

## Corking the Cam Newton Loophole, a Sweeping Suggestion

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### TABLE OF CONTENTS

I.	INTRODUCTION.....	342
II.	CURRENT REGULATORY SCHEMES TO POLICE ATHLETES, AGENTS AND OTHER INDIVIDUALS AND PROHIBITED ATHLETE-AGENT CONDUCT	344
A.	<i>The NCAA and its Bylaws</i> .....	345
1.	NCAA Bylaw, Article 12 – Amateurism Principles .....	346
2.	NCAA Bylaw, Article 16 – Extra Benefits .....	347
3.	NCAA Bylaw, Article 12.3.3 – Athletics Scholarship Agent.....	348
B.	<i>Enforcement of NCAA Bylaws</i> .....	349
C.	<i>The Uniform Athlete Agent Act</i> .....	351
D.	<i>The Sports Agent Responsibility and Trust Act</i> .....	352
III.	FACTUAL DISCUSSION OF THE “CAM NEWTON” LOOPHOLE .....	354
IV.	COMPARING AND CONTRASTING THE “LOOPHOLE” WITH SIMILAR CASES .....	360
A.	<i>Comparing Bush to Newton</i> .....	361
B.	<i>Comparing Stoudamire to Newton</i> .....	363
V.	SUGGESTED SOLUTIONS TO CLOSE THE “PAY TO PLAY” LOOPHOLE .....	364

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A.	<i>Creation of Federal Registry of All Agents and Runners</i> .....	365
B.	<i>Amend the NCAA Bylaws</i> .....	366
C.	<i>Implementing Proposed Solution Would Have Yielded Different Results</i> .....	367
VI.	CONCLUSION .....	368

## I. INTRODUCTION

College athletics is a billion dollar industry.<sup>1</sup> In particular, major men’s sports such as college football and basketball have “become more than an extracurricular activity . . . . [They have become] a global business.”<sup>2</sup> This “global business” creates billions of dollars for stakeholders such as the National Collegiate Athletic Association (the “NCAA” or “Association”), the hundreds of schools and universities throughout the nation that make up the NCAA, television networks, and sponsors. Yet while the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical nature of the Association, as its financial success is built on the sweat of amateur athletes. As NCAA athletes, student-athletes are bound to the rules of amateurism, which prohibit them from profiting off the collective sweat-equity they put into college athletics.<sup>3</sup> Thus, under NCAA rules, the intercollegiate athletes themselves are the only stakeholders not benefitting from their relationship with the NCAA.<sup>4</sup>

The debate over whether the existing system exploits college athletes is not a novel topic. Under the current scheme, a student-athlete may only receive tuition, educational fees, and room and board in exchange for his or her participation on a particular collegiate team.<sup>5</sup> NCAA bylaws finitely outline the limited circumstances in which an athlete may receive additional benefits without violating amateurism rules.<sup>6</sup>

Amateur athletes face significant time constraints with little time to

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<sup>1</sup> See *Time for Professional Student Athletes?*, THE ECONOMIST (Apr. 4, 2011), [http://www.economist.com/blogs/freeexchange/2011/04/sports\\_and\\_games](http://www.economist.com/blogs/freeexchange/2011/04/sports_and_games). See also Jodi Upton, Steve Berkowitz and Jack Gillum, *Big-Time College Athletics: Are They Worth the Big-Time Costs?*, USA TODAY (Jan. 15, 2010), [http://www.usatoday.com/sports/college/2010-01-13-ncaa-athletics-subsidies\\_N.htm](http://www.usatoday.com/sports/college/2010-01-13-ncaa-athletics-subsidies_N.htm).

<sup>2</sup> KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, THE BUSINESS OF SPORTS AGENTS 172 (2d ed. 2008).

<sup>3</sup> See 2010–2011 NCAA DIV. I MANUAL § 12 (2010) [hereinafter NCAA MANUAL].

<sup>4</sup> As one person put it, “[w]inning is enormously lucrative for everyone involved except the players, who happen to have the biggest influence over who wins and who loses.” SHROPSHIRE & DAVIS, *supra* note 2, at 3.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> See NCAA MANUAL, *supra* note 3, §§ 12.4, 15, 16.

procure a part-time job. Advocates of student-athlete compensation argue that the demands placed on the average college athlete, such as practice time, study hall, film, and conditioning, make it almost impossible for a student to earn extra money through part-time employment. Adding to this difficulty is the fact that NCAA rules place limits on the hourly wage athletes may earn for a part-time job.<sup>7</sup> While possible solutions such as paying athletes a minimum wage<sup>8</sup> and providing low interest loans<sup>9</sup> have been discussed, a more comprehensive solution still must be discovered, agreed upon, and implemented.<sup>10</sup> Because there is no reasonable alternative to assist a student-athlete in need of funds, some athletes are tempted to accept handouts offered by the many individuals clamoring to represent the prospect at the next level.

While in college, an elite player may encounter player agents, marketing agents, financial planners or one of their associates (i.e. a “runner”). These individuals most likely offer a combination of benefits if the player signs or promises to sign after he becomes a professional athlete. For example, agents and other third parties seeking to represent a player in some capacity may approach him or her and offer items such as cash, cars, jewelry, and real estate. An athlete may speak with each of these individuals without repercussion, but he or she will violate NCAA bylaws concerning amateurism and potentially forfeit eligibility if the athlete receives an extra benefit.<sup>11</sup> The athlete may also lose eligibility if a family member or friend receives a benefit.<sup>12</sup>

In an attempt to provide universities and, to a certain extent, players with a cause of action against agents who violate NCAA bylaws on amateurism, states and the federal government have enacted sports-specific statutes governing the player-agent relationship. While these statutes are not perfect, they do help police agents who willfully pursue athletes as clients while they are still amateurs. Until more adequate policing mechanisms are implemented, however, it will continue to be exceedingly difficult truly to prevent the various kinds of agent abuse that plague the amateur athletic model.

Agents have recently devised a new scheme to circumvent NCAA rules

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<sup>7</sup> See *id.* § 12. 4.

<sup>8</sup> SHROPSHIRE & DAVIS, *supra* note 2, at 167.

<sup>9</sup> *Id.* at 169.

<sup>10</sup> *Id.* at 165.

<sup>11</sup> Receiving a “benefit” becomes problematic and may disqualify the player when that extra benefit is “not available to the student body in general.” NCAA MANUAL, *supra* note 3, § 12.3.1.2(a).

<sup>12</sup> *Id.* § 12.3.1.2.

by offering athletes impermissible benefits during the recruitment process.<sup>13</sup> Two recent events involving prominent collegiate athletes symbolize the next wave of challenges the NCAA must combat to defend its amateurism principals.<sup>14</sup> It is unclear, however, whether the NCAA is the proper actor to police such events or whether it possesses the proper tools to do so. The first “pay to play” scandal involved former University of Southern California (“USC”) standout Reggie Bush in 2005.<sup>15</sup> More recently, Auburn Tigers’ All-American quarterback Cam Newton was accused of similar acts, thereby thrusting the “pay to play” scheme back into the nation’s conscious.<sup>16</sup>

This Comment will discuss the emerging “pay to play” scenario in the context of the Cam Newton accusations. Part II briefly outlines the current regulatory schemes available to police NCAA athletes, their family and friends, as well as prohibited athlete-agent conduct. Part II also explains why current NCAA legislation fails to deter agents from recruiting student-athletes while they are still amateurs. Part III introduces a concept known as the “Cam Newton Loophole” and provides a factual background of the Heisman Trophy winner’s career as a student-athlete. Part IV presents a discussion and analysis regarding recent scandals in which notable NCAA athletes Reggie Bush and Damon Stoudamire received impermissible benefits. Part V unveils the authors’ proposed solution for deterring individuals from violating the NCAA’s principles of amateurism. Part VI provides a conclusion to this Comment.

## II. CURRENT REGULATORY SCHEMES TO POLICE ATHLETES, AGENTS AND OTHER INDIVIDUALS AND PROHIBITED ATHLETE-AGENT CONDUCT

Attempts to regulate undesired NCAA athlete and agent conduct have spawned state, federal, and private legislation. The first lawsuits filed against troublesome agents were founded in common law causes of action.<sup>17</sup>

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<sup>13</sup> See Pat Forde, Chris Low, and Mark Schlabach, *Cash Sought for Cam Newton*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/ncf/news/story?id=5765214>.

<sup>14</sup> See *id.* § 2.9.

<sup>15</sup> See Madison Gray, *USC Trojans Get Black Eye Over Reggie Bush Scandal*, TIME.COM (June 10, 2010), <http://newsfeed.time.com/2010/06/10/usc-trojans-get-black-eye-over-reggie-bush-scandal/>.

<sup>16</sup> See *Cam Newton Scandal: Rep Sought Cash from MSU*, CBSNEWS.COM (Nov. 5, 2010), <http://www.cbsnews.com/stories/2010/11/05/sportsline/main7025408.shtml>.

<sup>17</sup> See Eric Willenbacher, Note, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing*

Much of the modern athlete-agent regulation, however, now occurs through NCAA bylaws and state or federal statutes.<sup>18</sup> The following paragraphs briefly discuss the most popular methods of athlete-agent regulation.<sup>19</sup>

#### A. *The NCAA and its Bylaws*

The NCAA was initially founded in response to mounting safety fears over college football.<sup>20</sup> As rules governing college athletes became more standardized and safety concerns were alleviated, the governing body evolved into an institution predicated on adhering to the principles of amateurism.<sup>21</sup> Under these notions, an amateur athlete must compete for the physical, mental and social benefits of a sport and must reject any commercial aspects.<sup>22</sup> To maintain his or her amateur status, a student-athlete participating in NCAA sanctioned events cannot receive anything other than pre-approved compensation, either directly from the university or from a third party.<sup>23</sup> If a student-athlete violates this rule, both the student-athlete and member school may be disciplined. The NCAA levies discipline so as to guard the amateurism ideal or Olympic model of athletic competition.<sup>24</sup>

Amateurism is fundamental under the Olympic model.<sup>25</sup> The NCAA's

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*System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1239-1242 (2004).

<sup>18</sup> *Id.* at 1235-39.

<sup>19</sup> While this Comment does not discuss this method, undesired agent behavior may be eliminated through penalties enacted by the various professional player associations.

<sup>20</sup> See Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1398 (2010).

<sup>21</sup> *History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Nov. 8, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history>; see also SHROPSHIRE & DAVIS, *supra* note 2, at 122-24.

<sup>22</sup> "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA MANUAL, *supra* note 3, § 2.9.

<sup>23</sup> See generally *id.* § 12.1.2 (discussing amateur status).

<sup>24</sup> Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 349 (2007) (discussing *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992) ("[T]he regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.")).

<sup>25</sup> "A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA MANUAL, *supra* note 3, § 1.3.1.

Principle of Amateurism reads: “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”<sup>26</sup> Thus, the bylaws most often used to enforce NCAA rules focus on preserving amateurism by prohibiting impermissible benefits.

A student-athlete who violates an NCAA bylaw becomes ineligible to participate in athletic contests.<sup>27</sup> Under the principle of institutional control, which is discussed in Bylaw 14.11.1, it is the school’s obligation to enforce the applicable NCAA rule to the student-athlete and withhold him or her from intercollegiate competition.<sup>28</sup> Failure to comply with NCAA rules results in significant penalties for both the student-athlete<sup>29</sup> and the member institution.<sup>30</sup> Once the school complies with its obligations, it may appeal to the Committee on Student-Athlete Reinstatement to have the student-athlete’s eligibility restored.<sup>31</sup> One obligation that all institutions and athletes must comply with under NCAA rules is detailed in Bylaw 12, which deals with the principle of amateurism.

### 1. NCAA Bylaw, Article 12 – Amateurism Principles

Article 12 of the NCAA Bylaws governs the principles of amateurism. Under this rule, only amateur student-athletes may compete in intercollegiate athletics.<sup>32</sup> Amateur athletes do not receive compensation for competing. Thus, amateur athletes cannot be paid<sup>33</sup> or they risk losing

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<sup>26</sup> *Id.* § 2.9 (stating the Principle of Amateurism).

<sup>27</sup> *See id.* § 14.11.4 (discussing ineligible participation).

<sup>28</sup> *Id.* §§ 14.11.1, 14.12.

<sup>29</sup> “Penalty for Ineligible Participation or Receipt of Improper Aid. A student-athlete who practices or competes in intercollegiate athletics and/or receives institutional financial assistance (based in some degree on athletics ability) while ineligible for such aid, practice or competition per Bylaw 14.3 shall be charged with the loss of one year of eligibility for practice and varsity competition for each year gained improperly. The student-athlete shall be declared ineligible at the time it is determined that eligibility was gained improperly. Prior to declaring the student-athlete ineligible, the institution may provide the student-athlete an opportunity for a hearing. The institution may appeal to the Committee on Student-Athlete Reinstatement for a reduction in the period of ineligibility.” *Id.* § 14.11.4.2.

<sup>30</sup> *Id.* § 14.11.3.

<sup>31</sup> *Id.* § 14.11.1.

<sup>32</sup> *Id.* § 12.01.1.

<sup>33</sup> “Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.” *Id.* § 12.02.2.

eligibility.<sup>34</sup> Athletes are prohibited from accepting benefits from certain external sources, including prospective agents or other third parties, while still an amateur.<sup>35</sup>

Amateurism means that an athlete will not sign an agreement to compete professionally,<sup>36</sup> which includes playing for compensation. A collegiate athlete will also lose eligibility if he or she agrees to be represented by an agent while still an amateur.<sup>37</sup> An agent may also disqualify an athlete from intercollegiate competition by furnishing him or her with any number of benefits, a concept that is discussed below.<sup>38</sup> This rule applies to the athlete as well as the athlete's family or friends.<sup>39</sup> Thus, terminating eligibility on the basis of receiving impermissible benefits, especially when the athlete claims to not have any knowledge of the alleged impermissible benefit, may quickly become a complicated scenario.

## 2. NCAA Bylaw, Article 16 – Extra Benefits

The bylaw governing impermissible or extra benefits is located in Article 16, which is entitled “Awards, Benefits and Expenses for Enrolled Student-Athletes.”<sup>40</sup> Simply put, the rule prohibits a student-athlete from receiving any extra benefit.<sup>41</sup> “The term ‘extra benefit’ refers to any special arrangement by an institutional employee or representative of the institution’s athletics interests to provide the student-athlete or his or her relatives or friends with a benefit not expressly authorized by NCAA legislation.”<sup>42</sup> The bylaw allows the student-athlete to escape punishment “if it is demonstrated that the same benefit is generally available to the institution’s students or their relatives or friends or to a particular segment of the student body.”<sup>43</sup>

The NCAA may easily find a student-athlete guilty of receiving an impermissible extra benefit. An athlete may break this rule by receiving something as minor as a free meal from a college coach<sup>44</sup> or a free set of

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<sup>34</sup> See *id.* § 12.1.2.1.

<sup>35</sup> See *id.* § 12.3.

<sup>36</sup> *Id.* § 12.2.5.

<sup>37</sup> *Id.* § 12.3.1.

<sup>38</sup> *Id.* § 12.3.1.2.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* § 16.

<sup>41</sup> *Id.* § 16.01.1.

<sup>42</sup> *Id.* § 16.11.2.1.

<sup>43</sup> *Id.* § 16.02.3.

<sup>44</sup> PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 24 (2009).

sporting event tickets from a third party.<sup>45</sup> Upon receiving the impermissible benefit, a student-athlete loses his or her eligibility. Following an appeals process, however, the NCAA may reinstate the student-athlete.<sup>46</sup> Situations may also arise where a student-athlete requests or receives impermissible benefits during the recruitment process.<sup>47</sup> With the increasing commercialization of collegiate athletics, this is an area that may receive additional attention from the NCAA as it revises its bylaws.

### 3. NCAA Bylaw, Article 12.3.3 – Athletics Scholarship Agent

Article 12.3.3, which governs student-athlete recruitment, also plays a crucial role in preserving amateurism. The rule, as currently implemented, prohibits a prospective student-athlete from paying a third party to place the athlete in a collegiate institution that will provide the athlete with financial aid.<sup>48</sup> This rule may be applied to anyone who seeks out representatives on behalf of the student-athlete, not just the athlete or the family, with or without the athlete's knowledge of the solicitation.<sup>49</sup>

Retaining an athletic scholarship agent is an issue that member institutions must confront, and it provides a new twist to the "pay-to-play" scheme. In many cases, amateur athletes demand compensation once they have established themselves as premier performers on a particular team. Furthermore, the increasing value of college basketball and football has left many amateur athletes feeling disenfranchised as stakeholders within the college athletics landscape before they even become collegiate athletes. The athlete's failure to receive any monetary benefit (other than financial aid) from college sports may cause an athlete to demand compensation prior to enrolling into an institution or, as seen below, attempt to sell his services to the highest bidder. Once these stakeholders enroll in their respective universities, member schools are counted on to help enforce NCAA rules and preserve amateurism.

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<sup>45</sup> *Id.*

<sup>46</sup> See NCAA MANUAL, *supra* note 3, §§ 14.11-12.

<sup>47</sup> See *Alabama Looking Into Illegal Recruiting Accusations*, SPORTING NEWS (Apr. 9, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-04-09/alabama-looking-into-illegal-recruiting-accusations>.

<sup>48</sup> "Any individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual's athletics ability or reputation." *Id.* § 12.3.3.

<sup>49</sup> See *infra* Part V.

### B. Enforcement of NCAA Bylaws

NCAA bylaws are only effective in preserving amateurism to the extent that its member schools enforce them. The NCAA has limited control over policing unethical athlete-agent conduct, as it is a volunteer organization with jurisdiction only over those entities and individuals that submit to its authority.<sup>50</sup> The NCAA's true power lies in its ability to directly sanction member institutions for violating NCAA rules.<sup>51</sup> This policing mechanism is consistent with the fundamental notion of institutional control and governance codified in the NCAA's Constitution.<sup>52</sup>

NCAA bylaws require that member institutions control all aspects of their athletic programs. Therefore, under the concept of institutional control, the school assumes responsibility for the conduct of every amateur athlete and any outside person or entity that may come into contact with the athletic program.<sup>53</sup> In the event of player, school, or agent misconduct, the NCAA may directly punish the offending institution rather than the actual misbehaving person. Past examples of such punishment include forcing a university to vacate wins accrued while an ineligible player participated on the team,<sup>54</sup> forfeiting monies generated while an ineligible athlete was playing in games,<sup>55</sup> losing scholarships,<sup>56</sup> and, in grave circumstances,

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<sup>50</sup> Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences* 19 (Wake Forest University Legal Studies Research Paper Series, 2006) (stating that “[a]s a private association, the NCAA lacks any authority to regulate the agent industry”).

<sup>51</sup> SHROPSHIRE & DAVIS, *supra* note 2, at 132.

<sup>52</sup> *Id.* at 132. See generally NCAA MANUAL, *supra* note 3, § 6.

<sup>53</sup> NCAA MANUAL, *supra* note 3, at § 6.4. See also *id.* § 6.01.1 (stating that “[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control.”).

<sup>54</sup> For an example, see the NCAA penalties levied against former University of Southern California star Reggie Bush. Greg Beacham, *NCAA Drops the Hammer on USC Football*, NBCSPORTS.COM (June 10, 2010), [http://nbcsports.msnbc.com/id/37621070/ns/sports-college\\_football/Cite\\_Bush](http://nbcsports.msnbc.com/id/37621070/ns/sports-college_football/Cite_Bush).

<sup>55</sup> *Michigan Imposes Sanctions, Including '03 Postseason Ban*, CBSSPORTS.COM (Nov. 7, 2002), <http://www.cbssports.com/collegebasketball/story/5867946>; Jack Cavanaugh, *UMass and UConn Lose '96 Honors*, THE NEW YORK TIMES (May 9, 1997), <http://www.nytimes.com/1997/05/09/sports/umass-and-uconn-lose-96-honors.html?scp=2&sq=marcus%20camby%20ncaa&st=cse>.

<sup>56</sup> David Borges, *Jim Calhoun Responds to NCAA Penalties, Said He Takes the Ultimate Blame*, THE MIDDLETOWN PRESS (Feb. 26, 2011), <http://middletownpress.com/articles/2011/02/26/sports/doc4d688d580eac6052474782.txt>; *NCAA Throws Out Arkansas State Wins*, ESPN.COM (Mar. 11, 2011), <http://sports.espn.go.com/ncf/news/story?id=6207321>; John Zenor, *Alabama Hit With Two-*

disbanding a team for a period of years.<sup>57</sup> All of these penalties have a cumulative effect intended to punish the institution financially so the school will vigilantly enforce the NCAA's amateurism requirements.

The NCAA is not always the proper body to penalize an offending party. For example, unethical agent conduct often results in an NCAA violation. The NCAA, however, cannot directly impose discipline on agents who violate NCAA bylaws because most agents have not consented to the NCAA's governing authority. The NCAA must instead punish the school, and the school is thus the damaged party, which must then seek an alternative route for legal redress. When a school is victimized by unethical agent conduct, it must bear the penalty imposed by the NCAA and take matters into its own hands.<sup>58</sup>

For years, aggrieved parties were forced to seek recovery against agents through common law causes of action, agency law, and such federal laws as the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>59</sup> For example, schools in the past have asserted breach of contract or tortious interference with contractual relations claims against agents who allegedly interfered with the contractual relationship established between the student-athlete and the scholarship-granting university.<sup>60</sup> These lawsuits, however, did not deter unethical athlete-agent conduct for a variety of reasons, particularly because of the substantial commissions agents receive once their elite athletes sign large contracts at the next level.<sup>61</sup> As a result, the Uniform Athlete Agent Act and the Sports Agent Responsibility and Trust Act have emerged as more workable and effective regulatory systems of athlete-agent conduct.

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*Year Bowl Ban by NCAA*, CINCINNATI ENQUIRER (Feb. 2, 2002), [http://www.enquirer.com/editions/2002/02/02/spt\\_alabama\\_hit\\_with.html](http://www.enquirer.com/editions/2002/02/02/spt_alabama_hit_with.html).

<sup>57</sup> This is commonly referred to as "the death penalty."

<sup>58</sup> When that party is a student-athlete, however, institutions seldom pursue lawsuits because it is bad publicity. Such an action harms the school's reputation and its ability to recruit. Instead, a university would be better served spending its efforts and finances on educating athletes on relevant NCAA rules and reexamining the institution's protocols designed to prevent rules violations. For a discussion, see Willenbacher, *supra* note 17, at 1246-49.

<sup>59</sup> See *id.* at 1239-42; see also SHROPSHIRE & DAVIS, *supra* note 2, at 148.

<sup>60</sup> See SHROPSHIRE & DAVIS, *supra* note 2, at 151 (stating that "courts have overwhelmingly recognized the relationship between student athlete and his or her college as contractual in nature").

<sup>61</sup> Willenbacher, *supra* note 17, at 1243-44 (stating that civil and criminal penalties will not deter unethical agent conduct because the potential financial rewards of signing a high draft pick outweigh the potential consequences of violating amateurism rules).

### C. *The Uniform Athlete Agent Act*

The Uniform Athlete Agent Act (“UAAA” or the “Act”) embodies over four years of research by the legal community and feedback from stakeholders within college athletics on how to curtail unethical athlete-agent conduct.<sup>62</sup> One major function of the Act is to protect the interests of the student-athlete and academic institution.<sup>63</sup> The UAAA is intended to deter NCAA athlete recruitment while athletes are still considered amateurs, provide disclosure, and give those damaged by dishonest agents a tangible civil remedy against the offending party. Additionally, the Act serves as a model statute for state legislatures, which have adopted almost identical legislation across the nation. Prior to 2000, at least twenty-eight states had implemented some form of agent regulation statute,<sup>64</sup> but each state statute varied, making uniform enforcement difficult. The UAAA resolves this enforcement problem. The entity responsible for drafting the UAAA, the National Conference of Commissioners on Uniform State Laws, urges states to adopt the proposed Act.<sup>65</sup> As of January 1, 2011, forty states have adopted some form of the UAAA.<sup>66</sup>

The Act attempts to professionalize the sports agent field by instituting various requirements and safeguards upon anyone seeking to enter the athlete-agent business. Those falling within the UAAA’s authority must comply with elaborate registration, certification, and renewal requirements,<sup>67</sup> furnish registration and renewal fees,<sup>68</sup> as well as submit to state agency authority to revoke or suspend the agent’s registration.<sup>69</sup> The Act also increases the agent’s disclosure requirements to both the student-athlete<sup>70</sup> and the educational institution.<sup>71</sup> The UAAA is not concerned with shielding professional athletes; it instead focuses on protecting amateur athletes and institutions.

One major function of the Act is the heightened disclosure and

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<sup>62</sup> The entire sporting profession came together to help promulgate the UAAA. See SHROPSHIRE & DAVIS, *supra* note 2, at 157–59.

<sup>63</sup> *Id.* at 157.

<sup>64</sup> *Id.* at 20.

<sup>65</sup> *Id.* at 158.

<sup>66</sup> *FAQ on Uniform Athlete Agents Act*, NCAA.ORG (Jul. 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act>.

<sup>67</sup> Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, DARTMOUTH L.J. 246, 252 (2009).

<sup>68</sup> UNIF.ATHLETE AGENTS ACT § 9 (2000) [hereinafter UAAA].

<sup>69</sup> *Id.* § 7.

<sup>70</sup> Heitner, *supra* note 67, at 252 (citing UAAA).

<sup>71</sup> UAAA, *supra* note 68, § 11.

registration requirements it imposes on both agents and runners.<sup>72</sup> Both agents and their runners are prohibited from lying and from providing a potential client with anything of value prior to entering into an agency contract. In other words, anyone trying to recruit an athlete must conduct himself or herself honestly. The heightened disclosure requirements of the Act also force agents to include specific provisions in a proposed agency contract, including a conspicuous notice in close proximity to the signature page that discloses to the athlete the ramifications of signing an agency contract.<sup>73</sup> This requirement ensures the amateur athlete understands the consequences of his actions and that his actions may damage the athlete's university or the athlete himself. If the agent or runner violates the Act, it provides the aggrieved party with specific remedies.<sup>74</sup>

Those damaged by prohibited athlete-agent conduct now have a specific remedy under the Act. The UAAA gives NCAA member institutions a civil remedy against agents who cause student-athletes to lose eligibility.<sup>75</sup> The Act also allows both state and federal actors to pursue civil and criminal claims.<sup>76</sup> Athletes, however, are not granted a statutory remedy under the Act. Instead, athletes may void an agency contract if the executed contract fails to comply with the Act's enumerated provisions.<sup>77</sup> As a result of the fact that the UAAA does not codify a cause of action for an amateur athlete injured by unethical athlete-agent conduct, the Act's focus is on protecting the interests of NCAA institutions, not those of the student-athlete. Recently enacted federal legislation focuses more on student-athletes.

#### *D. The Sports Agent Responsibility and Trust Act*

The Sports Agent Responsibility and Trust Act ("SPARTA") is a federally enacted statute that governs the recruiting and signing of amateur athletes.<sup>78</sup> SPARTA punishes unscrupulous agents whose conduct damages amateur athletes and NCAA member universities.<sup>79</sup> In particular, SPARTA regulates dishonest athlete-agent conduct intended to induce an athlete to sign an agency contract by prohibiting an agent from giving false or misleading information or making false promises to a student-athlete or anyone associated with the student-athlete before he or she enters into the

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<sup>72</sup> *Id.* § 5.

<sup>73</sup> *Id.* § 10.

<sup>74</sup> *See id.* §§ 15-17.

<sup>75</sup> *Id.* § 16(a).

<sup>76</sup> *Id.* §§ 15-16.

<sup>77</sup> *Id.* § 10(d).

<sup>78</sup> *See generally*, Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7801 (2011).

<sup>79</sup> *See Willenbacher, supra* note 17, at 1233-34.

agency contract.<sup>80</sup> Violations of SPARTA are treated as unfair or deceptive acts, regulated by the Federal Trade Commission.<sup>81</sup>

Like the UAAA, SPARTA emphasizes the duties of honesty and disclosure. Potential signees must be warned of the consequences of signing an agency contract, and universities must be notified in the event an athlete signs an agency contract.<sup>82</sup> Under SPARTA, both the agent and the athlete, within close time proximity of the signing, possess a duty to notify the athlete's university of the agency contract.<sup>83</sup> In addition, athlete-agents must provide the potential client (or the athlete's parent or legal guardian if he or she is under the age of eighteen) with a disclosure document that explains the consequences of signing with an agent.<sup>84</sup> This disclosure requirement almost mirrors the UAAA<sup>85</sup> and must be in boldface type letters in close proximity to the signature of the student-athlete.<sup>86</sup> If the athlete-agent engages in a prohibited act or fails to provide all required stakeholders with disclosure as required, several actors may pursue a remedy against the offending party.<sup>87</sup>

SPARTA authorizes both federal and state causes of action for various affected parties. Under the statute, a state attorney general in the state in which the cause of action arose may act on behalf of the state's residents. The Federal Trade Commission may also act and treat the agent's conduct as an unfair or deceptive act or practice.<sup>88</sup> An educational institution may also pursue a civil remedy through SPARTA for damages. The institution is limited to receiving damages for actual losses and expenses incurred as a result of the athlete agent's conduct.<sup>89</sup> Such losses are generally sustained as a result of NCAA, conference, and/or self-imposed sanctions.<sup>90</sup> SPARTA further allows other federal claims and equitable remedies to aggrieved parties seeking damages.<sup>91</sup>

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<sup>80</sup> 15 U.S.C. § 7802(a) (2011).

<sup>81</sup> See Willenbacher, *supra*, note 17, at 1234.

<sup>82</sup> See 15 U.S.C. § 7805(a) (2011).

<sup>83</sup> The athlete agent and the student-athlete must notify either the athletic director or a high-ranking member of the athletic department within seventy-two hours after entering into the contract or before the next athletic event, whichever occurs first. *Id.*

<sup>84</sup> See 15 U.S.C. § 7802(b)(3) (2011).

<sup>85</sup> UAAA, *supra* note 68, § 10.

<sup>86</sup> 15 U.S.C. § 7802(b)(3) (2011).

<sup>87</sup> See 15 U.S.C. §§ 7803-04 (2011).

<sup>88</sup> 15 U.S.C. § 7803 (2011).

<sup>89</sup> 15 U.S.C. § 7805 (2011).

<sup>90</sup> Gary Klein & David Wharton, *NCAA Sanctions Could Cost USC Millions*, L.A. TIMES (Jun. 10, 2010), <http://articles.latimes.com/2010/jun/10/sports/la-sp-0611-usc-ncaa-sanctions-20100611>.

<sup>91</sup> 15 U.S.C. § 7806 (2011).

Both the UAAA and SPARTA are important tools that help curtail unethical athlete-agent conduct because, unlike NCAA rules, they directly reach agents attempting to act on behalf of a student-athlete in a variety of capacities. These statutes, however, only regulate athletes currently playing college sports, and their application in any other context is nebulous. Enterprising individuals may still exploit amateur athletes in a variety of ways without the threat of liability under NCAA bylaws or these statutes. Dealing with such exploitation is a complex legal and regulatory issue.<sup>92</sup> Part III will illustrate this complexity through the example of the recruitment of 2010 Heisman Trophy winner quarterback and national champion Cam Newton.

### III. FACTUAL DISCUSSION OF THE “CAM NEWTON” LOOPHOLE

Nobody could have predicted Cam Newton’s rise to the pinnacle of college football when he originally signed his letter of intent with the Florida Gators in 2007. As a true freshman, the highly coveted Newton served as Florida’s backup quarterback.<sup>93</sup> Newton’s freshman campaign, however, abruptly ended after he suffered a season-ending ankle injury.<sup>94</sup> A few months after the injury, the elite quarterback prospect faced academic misconduct allegations, and Newton was accused of stealing another student’s laptop, arrested and suspended from the team.<sup>95</sup> This event signaled the end of Newton’s affiliation with the University of Florida, as he transferred shortly after the fall 2008 semester.<sup>96</sup>

Newton began rehabilitating his football career by enrolling at Blinn College, a junior college located in Texas.<sup>97</sup> The addition of Newton

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<sup>92</sup> Steve Wieberg, *NCAA Boss: Closing Cam Newton Loophole is ‘Complex’*, USA TODAY (Dec. 14, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/ncaa-boss-says-cam-newton-case-could-cause-rule-change/1> (quoting NCAA President Mark Emmert).

<sup>93</sup> Antonya English, *Cameron Newton Will Back up Tebow*, TAMPABAY.COM (Aug. 25, 2007), <http://www.tampabay.com/blogs/gators/content/cameron-newton-will-back-tebow>.

<sup>94</sup> Newton, however, received a medical redshirt.

<sup>95</sup> See *Report: Cam Newton Cheated at Florida*, ESPN.COM (Nov. 10, 2010), <http://sports.espn.go.com/nfl/news/story?id=5783051>; see also Jeremy Flower, *Backup QB Cameron Newton Arrested for Stealing Laptop, Suspended From Team*, THE ORLANDO SENTINEL (Nov. 21, 2008), [http://blogs.orlandosentinel.com/sports\\_college\\_uf/2008/11/backup-qb-camer.html](http://blogs.orlandosentinel.com/sports_college_uf/2008/11/backup-qb-camer.html).

<sup>96</sup> Jeremy Flower, *Exclusive: QB Cam Newton to Transfer to Texas JC*, THE ORLANDO SENTINEL (Jan. 5, 2009), [http://blogs.orlandosentinel.com/sports\\_college\\_uf/2009/01/exclusive-qb-ca.html](http://blogs.orlandosentinel.com/sports_college_uf/2009/01/exclusive-qb-ca.html).

<sup>97</sup> David Jones, *Florida Quarterback Newton Headed for Junior College*, USA TODAY

quickly turned Blinn's football team into a powerhouse, and the squad went on to win the NJCAA National Football Championship.<sup>98</sup> Newton's performance at Blinn College reaffirmed his status as a blue-chip recruit, and he sought to re-enter Division I college football. Going into the 2010 recruiting season, Newton was the nation's number one junior college prospect.<sup>99</sup>

Ultimately, Newton signed with Auburn University with marginal fanfare.<sup>100</sup> Newton quickly became a bona-fide Heisman Trophy candidate under center of the Tigers' offense. As the season teetered towards its conclusion, however, Newton found himself in the middle of separate NCAA and FBI investigations focusing on his recruitment from Blinn back into Division I Football.<sup>101</sup> The investigations quickly gained media notoriety as they brought to light alleged dealings between Newton's father, Cecil Newton, and individuals linked to an agency named Elite Football Preparation, an agency purported to be involved in Newton's recruitment to a Division I Football program.<sup>102</sup>

Newton's "pay-to-play" recruiting controversy surfaced in November 2010, as the college football regular season was approaching its conclusion. After former Mississippi State University quarterback John Bond submitted a statement to the Associated Press, various news reports surfaced alleging that during Newton's recruitment, individuals claiming to represent the athlete and his family demanded a payment of \$180,000 by Mississippi

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(Jan. 13, 2009), [http://www.usatoday.com/sports/college/football/sec/2009-01-13-florida-newton\\_N.htm](http://www.usatoday.com/sports/college/football/sec/2009-01-13-florida-newton_N.htm).

<sup>98</sup> Tony Adame, *Blinn's Late TD Stuns Fort Scott*, THE WICHITA EAGLE (Dec. 7, 2009), <http://www.kansas.com/2009/12/07/1086794/blinns-late-td-stuns-fort-scott.html>.

<sup>99</sup> *Juco Top 50 2010 Prospect Ranking*, RIVALDS.COM (Dec. 13, 2009), <http://rivals.yahoo.com/ncaa/football/recruiting/rankings/rank-2511>.

<sup>100</sup> *Auburn Football Signs JUCO Quarterback Cameron Newton to National Letter of Intent*, AUBURNTIGERS.COM (Dec. 31, 2009), <http://auburntigers.cstv.com/sports/m-footbl/spec-rel/123109aad.html>.

<sup>101</sup> Pete Thamel, *Heisman Front-Runner is Focus of Investigation*, THE NEW YORK TIMES (Nov. 4, 2010), [http://www.nytimes.com/2010/11/05/sports/ncaaf/05auburn.html?\\_r=1&scp=1&sq=thamel%20newton&st=cse](http://www.nytimes.com/2010/11/05/sports/ncaaf/05auburn.html?_r=1&scp=1&sq=thamel%20newton&st=cse); Naimah Jaball-Nash, *Cam Newton Scandal: FBI Joins Recruitment Investigation of Auburn Heisman Hopeful*, CBSNEWS.COM (Nov. 10, 2010), [http://www.cbsnews.com/8301-504083\\_162-20022371-504083.html](http://www.cbsnews.com/8301-504083_162-20022371-504083.html).

<sup>102</sup> Michael Rosenberg, *Newton Story Takes on New Life, but it's Hard to Know What to Believe*, SPORTS ILLUSTRATED.COM (Nov. 10, 2010), [http://sportsillustrated.cnn.com/2010/writers/michael\\_roseberg/11/10/cam.newton/index.html](http://sportsillustrated.cnn.com/2010/writers/michael_roseberg/11/10/cam.newton/index.html); see also Thamel, *supra* note 101; *Cam Newton: 'I did it the right way'*, ESPN.COM (Dec. 10, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5903485&campaign=rss&source=ESPNUHeadlines>.

State University to secure Newton's services.<sup>103</sup> Officials from the Mississippi State Athletics Department and the SEC were made aware of the alleged solicitation.<sup>104</sup>

As the facts began to unfold, it became clear that Newton's father was responsible for the "pay-to-play" demands placed on potential schools in exchange for his son's services. The younger Newton had let his father decide where he would play,<sup>105</sup> and the elder Newton allegedly used this opportunity to indirectly contact potential schools to solicit six-figure payoffs to steer his son toward that institution.<sup>106</sup> Although Mississippi State was the only confirmed school that Newton propositioned with the "pay-to-play" demand, speculation abounded whether other schools received the same, or a similar, request.

As a result of these allegations, Auburn suddenly found itself in the middle of a recruitment scandal. The school had to answer whether it paid Newton's family to land the prized recruit. Auburn's spectacular season was on the brink of disaster, as the team faced the possibility that it had marched to an undefeated record with a star quarterback who was ineligible under NCAA rules. A finding that Newton competed while ineligible would render Auburn's miraculous season void, and other repercussions would surely follow.

Cam Newton denied any knowledge that his representatives improperly solicited payments from schools seeking to secure his services.<sup>107</sup> Cam deflected the assertions to the senior Newton and his associates. Newton's father, however, also denied any wrongdoing.<sup>108</sup> The Newton scandal placed the NCAA in a difficult position. Cam Newton's story and his performance on the field made for compelling viewership. Nevertheless, the allegations were serious and, regardless of the player's popularity, the NCAA needed to conduct a diligent investigation.

After a month-long investigation, the NCAA declared that a violation of the amateurism rules had occurred, thereby making Newton ineligible for

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<sup>103</sup> *Cam Newton Scandal: Rep Sought Cash from MSU*, CBSNEWS.COM (Nov. 5, 2010), <http://www.cbsnews.com/stories/2010/11/05/sportsline/main7025408.shtml>; Pete Thamel, *supra* note 101.

<sup>104</sup> Pat Forde, Chris Low and Mark Schlabach, *Cash Sought for Cam Newton*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/nfc/news/story?id=5765214>; *see also* Joe Shad, *Sources: Newtons Talked of Pay Plan*, ESPN.com (Nov. 11, 2010), <http://sports.espn.go.com/nfc/news/story?id=5786315>.

<sup>105</sup> Rosenberg, *supra* note 102; *see also* Thamel, *supra* note 101 (stating that Newton told Sports Illustrated that he ultimately left the decision to his father).

<sup>106</sup> Shad, *supra* note 104.

<sup>107</sup> *Cam Newton Says He's Innocent*, ESPN.COM (Nov. 5, 2010), <http://sports.espn.go.com/nfc/news/story?id=5768636>.

<sup>108</sup> *Id.*

competition.<sup>109</sup> The investigation confirmed that Cam's father did indeed contact Mississippi State to solicit a cash payment in return for his son playing there, and Auburn subsequently declared Newton ineligible.<sup>110</sup> Auburn immediately filed to have Newton reinstated, as the Southeastern Conference ("SEC") Championship Game was only days away.<sup>111</sup> The NCAA reinstated Newton with enough time for him to play in the SEC Championship Game.<sup>112</sup>

The rationale to reinstate Newton was based on a lack of evidence necessary to substantiate the rumors that Newton knew of the scheme. The NCAA released a statement addressing why it declared Newton eligible, saying that although Newton's father did market the hot prospect in "a pay-for-play scenario . . . [b]ased on the information available to the reinstatement staff at this time, [the NCAA does] not have sufficient evidence that Cam Newton or anyone from Auburn was aware of this activity, which led to his reinstatement."<sup>113</sup>

Although there was enough evidence to find Cecil Newton and his associates guilty of culpable conduct, the NCAA claimed it lacked the evidence necessary to implicate the all-star quarterback. Thus, by claiming ignorance, Cam Newton successfully maintained his innocence throughout the investigation.<sup>114</sup> Three days after the NCAA's statement, Newton led the Tigers to a dominating victory over the South Carolina Gamecocks and a berth in the BCS National Championship Game against the University of Oregon.<sup>115</sup> Newton would go on to quarterback Auburn to a dramatic win over Oregon in the title game.<sup>116</sup>

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<sup>109</sup> David Paschall, *NCAA Deems Auburn's Newton Eligible*, CHATTANOOGA TIMES FREE PRESS (Dec. 1, 2010), <http://www.timesfreepress.com/news/2010/dec/01/ncaa-deems-auburns-newton-eligible/>.

<sup>110</sup> *Cam Newton Cleared to Play*, ESPN.COM (Dec. 3, 2010), <http://sports.espn.go.com/nfl/news/story?id=5870788>.

<sup>111</sup> *Id.*; see also *NCAA Rules Cam Newton Eligible To Play in SEC Title Game*, HUFFINGTON POST (Dec. 1, 2010), [http://www.huffingtonpost.com/2010/12/01/cam-newton-eligible\\_n\\_790508.html](http://www.huffingtonpost.com/2010/12/01/cam-newton-eligible_n_790508.html).

<sup>112</sup> *Id.*

<sup>113</sup> *NCAA Addresses Cam Newton's Eligibility*, NCAA.ORG (Dec. 1, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/NCAA+addresses+eligibility+of+Cam+Newton> [hereinafter *NCAA Statement*].

<sup>114</sup> The attorney representing the Newton family claimed, "No money has been offered to Cam Newton. Cam Newton [hasn't] asked for any money." *NCAA Rules Cam Newton Eligible To Play in SEC Title Game*, *supra* note 111; see also *Cam Newton Says He's Innocent*, *supra* note 107.

<sup>115</sup> *Cam Newton's 6-TD day Leads Auburn to SEC Championship and BCS Title Game*, ESPN.COM (Dec. 4, 2010), <http://sports.espn.go.com/nfl/recap?gameId=303382579>.

<sup>116</sup> *Auburn Claims SEC's Fifth Straight National Title by Dropping Oregon on Late Field*

Newton's exoneration and subsequent reinstatement was heavily criticized. Critics were skeptical of Newton's argument that he lacked any knowledge of the play-to-play scheme. Schools throughout Division I football and the media expressed concern over the shortage of accountability and minimal consequences for the offending parties.<sup>117</sup> Further, detractors wondered why the NCAA allowed Newton to compete even though it found that his father had actually solicited bids from other schools.<sup>118</sup> Had Cecil Newton succeeded, and Newton's associates received a six-figure payment, there would have been an imputed impermissible benefit to Newton, clearly rendering him ineligible. The fact that no money changed hands, critics argued, should not negate culpability for the solicitations.

One particularly harsh voice of the NCAA's decision not to further penalize Newton or Auburn was USC Athletic Director, Pat Haden. "I was always told the parent is the child," Haden said in reference to imputed benefits.<sup>119</sup> "That's what we've been telling our kids. If the parent does something inappropriate the child suffers the consequences."<sup>120</sup> USC's football team recently received major sanctions in large part because of improper benefits received by the parents of former star Reggie Bush.<sup>121</sup> Haden's comments exemplified the feelings of many disillusioned individuals who demanded an explanation from the NCAA for the difference in its handling of the Bush and Newton scandals.<sup>122</sup>

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*Goal*, ESPN.COM (Jan. 10, 2011), <http://scores.espn.go.com/nfc/recap?gameId=310102483>.

<sup>117</sup> Erick Smith, *Big Ten's Jim Delany Upset at NCAA's Cam Newton Decision*, USA TODAY (Dec. 3, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/big-tens-jim-delany-upset-at-ncaas-cam-newton-decision/1>; see also Gene Wojciechowski, *The Cam Newton Affair Still Stinks*, ESPN.COM (Jan. 21, 2011), [http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski\\_gene&page=wojciechowski/110121&sportCat=nfc](http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&page=wojciechowski/110121&sportCat=nfc); see also Pete Thamel, *Ruling on Newton is Drawing Criticism*, THE NEW YORK TIMES (Dec. 2, 2010), [http://www.nytimes.com/2010/12/03/sports/ncaafotball/03auburn.html?\\_r=1&ref=sports](http://www.nytimes.com/2010/12/03/sports/ncaafotball/03auburn.html?_r=1&ref=sports).

<sup>118</sup> See Thamel, *supra* note 117.

<sup>119</sup> Erick Smith, *USC's Pat Haden on Newton Decision: 'I was Always Told the Parent is the Child'*, USA TODAY (Dec. 1, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/12/uscs-pat-haden-on-newton-decision-i-was-always-told-the-parent-is-the-child/1>.

<sup>120</sup> *Id.*

<sup>121</sup> Erick Smith, *NCAA Hammers Southern Cal's Football Program with Two-Year Postseason Ban*, USA TODAY (June 10, 2010), <http://www.usatoday.com/communities/campusrivalry/post/2010/06/ncaa-hammers-southern-cals-football-program-with-two-year-postseason-ban/1>.

<sup>122</sup> The authors compare, contrast and discuss the Newton saga with several cases,

Current NCAA bylaws and state and federal statutes will not regulate another Newton-type situation. Newton was allegedly unaware of his father's actions and did not actually receive an impermissible benefit from anyone, neither from an agent nor a university representative. This key fact – lack of receipt of an impermissible benefit<sup>123</sup> – prevents SPARTA or a state implemented version of the UAAA from punishing those involved with such conduct. In order to discipline Newton or Auburn under current NCAA bylaws, Newton would have had to either form a relationship with a representative while still an amateur athlete,<sup>124</sup> retain a representative to assist him in a pay-to-play scheme,<sup>125</sup> or receive some form of compensation from an impermissible source.<sup>126</sup> While the evidence suggests that Newton's family violated fundamental amateurism rules, no mechanism currently exists to punish Newton's family. The lack of available mechanisms to deter this conduct has created an amateurism loophole in this area.

This “Cam Newton Loophole” has led the NCAA to reexamine its current rules. As a result of the backlash the NCAA encountered from deciding not to severely punish Newton and Auburn, NCAA President Mark Emmert is attempting to quell the crescendos claiming hypocrisy. In a statement made one day after Newton's reinstatement, Emmert acknowledged that, “[w]e recognize that many people are outraged at the notion that a parent or anyone else could ‘shop around’ a student-athlete and there would possibly not be repercussions on the student-athlete's eligibility”.<sup>127</sup> The NCAA's new president went on to say that he is “committed to further clarifying and strengthening [the NCAA's] recruiting and amateurism rules so they promote appropriate behavior by students, parents, coaches and third parties. We will work aggressively with our members to amend our bylaws so that this type of behavior is not a part of

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including the Bush case. *See infra* notes 130-144.

<sup>123</sup> *See Mark Emmert Addresses Backlash*, ESPN.COM (Dec. 3, 2010), (“If a student-athlete does not receive tangible benefits, that is a different situation from a student-athlete or family member who receives cash, housing or other benefits or knowingly competes and is compensated as a professional athlete.”), <http://sports.espn.go.com/nca/news/story?id=5876716>.

<sup>124</sup> NCAA MANUAL, *supra* note 3, § 12.3.1.1.

<sup>125</sup> NCAA MANUAL, *supra* note 3, § 12.3.3.

<sup>126</sup> NCAA MANUAL, *supra* note 3, §§ 12.3.1.2, 16.

<sup>127</sup> Mark Emmert, *Statement by NCAA President Mark Emmert on Cam Newton Eligibility*, NCAA.ORG (Dec. 2, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/Statement+by+NCAA+President+Mark+Emmert+on+Cam+Newton+Eligibility>.

intercollegiate athletics.”<sup>128</sup>

As part of the NCAA’s commitment, Emmert has pledged to close the “loophole” that allowed Newton to continue playing because there was no evidence he or Auburn were involved and no impermissible benefit was realized.<sup>129</sup> Despite these assurances by NCAA senior members, the NCAA lacks the power and authority to enact comprehensive reform. Instead, all stakeholders involved in amateur athletics will need to work together to create a framework that discourages individuals from pursuing the same strategies as Newton’s father.<sup>130</sup>

#### IV. COMPARING AND CONTRASTING THE “LOOPHOLE” WITH SIMILAR CASES

When comparing and contrasting previous NCAA decisions, it is important to note the differences and similarities between the NCAA and a state or federal court. The main difference is that the NCAA does not have the power to subpoena witnesses or perform discovery in the way that a plaintiff may in a court of law.<sup>131</sup> Witnesses who are neither student-athletes nor employed by an institution of higher education may also get away with divulging untruthful statements to the NCAA in an investigation without any threat of punishment for perjury.<sup>132</sup>

Although the NCAA’s enforcement powers are more limited than a court’s enforcement of state and federal laws, the NCAA is similar to the judicial system in that it heeds precedent in making its enforcement decisions.<sup>133</sup> It is extremely rare, however, that any two cases are exactly

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<sup>128</sup> *Id.*

<sup>129</sup> Steve Wieberg, *NCAA President Emmert Sets No-Nonsense Tone in Address*, USA TODAY (Jan. 14, 2011), [http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert\\_N.htm](http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert_N.htm).

<sup>130</sup> See Ted Lewis, *Scandal, Strife Have Taken Cheer Out of Holiday Bowl Season*, THE TIMES-PICAYUNE (Dec. 26, 2010), [http://www.nola.com/sugarbowl/index.ssf/2010/12/scandal\\_strife\\_have\\_taken\\_chee.html](http://www.nola.com/sugarbowl/index.ssf/2010/12/scandal_strife_have_taken_chee.html) (asking whether it is time for a summit within college football to address amateurism concerns).

<sup>131</sup> Michelle Brutlag Hosick, *Many NCAA Infractions Cases Move Quickly, but Complications can Slow the Process*, NCAA.ORG (Dec. 1, 2010), <http://ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/How+We+Work/Enforcement+process/>.

<sup>132</sup> *Id.*

<sup>133</sup> See The NCAA News, *Infractions Appeals Committee Upholds Alabama Penalty*, NCAA.ORG (Mar. 23, 2010), [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/division+i/infractions+appeals+committee+upholds+alabama+penalty\\_03\\_23\\_10\\_ncaa\\_news](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/division+i/infractions+appeals+committee+upholds+alabama+penalty_03_23_10_ncaa_news).

alike. When the facts of cases differ (even slightly), the NCAA must have the ability to differentiate between the particular facts of each and demand a logical punishment (if any) for the case at hand. As of the 2010 Southeastern Conference Championship Game, the facts regarding the above-discussed Cam Newton case were that:

- (1) There was no evidence that Cam Newton or his father received any money from any entity interested in having him enroll in a particular institution of higher education;
- (2) There was no evidence that Cam Newton had actual knowledge that any person was actively soliciting money for the apparent right to attain his services as a football player at an institution of higher education; and
- (3) There was no evidence that Cam Newton enrolled in an institution of higher education where he or a third party solicited money in return for the apparent right to attain his services as a football player.<sup>134</sup>

It would be inequitable for the NCAA to punish Cam Newton based on precedent from a case that did not have substantially similar facts to the case at hand. In the wake of the allegations regarding the solicitation of money in exchange for Cam Newton's commitment, many prominent media figures compared Newton's lack of punishment to prior incidents involving star athletes Reggie Bush and Damon Stoudamire.<sup>135</sup> As described below, the NCAA correctly distinguished Newton's situation from Bush's and Stoudamire's and refused to have its judgment clouded by precedent that lacked true relation.

#### A. Comparing Bush to Newton

There is no denying the many factual similarities between Reggie Bush and Cam Newton. They were both outstanding college football players, both won the Heisman Trophy, and both are African American. They each had parents who had no qualms about trying to earn money based on their son's football ability. Newton played for Auburn. Bush played for USC. Each school contended for a National Championship while the players were student-athletes. Not a single one of these shared characteristics, however, count as grounds on which the NCAA can punish a student-athlete.

The differences between Bush's and Newton's collegiate careers are

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<sup>134</sup> Mike Slive: *Right Ruling on Cam Newton*, ESPN.COM (Dec. 4, 2010), <http://sports.espn.go.com/nfc/news/story?id=5882933>.

<sup>135</sup> See notes 130–144.

also clear. Bush and his parents accepted, received, used, and benefited from improper third party support.<sup>136</sup> The Bush family established a partnership with third parties to create a sports agency.<sup>137</sup> An NCAA report reveals that those third parties later provided money and other benefits to Bush and his family while Bush was a student-athlete at USC.<sup>138</sup> The benefits included: 1) thousands of dollars towards a vehicle and wheel rims, 2) money appropriated for a car alarm and audio system, 3) no-cost limousine service, 4) free room and board at a Las Vegas resort, 5) roughly ten-thousand dollars for furniture, 6) a washer and dryer, and 7) one year of rent-free living.<sup>139</sup>

In contrast, as of the 2010 Southeastern Conference Championship Game, there was no proof that Newton or his father accepted, received, used, or benefited from any third party support, including financial support, outside of the NCAA student-athlete scholarship plan, from an institution of higher education. In fact, other than a single report from an Atlanta, Georgia television station, there were no allegations that Newton's father admitted to soliciting funds in return for his son signing at a specific institution of higher education.<sup>140</sup> For the purposes of this article, however, assume that Newton's father had solicited funds from at least one institution of higher education. This assumption would not make Newton's situation any more similar to Bush's case.

Even if Newton's father made a genuine attempt to form a relationship with an institution of higher education with the motive of offering his son's services in return for consideration, no NCAA report proves that any partnership or relationship was conceived or that anything of value was ever exchanged. Additionally, while Bush had knowledge of his and his parent's acceptance of money from third parties, there is no proof that Newton understood or was ever notified that his father was shopping him around to institutions of higher education in an attempt to find the highest bidder.

The NCAA determined that Bush's actions necessitated a firm response. Bush's and his family's actions resulted in far-reaching consequences,

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<sup>136</sup> Charles Robinson and Jason Cole, *Should Bush Lose His Heisman Trophy?*, RIVAL.COM (June 10, 2010), <http://rivals.yahoo.com/ncaa/football/news?slug=ys-heisman061010>.

<sup>137</sup> Nakia Hogan, *Reggie Bush Investigation Results in Major Sanctions for Southern Cal*, THE TIMES-PICAYUNE (June 11, 2010), [http://www.nola.com/saints/index.ssf/2010/06/reggie\\_bush\\_investigation\\_resu.html](http://www.nola.com/saints/index.ssf/2010/06/reggie_bush_investigation_resu.html).

<sup>138</sup> *Id.*

<sup>139</sup> Kevin Scarbinsky, *At This Time, Cam Newton Isn't Another Reggie Bush*, THE BIRMINGHAM NEWS (Dec. 3, 2010), [http://www.al.com/sports/index.ssf/2010/12/scarbinsky\\_cam\\_newton\\_isnt\\_ano.html](http://www.al.com/sports/index.ssf/2010/12/scarbinsky_cam_newton_isnt_ano.html).

<sup>140</sup> See Mark Winnie, *Exclusive: Cam Newton's Dad Admits Money Talks, Says Source*, WSBTV.COM (Nov. 15, 2010), <http://www.wsbtv.com/sports/25778803/detail.html>.

including USC: 1) forfeiting a chance to compete in a college football postseason bowl game for two years, 2) relinquishing thirty scholarships over three years, and 3) vacating the team's 2004 championship season victories, including its national title.<sup>141</sup> The NCAA, however, did not penalize Auburn or Mississippi State, the two schools considered possible targets of Newton's father. Nor should anything be taken from those institutions, until evidence reveals that Newton's father or a third party with Newton's father's authority requested money, and the institution gave money to Newton's father or the third party. As stated by NCAA President Mark Emmert, "[M]any in the media and public have drawn comparisons between recent high-profile NCAA decisions while ignoring the important differences among the cases . . . If a student-athlete does not receive tangible benefits, that is a different situation from a student-athlete or family member who receives cash, housing or other benefits . . ." <sup>142</sup> NCAA bylaws, as currently written, require the actual receipt of benefits to violate amateurism principals.<sup>143</sup> When viewing applicable laws from a plain meaning perspective, the actors involved in the Newton investigation required a different response from those in the Bush scandal.

### B. Comparing Stoudamire to Newton

Damon Stoudamire's situation was more closely related to Bush's than to Newton's. Stoudamire was a talented student-athlete at the University of Arizona in the 1990s. As in Bush's case, a relative of Stoudamire's accepted impermissible benefits from a third party.<sup>144</sup> While both of Bush's parents allegedly received money and benefits, only Stoudamire's father supposedly received a benefit from a third party.<sup>145</sup> Sports agent Steve Feldman provided Stoudamire's father with a plane ticket.<sup>146</sup> Like Newton, Stoudamire claimed that he had no knowledge of the free plane ticket.<sup>147</sup>

The primary difference between the Stoudamire and Newton cases is that Stoudamire's father admitted to receiving the plane tickets for no consideration.<sup>148</sup> As with Bush and his parents, Stoudamire's father

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<sup>141</sup> Beacham, *supra* note 54.

<sup>142</sup> See Emmert, *supra* note 127.

<sup>143</sup> See NCAA MANUAL, *supra* note 3, §§ 12.1.2.1.1, 12.3.1.2, 12.3.3, 16.02.3.

<sup>144</sup> Jeff Schultz, *Stop Whining: NCAA Got it Right on Cam Newton, Auburn*, ATLANTA J. CONST. (Dec. 1, 2010), <http://blogs.ajc.com/jeff-schultz-blog/2010/12/01/stop-whining-ncaa-got-it-right-on-cam-newton-auburn/?cp=28>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (The agent, Steve Feldman, admitted that Stoudamire's father accepted the airplane

accepted, received, used and benefitted from third party support, in the form of free airline tickets. Unlike both the Stoudamire and Bush cases, there is no proof that Newton's father ever accepted, received, used or benefited from any consideration originating with an institution of higher education. Thus, Newton would not deserve even the nominal one-game suspension that Stoudamire received for his father's actions.

## V. SUGGESTED SOLUTIONS TO CLOSE THE "PAY TO PLAY" LOOPHOLE

As discussed above, the NCAA released a statement addressing its decision on Newton's eligibility. It stated:

[t]he student-athlete's father and an owner of a scouting service worked together to actively market the student-athlete as a part of a pay-for-play scenario in return for Newton's commitment to attend college and play football. NCAA rules (Bylaw 12.3.3) do not allow individuals or entities to represent a prospective student-athlete for compensation to a school for an athletic scholarship.<sup>149</sup>

Yet, Newton retained his student-athlete eligibility, avoided suspension, and was permitted to compete for the National Championship. In late 2010, Kevin Lennon, NCAA vice president for academic and membership affairs, explained why Newton's case did not fall under the guise of NCAA Bylaw 12.3.3. He stated:

In determining how a violation impacts a student-athlete's eligibility, we must consider the young person's responsibility. Based on the information available to the reinstatement staff at this time, we do not have sufficient evidence that Cam Newton or anyone from Auburn **was aware of this activity**, which led to his reinstatement. From a student-athlete reinstatement perspective, Auburn University met its obligation under NCAA bylaw 14.11.1. Under this threshold, the student-athlete has not participated while ineligible.<sup>150</sup>

Lennon's statement implies that for a student-athlete to avoid punishment when someone solicits third-party compensation on behalf of the athlete, but does not accept any compensation, the athlete must not have knowledge of the solicitation. This loophole, if left unchecked, will let

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ticket provided to him).

<sup>149</sup> *NCAA Statement*, *supra* note 113.

<sup>150</sup> *Id.* (emphasis added).

student-athletes avoid punishment by claiming ignorance when third parties solicit benefits on their behalf. This type of behavior must be prohibited. However, it is not always the athlete who is proposing the “pay to play” scheme. Sometimes the athlete is truly ignorant and the third party can avoid consequences due to the player’s lack of knowledge. The following recommendation can result in a complete resolution of the problems caused by this loophole.

*A. Creation of Federal Registry of All Agents and Runners*

SPARTA is the only federal statute that directly regulates sports agents.<sup>151</sup> Unfortunately, however, SPARTA is extremely limited in its focus. The definition of “athlete agent” is limited to someone who “enters into an agency contract with a student-athlete, or directly or indirectly recruits or solicits a student-athlete to enter into an agency contract.”<sup>152</sup> Further, the statute is strictly concerned with agency contracts, and even with such a limited scope, specifically states that a spouse, parent, sibling, grandparent, or guardian of the student-athlete is excluded from being labeled as an athlete-agent.<sup>153</sup> The federal statute should be expanded to include other types of agent activity, and include regulations for the student-athlete’s relatives.

A student-athlete’s parent(s) and/or a third party who is given permission to bargain on behalf of a student-athlete should be labeled an athlete-agent and thus be held accountable for his or her actions. The NCAA is not the proper body to penalize these middlemen. Even if the Association tried to levy punishment on the middlemen, enforcement would be impossible, as it has no jurisdiction over these individuals. Consequently, the NCAA is limited to threatening the student-athlete with forfeiture of eligibility. But, if the student-athlete genuinely has no knowledge of others claiming authority on his or her behalf, it would be a mistake to penalize the student-athlete for the third party’s actions. Punishing the student-athlete would do nothing to deter future similar actions by third parties. Including third parties under the federal statutory definition of athlete agents and threatening them with civil and criminal penalties for their illegal actions could serve as a meaningful deterrent. Many self-interested parents would cease shopping around their children for their own benefit without care of the potential consequences, because actual consequences would finally exist.

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<sup>151</sup>15 U.S.C. §§ 7801–7807 (2011).

<sup>152</sup>15 U.S.C. § 7801.

<sup>153</sup>*Id.*

The authors suggest amending the definition of “athlete-agent” to include family members and expanding SPARTA to include other types of agent activity prohibited by the statute, such as soliciting and/or receiving funds through a “pay-to-play” scheme. Knowledge of such a scheme should not be the requisite *mens rea* for culpability and lack of knowledge should not mitigate potential penalties. The actor seeking impermissible benefits on behalf of an athlete should be the focus of this amended statute. To give these new provisions teeth, both state attorney generals and the Federal Trade Commission shall also be able to pursue SPARTA offenders.

### B. Amend the NCAA Bylaws

Suppose Cam Newton was aware that his father or another third party was soliciting money from an entity interested in having him enroll in a particular institution of higher education. It should not matter whether a student-athlete has knowledge of a family member’s intent, motive, desire or act to profit off of the athlete’s value. Why should knowledge be the *mens rea* to constitute an NCAA violation? Instead, the requisite *mens rea* should be purpose. Purpose triggers penalization of the third party seeking to profit off the athlete. If a university acquiesces and provides the third party with compensation or engages in any type of negotiation regarding compensation, then that institution should also be penalized. However, if the athlete only has knowledge of this arrangement and does not actively partake in any negotiations concerning a third party’s receipt of compensation, he or she should not be punished. Society does not put the son of a father in jail because the father attempts to commit a robbery, even if the father was robbing the store to provide for his son and the son knew that his father was going to commit the crime before it actually occurred. The son has no legal responsibility to prevent the crime from occurring or to warn others that the robbery will take place. A student-athlete’s knowledge of his father’s actions should be similarly distinguished from a student-athlete acting as an accomplice or in a conspiracy with his father.

Bylaw 12.3.3, titled “Athletics Scholarship Agent,” reads: “[a]ny individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual’s athletics ability or reputation.”<sup>154</sup> One possibility for amending this bylaw so that it is applicable to a student-athlete’s family members is the addition of a clause that specifically states that covered individuals include a student-

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<sup>154</sup> NCAA Manual, *supra* note 3, § 12.3.3.

athlete's parents, guardians, and immediate family. Alternatively, the bylaw could be amended to include an even larger class. Instead of limiting individuals to a student-athlete's parents, guardians or immediate family, it could be broadened to incorporate any individual associated with a prospective student-athlete.

Broadening the bylaw's language to include any individual associated with a prospective student-athlete makes sense in this case because it harmonizes this vague area of NCAA recruiting with language as it pertains to recruitment in men's basketball.<sup>155</sup> Men's basketball has a more expansive definition of those associated with the prospective student-athlete due to the sometimes complicated nature of men's basketball recruiting.<sup>156</sup> While this updated definition to Bylaw 12.3.3 would enable the NCAA to justify punishment based on the actions of a wide variety of third parties, it might also open the door to more challenges and public scrutiny, since there are many different definitions of the word "associated." If, however, an "individual associated with a prospective student-athlete" is understood to have the same meaning as it does in men's basketball, the phrase would include parents, guardians, family members, coaches and all others associated with the student-athlete based on his ability to perform, reputation, or participation in men's basketball.<sup>157</sup>

Updating NCAA Bylaw 12.3.3 as proposed would still be only partially effective. Since it is a volunteer institution, the NCAA can only discipline an actor if the actor submits to its jurisdiction. However the proposed changes would allow for federal regulation. Therefore, the authors believe that the NCAA must work in concert with state and federal entities in order to effectively eliminate this emerging "pay to play" phenomenon.

### *C. Implementing Proposed Solution Would Have Yielded Different Results*

Implementing the above-discussed proposed changes to SPARTA and the NCAA bylaws prior to the Cam Newton recruitment investigation would have led to significantly different results. The NCAA and local authorities would have worked together to investigate these allegations.

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<sup>155</sup> John Infante, *Closing the Cam Newton Loophole*, NCAA.ORG (Dec. 7, 2010), <http://www.ncaa.org/blog/2010/12/closing-the-cam-newton-loophole/>.

<sup>156</sup> NCAA DIVISION I BOARD OF DIRECTORS, IMPLEMENTATION PLAN FOR RECOMMENDATIONS FROM BASKETBALL FOCUS GROUP AND ACADEMIC AND MEMBERSHIP AFFAIRS STAFFS ON SOLUTIONS TO CURRENT ISSUES IN MEN'S BASKETBALL RECRUITING, SUPPLEMENT NO. 5 (2009), available at [http://fs.ncaa.org/Docs/DI\\_MC\\_BOD/DI\\_BOD/2009/October/SUPP\\_05\\_MBB\\_priorities.pdf](http://fs.ncaa.org/Docs/DI_MC_BOD/DI_BOD/2009/October/SUPP_05_MBB_priorities.pdf).

<sup>157</sup> Infante, *supra* note 155.

The NCAA's only role in this matter would be confined to levying potential discipline against Cam Newton and any university found to have participated in a "pay to play" arrangement if improper benefits truly were received pursuant to NCAA bylaw 12.1.2.1.1, 12.3.1.2, 12.3.3 and 16.02.3. Any repercussions for Cecil Newton would have been handled through SPARTA. Had a university been found to have participated in negotiations concerning a "pay to play" arrangement, but not actually transferred any benefit to a third party, the educational institution could still be penalized, but Cam Newton would not have suffered any direct consequences.

Under the new SPARTA guidelines, Cecil Newton would have been considered an "athlete-agent," thus subjecting him to SPARTA's jurisdiction. Newton's act of soliciting Mississippi State for a six-figure payout in order to steer his son to the institution would have allowed either the Federal Trade Commission or Alabama State Attorney General to pursue a remedy. If Cam Newton knew of this proposed arrangement, but had no intent to personally profit, he should escape discipline. The only actors receiving discipline should be the participating parties. Participation by the university must be something more than receipt of a verbal or written offer. There needs to be responding correspondence or evidence of the same in order to bring the institution under the guise of the proposed new NCAA bylaws. These repercussions should be significant enough to deter future "pay to play" schemes.

## VI. CONCLUSION

Since its foundation, the NCAA has striven to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>158</sup> The NCAA has gone to great lengths to distinguish players who receive compensation for their performance from those who are strictly "motivated by education and by the physical, mental and social benefits."<sup>159</sup> Many players would like to fall somewhere in between the two classifications, and third parties threaten to disrupt the NCAA from restricting student-athletes' access to impermissible benefits.

While a workable scheme should be implemented to reward student-athletes for their on-field efforts, amateurism cannot withstand an influx of monetary benefits. Thus, student-athletes who act with the purpose to receive an impermissible benefit through a "pay to play arrangement" with

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<sup>158</sup> NCAA MANUAL, *supra* note 3, § 1.3.1.

<sup>159</sup> See NCAA MANUAL, *supra* note 3, § 2.9.

a third party must be disciplined. Amateurism will cease to exist without a formal and reliable system of rules and regulations that may be referenced by those who hand out discipline. It is vital that the “Cam Newton Loophole” be closed through revising applicable statutes and NCAA bylaws to better encompass the increasing number of hypothetical violations that might occur. The proposed amendments, however, should not change the outcome for players who do not purposefully work with third parties (even fathers) in furtherance of receiving impermissible benefits. Federal law should step in to regulate family members, but not the athlete, who act for the purpose of obtaining an impermissible benefit.

It is inequitable to permit a loophole that allows a student-athlete to deflect any discipline by placing the blame on a third party despite the student-athlete’s intent to profit. However, the current bylaws as written do not allow the NCAA to levy a tangible punishment upon any actor other than the athlete or university. The NCAA’s focus should be on punishing the educational institution for engaging in any “pay to play” scheme, but without proving the athlete’s purpose, the NCAA bylaws should not punish the student-athlete for the actions of third parties.

Punishing student-athletes for the wrongdoings of parents and agents will not eliminate the practice of family members seeking benefits. Beyond actions taken by the NCAA against its member institutions, parents and agents need to be held accountable for their actions, and the federal government should be tasked with the duty to include provisions within their laws to accommodate for this scenario.