete Interaction*, ESPN (July 30, 2010, 3:43 PM) <http://sports.espn.go.com/ncaa/news/story?id=5423136> (discussing various proposals by NCAA commissioners and FBS Conference officials).

198. See O’Neil, *supra* note 185 (“Let agents have contracts with players and the schools. . . . Those clauses would have a liquidated damages clause, where it would cost the agent \$1 million or \$2 million if they did anything that made the player ineligible. . . . You’ll promote the agents who want to do it the right way.”).

2. *Granting Amnesty to Schools to Report Unethical Agents*

Uncovering improper relationships between agents and student-athletes is a difficult task for the NCAA because of the secrecy between the student and agent.¹⁹⁹ In response to this problem, Bob Stoops suggested giving amnesty to college athletes for reporting agent misconduct instead of suspending the individual student and penalizing the student's university.²⁰⁰ Stoops asserted that "[t]he only way to really start having a chance to clean it up would be for the NCAA to allow players to come forth and say, '[t]hese guys and these guys and these guys are doing this, this and this.'"²⁰¹ Furthermore, as Stoops noted, it seems unfair to only punish student-athletes for accepting money from agents, especially when many of these college students come from poor families.²⁰² Colleges and universities, which are better equipped to monitor athletes than the NCAA, may be averse to conducting investigations because the end result, if student-agent violations exist, are usually sanctions imposed by the NCAA against the schools.²⁰³ Therefore, as Stoops explained, the NCAA must change this dynamic by incen-

199. *See id.* (explaining that it is difficult to uncover agent/student relationships because of how private these relationships normally are); *see also* Michael Rosenberg, *NCAA Facing Uphill Battle to Control Agents Paying Players*, SPORTS ILLUSTRATED (Oct. 13, 2010, 2:40 PM), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/10/13/ncaa.agents/index.html (contending that NCAA is basically powerless in discovering improper relationships between agents and student-athletes unless either athlete or agent tells NCAA and acts as "whistle-blower").

200. *See Bob Stoops: Amnesty for Some Players*, *supra* note 178 (explaining Stoops' suggestions to alleviate current problems with agents that have continued to escalate in recent years).

201. *Id.*

202. *See OU's Bob Stoops: Players Who Report Agents Should Receive Amnesty*, FOX SPORTS (Sept. 2, 2010), <http://www.foxsportssouthwest.com/09/02/10/OU's-Bob-Stoops-Players-who-report-agents/landing.html?blockID=303331&feedID=3742> (discussing problem of sports agents in college football and how student-athletes who do not have any other source of income in addition to their scholarships and small stipends should not bear cost of agents providing them compensation); *see also* Bill N, *Eight Solutions to Fix the NCAA and Improve College Football*, BLEACHER REPORT (July 26, 2010), <http://bleacherreport.com/articles/425064-8-solutions-to-fix-the-ncaa-and-improve-college-football> (implying that treatment of poor college players from economically poor areas is unfair because NCAA officials and administrators generate so much money from these athletes).

203. *See OU's Bob Stoops: Players Who Report Agents Should Receive Amnesty*, *supra* note 202 (explaining why colleges often turn blind-eye to improprieties at their own school); *see also* White, *supra* note 146 (noting that athletic directors do not want to take accountability for potential NCAA violations). "This wouldn't be a problem if the NCAA truly made school presidents, athletic departments and coaches accountable. It's no secret that every big-time athletic program knows the shady characters who hang around the school's athletes." *Id.*

tivizing students and universities to eradicate the agent problem in college football.²⁰⁴

B. The Downfall of NCAA and Head Coaches' Suggestions to Eliminate the NCAA Agent Problem

Although the various suggestions proposed by the NCAA Amateurism Cabinet and head coaches may decrease the frequency with which agents improperly exchange money with student-athletes, these types of suggestions would not curtail the NCAA's agent problem to any large degree.²⁰⁵ The regulations suggested would only serve to moderately alleviate the predicament without eliminating the root cause of the problem.²⁰⁶ State and federal laws (UAAA and SPARTA) already exist that mandate extreme punishments for sports agents that improperly contact student-athletes or provide student-athletes with financial benefits.²⁰⁷ Furthermore, college athletes who are revealed to have taken money from agents face multiple game suspensions and possible expulsion from the NCAA.²⁰⁸ Despite these intimidating sanctions, both agents and student-athletes continue to violate NCAA regulations.²⁰⁹ These improper behaviors persist between agents and student-athletes be-

204. See *OU's Bob Stoops: Players Who Report Agents Should Receive Amnesty*, *supra* note 202 (explaining rationale behind Stoops' proposal to grant amnesty to student-athletes engaging in improper behavior with agents).

205. For a further discussion on the reasons why the NCAA and head coach solutions to the agency problem fail, see *infra* notes 206-211 and accompanying text.

206. See Tanner, *supra* note 2 (arguing that rules prohibiting agent contact with student-athletes will not be completely effective because temptation still exists for students to take money from agents).

207. See *Bob Stoops: Amnesty for Some Players*, *supra* note 178 ("State laws intended to protect the amateurism of college athletes have had little effect. An Associated Press review found that more than half of the 42 states with sports agent laws have yet to revoke or suspend a single license, or invoke penalties of any sort."). See also Alan Scher Zagler, *AP Study: Laws for Sports Agents Rarely Enforced*, DENVER POST (Aug. 17, 2010), http://www.denverpost.com/sports/ci_15804970 (asserting that state laws against sports agents have been ineffective for several reasons including lack of available state funding to enforce such laws and lack of time to prosecute such matters because prosecutors are too busy with more important matters such as "bank robbers and rapists"). See also Rosenberg, *supra* note 199 (declaring that it took NCAA so many years to conclude investigations against Reggie Bush, USC basketball, and Michigan basketball because "the NCAA doesn't have a lot of options for prosecution").

208. See Paul Newberry, *Georgia's A.J. Green suspended for 4 games*, NBC SPORTS (Sept. 8, 2010), <http://scores.nbcsports.msnbc.com/cfb/story.asp?i=20100909035838050000101&ref=hea&tm=&src=> (announcing that NCAA suspended Green for giving jersey to agent in exchange for \$1,000).

209. See *Analyzing NCAA Hypocrisy: Root Cause and Solutions*, BLEACHER REPORT (June 28, 2010), <http://bleacherreport.com/articles/412841-ncaa-hypocrisy-root-cause-and-solutions> (contending that NCAA's main purpose "is to maximize

cause many student-athletes cannot resist the money given to them despite the potential consequences, and agents will continue to pay college athletes as long as there is potential money to be made.²¹⁰ Thus, student-athletes, especially those from economically poor backgrounds, will continue to accept improper compensation from agents until they find other means of receiving similar compensation.²¹¹

C. Various Revenue Sharing Proposals Between the NCAA, Schools, and Student-Athletes

The increased commercialization of college sports with little additional benefit to student-athletes has enraged many legal scholars.²¹² It has also prompted numerous articles urging the NCAA to change its amateurism rules to allow compensation for student-athletes.²¹³ Although none of these articles specifically focus on the agent problem in college sports as the reason for adopting such changes, it is not difficult to see why different forms of payment would prevent student-athletes from accepting benefits from agents.²¹⁴ Ultimately, however, all of these proposals have failed to effectively persuade the NCAA to change its revenue system because of the various problems they create.²¹⁵

money for itself and member colleges,” which is “done at the expense of the student athletes, without whom none of this money would be generated”).

210. See White, *supra* note 146 (“As long as an athlete has potential to earn money playing professionally, you can count on someone trying to work their way into the picture.”).

211. See Dan Wetzel, *Why the Case vs. UNC Matters*, RIVALS (Sept. 30, 2010), <http://rivals.yahoo.com/ncaa/football/news?slug=dw-agents093010> (“It’s been a mostly fruitless effort because star players are walking lottery tickets ready to be cashed. No NCAA rule will ever stop the wheels of capitalism.”).

212. See David E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 353-54 (2007) (“Without student-athletes, the NCAA could not pursue its commercial goals or realize any of its economic objectives. Simply put, college players are the raw materials comprising the most essential ingredient of any NCAA sports product.”). For a further discussion of the legal scholars opposed to the current NCAA revenue scheme, see *infra* notes 216-273 and accompanying text.

213. For a further discussion of the various payment plans to student-athletes, see *infra* notes 216-273 and accompanying text.

214. See *infra* notes 216-273 and accompanying text (discussing overview of agent problems in college sports).

215. For a further discussion of the reasons why these payment models fail to influence the NCAA to make any changes to its current revenue scheme, see *infra* notes 218-277 and accompanying text.

1. *The Pay-for-Play Model*

The basic pay-for-play model asserts that schools should compensate student-athletes for their participation in college sports by providing college athletes with a monthly stipend.²¹⁶ Numerous legal scholars have justified this payment proposal by calling attention to the inequality between revenue gained by the NCAA and the lack of compensation given to athletes.²¹⁷ Ultimately, the pay-for-play model has a number of serious practical and legal consequences that prevent it from being a viable alternative to the NCAA's current system.²¹⁸ First, although a number of universities generate millions of dollars through football and basketball programs, schools utilize this revenue to fund other unprofitable sports.²¹⁹ Consequently, although numerous schools would be able to afford to pay all student-athletes a monthly stipend, a large number of schools would be forced to cut other men's sports to even consider paying stipends to both men and women student-athletes

216. See Thomas R. Hurst & J. Grier Pressly, *Payment of Student Athletes: Legal and Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 57-60 (2000) (discussing basic aspects of pay-for-play model); see also Tim Wendel, *Pay the Players*, USA TODAY (Mar. 20, 2005), http://www.usatoday.com/news/opinion/editorials/2005-03-20-ncaa-edit_x.htm (explaining main elements of pay-for-play model as "modest compensation" on a frequent basis that NCAA has continually rejected as destroying integrity of NCAA amateur sports).

217. See Nathan McCoy & Kerry Knox, *Flexing Union Muscles – Is it the Right Game Plan for Revenue Generating Student-Athletes in Their Contest for Benefits Reform with the NCAA*, 69 TENN. L. REV. 1051, 1060 (2002) ("[S]ome authors suggest that compensating student-athletes in some form or fashion introduces a measure of fairness into an otherwise inequitable system. Various means of compensation have been suggested, from paying salaries to receiving profits from revenue-sharing plans."); see also Hurst, *supra* note 216, at 59 (stating that many scholars assert that student-athletes should receive compensation because large number of college athletes have no spending money and little financial support from relatives).

218. For a further discussion of the practical and legal consequences of the pay-for-play model, see *infra* notes 218-252 and accompanying text.

219. See Doug Lederman, *A (Money) Losing Proposition*, INSIDE HIGHER ED (May 16, 2008), <http://www.insidehighered.com/news/2008/05/16/ncaa> (stating that although men's basketball and football programs are known for making money and supporting other college sports programs, even many of these basketball and football teams are losing money in today's poor economy); see also Aaronson, *supra* note 162 ("And even for schools that have profitable football and basketball programs, the money earned goes primarily toward paying student scholarships and subsidizing the non-revenue sports."); see also Moore, *supra* note 145 (stating that Wisconsin's football program had \$89 million in revenue from 2008-2009 football season but was only "in the black" by \$100,000 because of expenses paid to coaches, administrators and financial support given to other unprofitable sports); see also Matt Hayes, *Despite NCAA Concessions, Pay for Play is Wrong*, SPORTING NEWS (May 14, 2001), http://findarticles.com/p/articles/mi_m1208/is_20_225/ai_74800763/ (mentioning that University of Florida's athletic budget for 2000-2001 season was \$44 million but would only have surplus of \$400,000 after expenses).

that could total millions of dollars.²²⁰ While scholarship cuts could help schools solve their potential financial woes, this proposed financial solution would eliminate opportunities for male athletes in sports such as wrestling and baseball, which have already been drastically reduced by schools to remain in compliance with Title IX.²²¹

To resolve this situation, scholars have proposed to only pay students participating in profitable sports, such as men's football and men's basketball.²²² By implementing this plan, a greater number of universities would be able to afford paying stipends to approximately 100 students (eighty-five football players and fifteen male basketball players) rather than 100 male athletes and 100 female athletes.²²³ Nonetheless, solving the practical problem of allowing more schools to afford such a payment proposal would likely conflict with Title IX.²²⁴

Title IX mandates that colleges and universities must provide female student-athletes with the same athletic opportunities as male athletes, and schools must give equal treatment to both men's and women's sports.²²⁵ Accordingly, providing male football and bas-

220. See Acain, *supra* note 5, at 349-50 (attempting to remedy revenue-sharing proposal by stating that men's football program can decrease in size, and eliminating other men's sports completely); see also Maywood, *supra* note 158 (displaying calculations that paying all 361,175 college athletes with \$2,000 stipend would cost over \$722 million annually).

221. See Graham Watson, *Title IX Puts Schools in Conundrum*, ESPN (July 14, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4326021> (declaring that Northern Iowa had to eliminate its baseball program to maintain equal amounts of scholarships between male and female sports); see also Ann Coulter, *Title IX Defeats Male Sports*, USA TODAY (July 25, 2001), <http://www.usatoday.com/news/opinion/2001-07-25-nguest2.htm> (arguing that Title IX actually discriminates against male sports); see also Aaronson, *supra* note 162 (stating former Michigan athletic director and former president of U.S. Olympic Committee Bill Martin's insinuation that schools would be forced to cut sports programs if Congress ever ordered NCAA and universities to pay student-athletes some type of compensation).

222. See Hurst, *supra* note 216, at 72 (discussing proposals to only pay stipends to student athletes in sports generating money).

223. See *College Football Players*, ESPN, <http://espn.go.com/college-football/players>, (last visited on Oct. 21, 2011, (listing all FBS schools with links to rosters that generally show eighty-five players on each team); see also Men's Basketball, DUKE UNIVERSITY, http://www.goduke.com/SportSelect.dbml?SPSID=22727&SPID=1845&DB_OEM_ID=4200&Q_SEASON=2009 (last visited on Oct. 21, 2011), (listing fourteen players on 2009-2010 roster); See Hurst, *supra* note 216, at 72 (noting that there are usually eighty-five players on football team).

224. See Acain, *supra* note 5, at 352 (discussing requirements of Title IX and stating that "it is unlikely that female student-athletes would have the same opportunities as their male counterparts to share in the revenues they generate").

225. See Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 95 (2004) ("Title IX not only requires universities to provide equal opportunities for participation in athletic programs, it also requires the schools to provide equal treatment and benefits for all student-athletes.").

ketball players with stipends would probably constitute unequal treatment between male and female student-athletes.²²⁶ Thus, the pay-for-play model would create financial difficulties for a large number of college programs and leave college programs in non-compliance with Title IX if programs attempted to alleviate these financial woes.²²⁷

In addition, schools and student-athletes alike could face tax implications from the disbursement of monthly stipends to college athletes.²²⁸ While currently a tax exempt entity, the NCAA would most likely lose this status by paying student-athletes for on-field play.²²⁹ If schools began paying student-athletes, it is likely that the IRS would no longer classify the NCAA as an organization that promotes amateur athletic competition because the student-athletes would essentially become professional athletes.²³⁰ Even if the NCAA remained a tax-exempt organization under Section 501(c)(3) because of its role in fostering educational opportunities for student-athletes, it is likely that the IRS would no longer exempt the NCAA from unrelated business income tax, as directly paying student-athletes for athletics does not seem “substantially related” to the reasons why it is tax exempt.²³¹

226. See Hurst, *supra* note 216, at 75 (“If the stipend proposal were adopted and the universities began paying stipends to student-athletes in revenue-producing sports, with a proportionate number of female student-athletes in order to comply with Title IX, a student-athlete in a non-revenue sport potentially could mount an Equal Protection challenge against a university.”).

227. See *id.* (describing problems that arise from pay-for-play model as comment urges NCAA to adopt laundry money proposal).

228. See Hurst, *supra* note 216, at 75 (stating that schools and players would face tax issues once schools begin paying students just like regular employees); see also C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL’Y 125, 129 (1996) (contending that payment to student-athletes would also create tax implications for college athletes just as payment in form of stipend to graduate assistants creates tax consequences for graduate students even though normal scholarship would have no tax implications).

229. See Hurst, *supra* note 216, at 75 (explaining IRS’s treatment of colleges and universities).

230. See *id.* at 73-74 (asserting belief that university payments to students would change tax-status under IRC).

231. See *id.* (explaining that income derived from sports would not be considered in pursuit of educational purposes if schools began to pay student-athletes); see also Goplerud, *supra* note 228, at 131 (noting high probability that schools would see tax implications from paying stipends to student-athletes, which would result in “significant price tags” for universities and substantial income lost from current amount generated).

Paying student-athletes would also change how workers' compensation affects the NCAA.²³² Currently, student-athletes do not qualify for workers' compensation because it is only available to employees, and courts have declared that student-athletes are not considered "employees" of their schools.²³³ To support workers' compensation, employers continually pay into a fund in case any of their employees injure themselves.²³⁴ Colleges and universities have saved a tremendous amount of money by not paying into the workers' compensation fund to compensate student-athletes if they are injured or killed.²³⁵ If schools decided to provide stipends to student-athletes, then courts, as Justice Holmes noted in *Hanson*, would most likely consider student-athletes "employees" because universities would effectively be paying the athletes just like any other employee.²³⁶ As a result, university revenues would decrease from paying both stipends and workers' compensation.²³⁷

As employees of the universities, student-athletes would also hold the right to a collective bargaining agreement under the National Labor Relations Act ("NLRA").²³⁸ Consequently, the NCAA

232. See *infra* notes 233-237 and accompanying text (detailing how workers' compensation could be imposed upon NCAA).

233. See Mondello, *supra* note 76, at 295-300 (giving history of student-athlete workers' compensation cases and stating that colleges do not currently pay workers' compensation to athletes); see also Charlotte M. Rasche, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes*, 16 REV. LITIG. 219, 231-36 (1997) (declaring that current cases have determined that student-athletes should not receive workers' compensation).

234. See *Employers' Guide to Workers' Compensation*, LABOR COMMISSION OF UTAH DIVISION OF INDUSTRIAL ACCIDENTS (August 2008), <http://www.laborcommission.utah.gov/IndustrialAccidents/Publications/pdfs/Employers%20Guide.pdf> (describing workers' compensation program); see also *Workers' Compensation – The Workers' Comp Service Center*, WORKERSCOMPENSATION.COM, <http://www.workerscompensation.com> (last visited Oct. 21, 2011) (providing various workers' compensation rules for all states).

235. See Rasche, *supra* note 233, at 238 (discussing athletic programs' revenues, none of which are given to student-athletes).

236. See Hurst, *supra* note 216, at 70 (stating that "wage earners" are employees); see also Goplerud, *supra* note 228, at 128 (mentioning possibility that stipends to student-athletes could create workers' compensation responsibilities for colleges and universities); see also Mondello, *supra* note 76, at 298-99 (noting that previous courts have justified not making schools responsible for workers' compensation to student-athletes because scholarships are not equivalent to pay, which suggests that providing stipends to student-athletes would create workers' compensation responsibilities for schools); see also Rasche, *supra* note 233, at 246 ("There is a risk that some types of compensation in excess of the current allowable scholarship would affect the athlete's relationship with the university, including eligibility for worker's compensation benefits and the potential liability of the university for the tortious conduct of the athlete.") (citation omitted).

237. See Hurst, *supra* note 216, at 70 (asserting that employee designation creates workers' compensation responsibilities for employer).

238. See *id.* (declaring that employees hold right to unionize under NLRA).

would not solely determine these newly instituted stipends, practice hours, or transfer rules, as the NCAA would need to meet with the student-athletes' collective bargaining representative to negotiate the terms of these arrangements.²³⁹ Schools, as employers of student-athletes, would effectively create a principal-agent relationship in which the schools would likely be vicariously liable for certain actions by student-athletes.²⁴⁰ This scenario is similar to the Baltimore Orioles in *Manning v. Grimsley* where the Orioles were potentially liable for the actions of a pitcher who hit a fan with a baseball.²⁴¹ Thus, as employers of student-athletes, schools would likely be liable for intentional torts during the scope of the student-athlete's employment.²⁴² Given the frequency of injury in sports, however, courts would probably not hold a school vicariously liable for the injury caused by a school's student-athlete that was not intentional or grossly negligent.²⁴³

2. *The Revenue-Sharing Plan*

The revenue-sharing plan, a variation of the pay-for-play model, contends that college sports teams should share profits with student-athletes by giving college athletes a percentage of the revenue generated by an individual athlete's respective team.²⁴⁴ Gener-

239. See *id.* at 70-71 (explaining that employees would be entitled to collective bargaining representatives that could negotiate with schools over numerous issues).

240. See Rasche, *supra* note 233, at 220 (implying that payment to student-athletes would open schools to further liability of actions taken by student-athletes).

241. See *Manning v. Grimsley*, 643 F.2d 20, 21-22 (1st Cir. 1981) (applying Massachusetts's vicarious liability law for employers to professional sports franchise).

242. See Rasche, *supra* note 233, at 243 ("If a student athlete were to receive excess compensation in a form that would result in employee status under *respondent superior* analysis, the next step is to determine the athlete's scope of employment."); see also Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for on-the-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266, 283 (1999) ("[P]rofessional sports is the type of employment that fosters, and indeed demands, aggressiveness and even violence, and that employers thus should be held vicariously liable for their employees' tortious assaults . . .").

243. See Hurst, *supra* note 216, at 76 (stating that schools would probably only be held liable for grossly negligent acts of student-athletes because sports, by their nature, invite injury); see also Rubin, *supra* note 242, at 269-72 (asserting that there is "assumption of risk" associated with sports because sports are violent in nature and injuries are frequent, which leads to notion that teams are not liable for all injuries that result from on-field play).

244. See Acain, *supra* note 5, at 352-53 (advocating implementation of revenue-sharing plan for colleges and student-athletes to decrease discrepancy between revenue of athletic programs and small scholarship amounts given to student-athletes); see also Mueller, *supra* note 225, at 88-90 (explaining basic concept of revenue-sharing proposal).

ally, scholars assert that student-athletes should receive a portion of the net profits generated by each team so that teams, which lose money overall, would not lose more money by distributing a portion of the gross revenue to student-athletes.²⁴⁵ Therefore, student-athletes playing on teams that fail to produce a net profit would not receive additional compensation for their efforts.²⁴⁶

Several types of arrangements can be made under a revenue-sharing system between players and schools.²⁴⁷ First, some scholars contend that revenue should be distributed based on seniority.²⁴⁸ In other words, each successive grade level would receive a greater percentage of the revenue generated by a team.²⁴⁹ Second, proponents of the revenue sharing plan suggest that players who perform well during postseason play should receive a higher portion of money generated from these games than during the regular season because post-season games are usually more lucrative to schools.²⁵⁰ Third, scholars assert that Academic All-Americans should receive larger awards from the NCAA.²⁵¹ Fourth, revenue-sharing proponents contend that student-athletes should share in the endorsement and licensing agreements given to schools.²⁵² For example, the University of Notre Dame signed a ten-year deal with Adidas

245. See Acain, *supra* note 5, at 337 (asserting that revenue-sharing plan “considers the relative costs associated with each sport” so sports still possess enough money to run program); see also Mueller, *supra* note 225, at 88 (noting that players would receive percentage of net revenue of team).

246. See Acain, *supra* note 5, at 337 (“[I]f a certain team, for some reason fails to make any profit for that school year, each student-athlete on that team would rely on their scholarship as their sole means of compensation.”).

247. See *id.* at 338-42 (discussing simple revenue sharing from season, post-season changes to revenue-scheme, post-season award bonuses, and endorsements).

248. See Acain, *supra* note 5, at 338 (“[E]ach player in his or her fourth year of participation would receive 1% of all revenues generated for that year; (2) each player in his or her third year would receive 0.75%; (3) each player in his or her second year would receive 0.5%; (4) each player in his or her first year would receive 0.25% of the revenue.”).

249. See *id.* at 307 (declaring that seniors would receive highest percentage of compensation and freshman would receive least amount of money from revenue).

250. See *id.* at 338-39 (asserting that players should receive thirty-five percent of playoff revenue and such revenue should be distributed among players by performance from games, not seniority); see also Mueller, *supra* note 225, at 88-89 (explaining that revenue would be apportioned differently during playoff and post-season games).

251. See Acain, *supra* note 5, at 340 (rationalizing increased financial amount of award by stating that NCAA should emphasize academics, and thus reward student-athletes who excel in classroom).

252. See *id.* at 341-42 (declaring that student-athletes should receive thirty-five percent of licensing agreements and twenty percent of revenue from school endorsements).

worth approximately \$60 million in 2005, which specified that Adidas would supply Notre Dame's twenty-six varsity sports with Adidas practice and game apparel.²⁵³ Under the terms of a revenue-sharing plan instituted by the NCAA, Notre Dame would share a portion of the cash provided to the university with student-athletes.²⁵⁴

The revenue-sharing plan possesses many of the same problems as the basic pay-for-play model.²⁵⁵ Universities and colleges would certainly save money by limiting payments to players on those teams that generate money.²⁵⁶ Like the pay-for-play model, though, this type of payment plan would probably violate Title IX.²⁵⁷ Although several women's teams have posted net profits over the thirty-eight years since Congress enacted Title IX, profitable women's teams are a rare occurrence even with successful teams.²⁵⁸ With so few women's teams generating any type of revenue, female student-athletes would almost never receive compensation under the revenue-sharing scheme.²⁵⁹ Thus, this plan would violate Title

253. See *Notre Dame Signs 10-year, \$60M Deal with Adidas*, ESPN (Nov. 9, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2218912> (declaring that Adidas began supplying Notre Dame with merchandise in 1997).

254. See Mueller, *supra* note 225, at 88-90 (explaining basic concept of revenue-sharing proposal).

255. See Edelman, *supra* note 5, at 883 (noting that complying with Title IX while possessing enough money to pay both male and female athletes would be extremely difficult).

256. See Hurst, *supra* note 216, at 71-72 (stating that schools would have to spend twice as much by paying women athletes and complying with Title IX).

257. See Mueller, *supra* note 225, at 95-96 (stating that schools would have to compensate both male and female athletes equally in order to comply with Title IX); see also Edelman, *supra* note 5, at 883 ("[A]ny university that provides revenue to its male student-athletes must provide it to an equal proportion of its female athletes.").

258. See Acain, *supra* note 5, at 352 (declaring that University of Connecticut women's basketball team made \$800,000 in net revenue during 1996-1997 season); see also John Maher, *Growing Deficit's in Women's Programs Straining Budgets*, STATESMAN (Apr. 3, 2010), <http://www.statesman.com/sports/growing-deficits-in-womens-programs-straining-budgets-514843.html> (stating that only three NCAA women's basketball programs made money in 2004 while twenty-eight women's basketball programs lose more than two million dollars); see also Jeremy Brown, *Should Student-Athletes Like Tim Tebow Be Paid for Endorsements*, BLEACHER REPORT (Jan. 14, 2009), <http://bleacherreport.com/articles/111022-should-student-athletes-like-tim-tebow-be-paid-for-endorsements> (stating that Tennessee Lady Volunteers going to women's basketball championship games actually increases expenses and losses for Tennessee athletic program).

259. See Acain, *supra* note 5, at 352 (admitting that women would not share in same opportunities as male athletes under revenue-sharing scheme because women's sports rarely generate profits); see also Edelman, *supra* note 5, at 883 ("[M]ale student-athletes account for a significant percentage of revenue-generation, as men's basketball and football are the two NCAA sports with multi-million dollar television contracts. However, it is unlikely that Title IX would allow schools

IX because it would not afford women “equal opportunities” to share in revenue.²⁶⁰

Even without any Title IX implications, many schools would still not be able to afford a revenue-sharing scheme because, as noted earlier, a number of colleges use the proceeds from revenue generating sports such as football and basketball to fund all other unprofitable sports.²⁶¹ Additionally, as wage earners of the universities, student-athletes would probably still fall under the classification of “university employees.”²⁶² As a result, employment and taxation issues would plague schools implementing the revenue-sharing plan.²⁶³

3. *Laundry Money*

The laundry money proposal is another variation of the pay-for-play model that eliminates several problems that plague the original model.²⁶⁴ This proposal declares that schools should provide all student-athletes – both male and female – with a certain amount of spending money amounting to less than the monthly stipend proposed under the basic pay-for-play model yet still substantial enough to allow students to eat-out or go to the movies.²⁶⁵ Proponents of the laundry money proposal usually suggest a monthly payment of thirty to fifty dollars.²⁶⁶

to provide student-athletes in these sports with a revenue share reflective of percent generated.”) (citation omitted).

260. See Hurst, *supra* note 216, at 71-73 (declaring that female student-athletes could win equal protection challenges against schools implementing payment plans that generally exclude compensation to female student-athletes); see also Maher, *supra* note 258 (mentioning that average NCAA men’s basketball program made over \$1 million in net revenue while average women’s basketball program lost more than \$1.5 million during 2007-2008 season).

261. See Steve Berkowitz, *Few Athletics Programs in Black; Most Need Aid*, USA TODAY (May 16, 2008), http://www.usatoday.com/sports/college/2008-05-16-financial-study_N.htm (stating that only nineteen of 119 FBS athletic programs turned profit in 2006).

262. See Mueller, *supra* note 225, at 92-94 (arguing that paying student-athletes would create employer/employee relationship between students and schools that would result in greater expenses for schools such as workers’ compensation).

263. See *id.* (stating that compensating student-athletes creates serious problems for schools).

264. See Hurst, *supra* note 216, at 78-82 (arguing that laundry money proposal solves problems of revenue-sharing and pay-for-play models). *But see* Mondello, *supra* note 76, at 301 (contending that laundry money proposal still creates many problems for colleges and universities).

265. See Mondello, *supra* note 76, at 301 (discussing laundry money proposal to pay all student-athletes of university).

266. See Hurst, *supra* note 216, at 78 (stating that thirty to fifty dollars would be appropriate and affordable as laundry money); see also McCoy, *supra* note 217,

Providing compensation to both male and female students would undoubtedly alleviate any compliance problems with Title IX.²⁶⁷ Also, by only distributing thirty to fifty dollars per month to students, some scholars estimate that the laundry money proposal would only cost colleges and universities an extra \$100,000 per year.²⁶⁸ As a small increase in the amount of money given to student-athletes in addition to money for room and board, tuition fees, and books, the laundry money proposal would not constitute compensation to employees because this type of financial benefit would fall under the athletic scholarship umbrella.²⁶⁹ As a result of this classification, colleges would avoid all of the issues concerning taxes and employment implications that plague the pay-for-play model and the revenue-sharing plan.²⁷⁰

Despite its benefits, the NCAA and its schools would probably encounter problems with this model as well.²⁷¹ Although some scholars contend that thirty to fifty dollars per month would satisfy a student-athlete's need for further compensation, other legal minds contend that schools would need to distribute a higher amount of money that would ultimately be financially inconceivable for many schools.²⁷² Furthermore, assuming thirty to fifty dollars meets a student's need, \$100,000 in additional expenses would still create a tremendous financial burden for many schools because many athletic programs operate at a net loss.²⁷³

at 1061-62 (contending that laundry money proposal suggests payment between thirty and fifty dollars).

267. See Mueller, *supra* note 225, at 94-95 (asserting that Title IX compliance necessitates equal payment among male and female athletes); see also Hurst, *supra* note 216, at 79 (stating that laundry money model avoids Titles IX issues encountered by basic pay-for-play model).

268. See Hurst, *supra* note 216, at 79 (asserting that reasonable amount of laundry money would only cost \$100,000 per year for each collegiate institute).

269. See *id.* ("Unlike a stipend payment, which resembles a wage for services rendered, the amount would represent 'laundry money' such as was allowed in the 1970s and would fall under the new NCAA definition of 'athletic scholarship,' along with tuition, fees, room, board and books.").

270. See McCoy, *supra* note 217, at 1061-62 (summarizing benefits of laundry money proposal over pay-for-play model, including avoidance of tax, Title IX, and workers' compensation issues).

271. See Mondello, *supra* note 76, at 301 (asserting that laundry money model would be too costly for many schools); see also Edelman, *supra* note 5, 884-85 (discussing various problems that would probably occur if NCAA and universities implemented laundry money proposal).

272. See Mondello, *supra* note 76, at 301 (stating that appropriate laundry money could cost universities up to \$540,000 per year for each college).

273. See *NCAA Report: Economy Cuts Into Sports*, ESPN (Aug. 23, 2010), <http://sports.espn.go.com/nca/news/story?id=5490686> (announcing that only fourteen of 120 FBS schools turned profit in 2010 compared to twenty-five in 2009); see also Berkowitz, *supra* note 261 (asserting that overwhelming majority of FBS schools

D. The Endorsement Deal Model – The Optimal Approach

While the suggestions proposed by the NCAA and its head coaches fail to eliminate the incentives for student-athletes to receive compensation from sports agents, the pay-for-play model and the revenue-sharing plan also fall short because of the practical and legal consequences inherent in the implementation of these plans.²⁷⁴ Moreover, although the laundry money proposal avoids the legal implications of the other student-athlete payment methods, this plan would not succeed in eliminating the agent problem for the same reason as the NCAA's proposals.²⁷⁵ Providing student-athletes with thirty to fifty dollars per month (or \$360 to \$600 a year) would not lessen the desire for poor student-athletes to accept thousands of dollars from sports agents.²⁷⁶ Allowing student-athletes to seek lucrative endorsement deals, though, would avoid the legal and practical implications preventing universities from implementing the other student payment proposals while also providing an ample amount of money to the type of successful athletes that are approached by willing sports agents.²⁷⁷ Accordingly, the endorsement deal model is the optimal approach.

1. *Alleviating the Agent Problem in the NCAA*

By permitting student-athletes to seek and accept endorsement deals, the NCAA would essentially eliminate the need for student-athletes to improperly accept money from sports agents.²⁷⁸ Playing in commercialized sports with fan bases that are often larger than

operated at loss in 2006); *see also* Brown, *supra* note 258 (arguing that colleges cannot afford to pay any further type of compensation to student-athletes).

274. *See* Edelman, *supra* note 5, at 83 (discussing problems of revenue-sharing scheme). For a further discussion of the shortcomings of the pay-for-play model and revenue-sharing plan, *see supra* notes 218-263 and accompanying text.

275. *See* Edelman, *supra* note 5, at 883-84 (stating that hundreds of thousands to millions of dollars will deter student-athletes from accepting gifts from agents).

276. *See id.* at 885 (contending that even giving \$2,000 to athletes is insignificant when compared to amounts of money generated by college sports, amounts of money to be made in U.S. professional leagues, and millions of dollars in endorsement deals for professional athletes).

277. *See* Rosenberg, *supra* note 5 (asserting that “[a]s long as college students need money and agents are willing to pay them . . .” NCAA will not be able to eliminate improper contact, which implies that endorsement deals, as means of eliminating need for student-athletes to accept money from agents, should alleviate agent problem).

278. *See* Dohrmann, *supra* note 183 (alleging that student-athletes usually approach agents because they want to be paid and need money). Dohrmann stated:

One of the misconceptions about the agent business is that the kids are victims, preyed on by people like me. When Alabama coach Nick Saban and others rail against the agent business, they don't mention that most of the time the player or someone from his family approaches us. Guys

most professional teams, many prominent college athletes are more popular than famous professional athletes in the United States.²⁷⁹ For example, former Florida Heisman Trophy winning Quarterback Tim Tebow, now the starting quarterback for the Denver Broncos, had the number one selling jersey among all NFL players before he played a single snap in a regular season NFL game.²⁸⁰

Tebow's fanfare, though, has nothing to do with his play for the NFL's Denver Broncos.²⁸¹ Rather, Tebow's immense popularity originates from his tremendous success as a college athlete at Florida where he won two national championships and scored a total of 145 touchdowns.²⁸² To put Tebow's college popularity in perspective, the Davie-Brown index, an independent marketing research tool, determined that Tebow was more popular than New England Patriots Quarterback Tom Brady, a three time Super Bowl Champion and one of the most recognizable faces in professional sports.²⁸³ Since the Broncos drafted Tebow with the twenty-fifth pick in the 2010 NFL Draft, Tebow has signed endorsement deals with both Nike and EA Sports, and has reportedly turned down other seven-figure endorsement deals in order to concentrate on his role as an NFL quarterback.²⁸⁴

Tebow is also not the only professional player to sign endorsement deals purely on his popularity and play as a college athlete.²⁸⁵

see that one of their teammates has some cash, ask him about it, and suddenly my phone rings.

Id.

279. See *Tim Tebow: A Different Kind of Superstar*, GACK SPORTS, <http://www.gacksports.com/4887/tim-tebow-a-different-kind-of-superstar/> (last visited Oct. 21, 2011) (stating that Tebow has become the "Golden Boy of the NFL" despite only holding reserve role for Denver Broncos).

280. See *id.* (describing craze for Tebow among football fans).

281. See *id.* (stating that Tebow's immense popularity originates from enigmatic personality and success at Florida); see also Dave Krieger, *Tebow Boosts Broncomania Before First Snap*, DENVER POST (July 18, 2010), http://www.denverpost.com/sports/ci_15542032 (noting Tebow's immense popularity has not only led to his jersey selling more than any other NFL jersey, but also to his own shoe deal with Nike before he even started playing for Broncos).

282. See Peter Finney Jr., *Tebow Turns Cincy into Gater Bait*, N.Y. POST (Jan. 2, 2010), http://www.nypost.com/p/sports/college/football/tim_sugar_rush_Xngs_mvHjXXD9zXso3OIVNJ (stating that Tebow holds NCAA record for most touchdowns scored in career).

283. See *Tim Tebow Says He Has Turned Down 'Seven-Figure' Endorsement Deals*, HUFFINGTON POST (May 13, 2010), http://www.huffingtonpost.com/2010/05/13/tim-tebow-says-he-has-tur_n_575761.html (discussing Tebow's popularity before he was even drafted in NFL).

284. See *id.* (declaring that Tebow has been flooded with endorsement offers because of his immense popularity and has even turned down lucrative deals).

285. See Neal J. Leitereg, *Philadelphia 76ers Rookie Evan Turner Inks Deal with李宁*, HULIQ (Aug. 25, 2010), <http://www.huliq.com/10164/philadelphia-76ers->

John Wall, the number one overall pick in the 2010 NBA Draft who played one season at the University of Kentucky, reportedly signed a five-year endorsement deal with Reebok worth \$25 million.²⁸⁶ Furthermore, in the 2008 NFL Draft, Nike signed “nine out of the top 11 draft picks” to endorsement deals before any of these former college athletes played a down in the NFL.²⁸⁷ Nike and Reebok undoubtedly made an initial investment in these former college standouts because they believe that many of these athletes will become successful professional players.²⁸⁸ Nevertheless, as evidenced by Tim Tebow, numerous star college athletes are extremely marketable without playing professionally because of the commercialization of college sports and the large fan bases of college teams.²⁸⁹

It seems likely that many student-athletes would not receive lucrative endorsement deals, as marketing potential usually coincides with popularity derived from success on the playing field.²⁹⁰ Student-athletes, who are most likely to be courted by sports agents, usually represent those college athletes who have the most success at the college level, and are, the most marketable players.²⁹¹ Thus, student-athletes who would not be able to attain endorsement deals

rookie-evan-turner-inks-endorsement-deal-li-ning (stating that Evan Turner, 2010 NCAA Player of Year, signed endorsement deal with Li-Ning to boost image in global community).

286. *See id.* (stating that John Wall also signed lucrative endorsement contract with Reebok); *see also* Neal Leitereg, *No.1 Overall Pick John Wall Signs Exclusive Trading Card Deal with Panini America*, EXAMINER (Aug. 28, 2010), <http://www.examiner.com/nba-draft-in-national/no-1-overall-pick-john-wall-signs-exclusive-trading-card-deal-with-panini-america> (declaring that Wall also signed trading card endorsement deal in addition to his lucrative deal with Reebok).

287. *See* Quibian Salazar-Moreno, *Nike, Reebok Get Busy Signing NFL Draft rookies to Endorsement Deals*, AOL (Apr. 29, 2008, 8:06 AM), <http://www.bvonsports.com/2008/04/29/nike-reebok-get-busy-signing-nfl-draft-rookies-to-endorsement-d/> (declaring that newly drafted NFL first-round picks received big endorsement deals after teams selected them, as Nike plans to have players such as Darren McFadden wear Nike gear from “head-to-toe”).

288. *See* Leitereg, *supra* note 285 (stating that Li-Ning signed Turner for his tremendous potential to be star in NBA and thus become even more marketable).

289. *See* Edelman, *supra* note 5, at 887 (“Star college players have similar name recognition as professional players and are therefore almost as marketable.”).

290. *See* Aaronson, *supra* note 162 (“California State University-San Marcos economist Robert Brown told ESPN.com for a December 2009 story that the average NFL-bound college football player would be worth \$1.3 million to \$1.36 million per season to his school ‘if the college game were subject to market forces similar to those that govern the NFL.’ Former Florida quarterback Tim Tebow, he said, would likely be paid more than \$2.5 million.”).

291. *See* Brad Pinkerton, *Inside Pitch: Bush Ahead of NFL Rookies in Endorsement Game*, SPORTS BUSINESS DAILY (Sept. 7, 2006), <http://www.sportsbusinessdaily.com/article/105634> (stating that Bush, who was recent focus of investigations relating to improper agent contact with players, led rookies in endorsement deals).

due to a lack of success on the field would most likely not be the types of players contacted by sports agents.²⁹²

In the current state of college athletics, numerous student-athletes come from economically poor backgrounds and have little spending money despite their popularity and success.²⁹³ Even though the NCAA has begun to investigate schools more thoroughly in recent years, college athletes continue to accept financial compensation from sports agents because the amount of compensation given to these players is still worth the risk of NCAA suspension.²⁹⁴ With lucrative endorsement deals available to many players, though, the temptation of such improper benefits would dramatically decrease if student-athletes were able to earn significantly more money through endorsement deals than from benefits given by agents.²⁹⁵ In other words, for many student-athletes, the risk/reward relationship currently weighs in favor of accepting benefits from sports agents because these student-athletes have no other source of income.²⁹⁶ If student-athletes were able to receive endorsement deals worth six or even seven figures in some circum-

292. For a discussion of how only those players receiving endorsement deals would be courted by unethical sports agents, see *supra* notes 290-291 and accompanying text.

293. See Anthony Jerrod, *Are College Athletes Being Pimped by Agents and the NCAA?*, ATLANTA POST (Sept. 15, 2010), <http://atlantapost.com/2010/09/15/are-college-athletes-being-pimped-by-agents-and-the-ncaa/> ("It is safe to state that most stars in the big-money college sports such as football and basketball are African-American athletes who evolve from low-income and lower middle class status."); see also Dohrmann, *supra* note 183 (telling story of sports agent John Luchs who stated that he paid players who needed money because of family illnesses, credit card debt, and other family financial problems); see also Frank Deford, *Awful Injustice: It's Time to Pay Revenue-Earning College Athletes*, SPORTS ILLUSTRATED (Jan. 2, 2008), http://sportsillustrated.cnn.com/2008/writers/frank_deford/01/02/paid.athletes/ (mentioning that college basketball and football players are normally "poor African-Americans").

294. See Jerrod, *supra* note 293 (stating that it is extremely difficult for poor college athletes to turn down money from agents when NCAA profits at their expense); see also Therber, *supra* note 4 (alleging that student-athletes would believe taking money from agents is too much of a risk if college athletes actually believed NCAA would catch them and declare them ineligible); see also Rosenberg, *supra* note 199 (contending that good system of enforcement catches enough people to be a large deterrent for others thinking of committing violation, but implying that NCAA will not be able to achieve such enforcement system).

295. Compare Edelman, *supra* note 5, at 887 (stating that Tracy McGrady received \$12 million in endorsements right out of high school) with Newberry, *supra* note 208 (stating that Green only received \$1,000 for jersey given to agent).

296. See Jeff Eisenberg, *Maryland's Gary Williams Says College Athletes Should Be Paid*, RIVALS (Sept. 22, 2007), http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Maryland-s-Gary-Williams-says-college-athletes-s?urn=ncaab-271721 (noting Maryland basketball coach Gary Williams's opinion that some poor players are even tempted by \$100).

stances, the risk of the NCAA suspending student-athletes for several games would not be worth the thousands of dollars given by sports agents.²⁹⁷

2. *Avoiding Legal and Practical Consequences of Other Student-Proposals*

In addition to reducing the incentives of many student-athletes to engage in improper behavior with sports agents, the endorsement deal scheme also avoids the problems associated with the other payment proposals.²⁹⁸ In regard to the financial concerns relating to the pay-for-play proposal and the revenue-sharing scheme, allowing student-athletes to accept endorsement deals would do little, if anything, to diminish the revenues generated by college athletic programs.²⁹⁹ In contrast to the other payments models, the endorsement plan does not rely on money generated from university sports programs.³⁰⁰ Although numerous colleges and university athletic programs rely on endorsement deals as well, it seems unlikely that companies like Nike and Adidas would decrease the amount of funds they spend on schools.³⁰¹ Colleges and universities mainly receive endorsement contracts for placing a company's logo on school athletic uniforms whereas student-athletes would most likely receive endorsement deals for promotional commercials.³⁰²

297. See Edelman, *supra* note 5, at 885 (asserting that it would take considerable amount of money to eliminate temptations by agents).

298. For a discussion of how the endorsement plan avoids both practical and legal problems that plague other payment proposals, see *infra* notes 299-318 and accompanying text.

299. See Edelman, *supra* note 5, at 880 (stating that deregulation would not affect university money because schools gain money from other sources).

300. For a further discussion on the endorsement deal scheme to seek promotional opportunities, see *infra* notes 302-304 and accompanying text.

301. See Rachel Bachman, *Lucrative Deals with Nike, Adidas Another Battle Between College 'Haves,' 'Have Nots,'* OREGONIAN (June 5, 2010), http://blog.oregonlive.com/pac10/2010/06/lucrative_deals_with_nike_adid.html (asserting that endorsement deals for college athletic programs are result of fan base, tradition, winning percentage, and market share where companies have ability to "sell official team gear" and "shape a team's image"); see also Mike Fish, *What Price Glory? The Star's Value*, ESPN (Dec. 11, 2009), <http://sports.espn.go.com/espn/otl/news/story?page=fish/091211> (arguing that increased marketability of players can increase endorsement deals for organizations, as Michael Jordan's "presence led to new sponsorship deals for the team").

302. See *Notre Dame Signs 10-year Deal with Adidas*, *supra* note 253 (stating that Notre Dame receives money from Adidas in exchange for all twenty-six Notre Dame varsity sports wearing Adidas logo on uniforms); see also Bachman, *supra* note 301 (discussing actual reasons why companies attempt to contract into endorsement deals with college athletic programs); see also RICHARD L. IRWIN, WILLIAM A. SUTTON & LARRY M. MCCARTHY, *SPORTS PROMOTION AND SALES*

Furthermore, unlike other payment options, the endorsement plan does not violate Title IX.³⁰³ The endorsement plan does not create an environment where schools treat women's sports unfairly because it does not require schools to compensate athletes unequally, as the endorsement plan excludes participation of schools.³⁰⁴ Moreover, by changing its regulations to allow athletes to seek endorsement opportunities, the NCAA effectively creates endorsement opportunities for both male and female athletes.³⁰⁵ In professional sports, female athletes have proven that they have just as much star-power and marketability as male athletes.³⁰⁶ Female tennis star Maria Sharapova earned an estimated \$23 million in endorsement deals in 2010, and also signed a contract with Nike worth reportedly \$70 million over 8 years.³⁰⁷ Additionally, Danica Patrick has become the most popular driver on the Indy Car Series, earning \$12 million in 2010, much of which was due to endorsement deals with various companies.³⁰⁸ Thus, even if Title IX did apply to the endorsement plan, such a proposal would likely not violate the Act.³⁰⁹

Without accepting wages from universities, student-athletes would not be considered "employees" of the schools for which they play.³¹⁰ Consequently, colleges and universities would avoid any type of workers' compensation payments or collective bargaining

MANAGEMENT 151 (2d ed. 2007) (explaining that arrangements between athletes and sponsors usually entail athlete endorsing sponsor's product and promoting it so that product grows in popularity).

303. See Edelman, *supra* note 5, at 880 (stating that deregulation of amateurism ideals, which includes allowance of endorsement deals, complies with Title IX).

304. See *id.* at 888 ("[D]eregulation does not involve any payment from educational institutions to student-athletes, and therefore is free from the regulation's scope.").

305. See Edelman, *supra* note 5, at 888 (asserting that deregulation would include opportunities for women to receive endorsement deals).

306. See Kurt Badenhausen, *The World's Highest-Paid Female Athletes*, FORBES (Aug. 27, 2010), <http://english.sina.com/sports/p/2010/0827/336458.html> (proving that women are some of highest paid athletes in world in regard to endorsements); see also Craig T. Bogar, *Trends in Product Endorsement by Athletes*, SPORTS DIGEST, <http://thesportdigest.com/article/trends-product-endorsements-athletes> (last visited Oct. 21, 2011) (noting that Michelle Wie has surpassed most male athletes in money from endorsement deals).

307. See Badenhausen, *supra* note 306 (demonstrating tremendous amount of money made by Sharapova as result of endorsement deals).

308. See *id.* (discussing Patrick's celebrity status as female auto-racer).

309. See *id.* (showing that women athletes can generate large quantities of money as popular athletes).

310. See Edelman, *supra* note 5, at 885-88 (stating that deregulation, which includes endorsement deals, would not create employee/employer relationship between student-athletes and universities).

agreements that could arise if the student-athletes were wage earners.³¹¹ This type of plan also prevents schools from being vicariously liable for actions by student-athletes.³¹²

Finally, the NCAA and its colleges and universities would still maintain tax-exempt status under the endorsement proposal.³¹³ First, the IRS is not likely to consider the revenue generated by college sports as “business income” because schools would still not be paying student-athletes to compete in college athletics.³¹⁴ Second, the NCAA would also maintain its tax-exempt status as an “amateur athletic organization.”³¹⁵ Although the NCAA imposes strict guidelines to ensure qualification as an amateur organization, other similar organizations to the NCAA with less stringent guidelines retain amateur organization status under the IRC.³¹⁶

As one legal sports scholar has asserted, organizations only clearly conflict with amateurism if they “are paying athletes a substantial formal salary for their play.”³¹⁷ For instance, the United States Olympic Committee (“USOC”), which qualifies as a tax-exempt organization because it “foster[s] national or international *amateur* sports competition,” allows professional basketball and hockey players who make millions of dollars to participate in the Olympic games.³¹⁸ Moreover, in 2007, the USOC made approxi-

311. See Hurst, *supra* note 216, at 66 (declaring that lack of compensation by schools precludes student-athletes from being employees of their schools); see also Mondello, *supra* note 76, at 300 (asserting that universities would probably only be considered “employers” of student-athletes and, thus, responsible for workers’ compensation payments for student-athletics if these schools began paying players).

312. See Hurst, *supra* note 216, at 76 (stating that lack of employer classification eliminates vicarious liability theory).

313. For an explanation of how the NCAA would retain tax-exempt status even with implementation of endorsement deal plan, see *infra* notes 314-320 and accompany text.

314. For a discussion of why universities could lose tax-exempt status from paying student-athletes, see *infra* notes 314-320 and accompany text.

315. See Fitt, *supra* note 20, at 585 (asserting that to qualify as amateur athletic organization, it must be “organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports”). I.R.C. § 501(j).

316. See Fitt, *supra* note 20, at 582-83 (asserting that many Olympic related organizations keep tax-exempt status despite having less stringent amateur guidelines than NCAA).

317. *Id.* at 582-83.

318. See *Why is the U.S. Olympic Committee Tax-Exempt?*, URBAN INSTITUTE (Feb. 26, 2010, 13:59 EST), http://taxvox.taxpolicycenter.org/blog/_archives/2010/2/26/4466190.html (noting that Olympic Committee remains exempt from taxes because of its designation as organization that fosters amateur sports competition).

mately \$147 million, and roughly 67% of that revenue paid administrative expenses and salaries.³¹⁹ Nevertheless, the USOC still maintains tax-exempt status because it does not pay salaries to the athletes participating in the Olympics, even though these athletes are nearly all professionals.³²⁰

IV. CONCLUSIONS

Amid tremendous controversy and criticism regarding his alleged acceptance of benefits from a sports agent as a student-athlete, Reggie Bush returned his Heisman Trophy to the Heisman Trophy Trust on September 14, 2010.³²¹ Realizing the great temptation facing college athletes with little money, Bush expressed his desire “to establish an educational program which will assist student-athletes and their families [in] avoid[ing] the mistakes that [he] made.”³²² Bush, however, is only one of many examples of student-athletes taking money from sports agents, and NCAA officials are just now discovering how deeply unethical agents have penetrated the college sports world.³²³ Despite having state laws in forty-two states prohibiting improper contact between agents and student-athletes, “more than half of [these states] have yet to revoke or suspend a single license, or invoke penalties of any sort.”³²⁴ Although the NCAA has begun to take steps to combat agent influence in the NCAA, eradication of this problem will only come with

despite fact that overwhelming majority of Olympians are actually professional athletes).

319. *See id.* (showing breakdown of Olympic revenue).

320. *See id.* (discussing how USOC does not pay taxes to IRS); *see also Analyzing NCAA Hypocrisy: Root Cause and Solutions*, *supra* note 209 (“The Olympics figured this situation out a long time ago and adjusted ‘amateurism’ to . . . allowing [athletes] to receive money from other sources. The NCAA does not need to do things the same as the Olympics, but it is a model for ideas.”).

321. *See* Bill Pennington, *Reggie Bush, Ineligible for '05, Returns Heisman*, N.Y. TIMES (Sept. 14, 2010), http://www.nytimes.com/2010/09/15/sports/ncaafotball/15heisman.html?_r=1 (discussing travesty Bush created and consequences he must now pay).

322. *Id.*

323. *See Report: Agent, Coach Have Financial Ties*, ESPN (Sept. 30, 2010), <http://sports.espn.go.com/ncl/news/story?id=5631748> (discussing relationship between former North Carolina assistant football coach and sports agent).

324. *See Bob Stoops: Amnesty for Some Players*, *supra* note 178 (demonstrating that state laws have done little to deter agents from giving benefits to student-athletes).

removal of player temptations, which can most easily be accomplished by allowing players to seek endorsement deals.³²⁵

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325. See Tanner, *supra* note 2 (noting that paying student-athletes is best way to reduce temptation of athletes taking money from “unscrupulous agents”); see also Edelman, *supra* note 5, at 880 (asserting that proposals to pay students – both revenue sharing scheme and laundry money stipend – would reach “sub-optimal outcomes” for colleges and NCAA). For an explanation of why the endorsement deal model escapes problems of other payment proposals, see *supra* notes 298-320.

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