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Criminal Liability of Sports Agents: It Is Time to Reline the Playing Field

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CRIMINAL LIABILITY OF SPORTS AGENTS: IT IS TIME TO RELINE THE PLAYING FIELD

Many regard Joe Star as the nation's premier college basketball player as he enters his senior year at State X University. Star grew up in poverty, and his family, with whom he is still very close, continues to struggle. Star hopes that his athletic skills will enable him to sign a lucrative professional basketball contract and help provide for his family.

Cagey Agent is a "financial manager" who operates a sports agency in State X. Agent pays $1,000 to a State X University employee in exchange for an introduction to Star. At this meeting, Agent gives Star a business card that reads: Cagey Agent—Attorney/Certified Public Accountant—Sports Agent for Top Professional Athletes. Agent is not a Certified Public Accountant. Over the next several days, Agent takes Star to concerts, sporting events and expensive restaurants, and buys him expensive clothing and jewelry. Star reveals to Agent his family's poor financial condition. Agent proposes to help Star and his family by advancing him $10,000 in return for Star's agreement to have Agent represent Star when he turns pro. Agent tells Star that this is a routine procedure, that he will postdate the agreement until after the college basketball season is complete, and that Star should tell no one of this agreement.

After a successful senior season, Star signs a five-year $9,000,000 contract to play professional basketball. Star also receives a $1,000,000 signing bonus which Agent immediately takes as his 10% commission, leaving Star with no money until he receives his first paycheck. Later that year, an NCAA investigation uncovers Star's dealings with Agent while he was attending State X University. The NCAA declares that this conduct made Star ineligible to compete at State X University, and accordingly, State X University must forfeit $300,000 in revenue earned from post-season play. Meanwhile, Star, who wishes to buy a new home for his family, had his home loan application rejected by his bank, and requests a meeting with Agent who controls all his money.

Star meets with Agent who assures him that his money is "safe" and proceeds to give Star a check to purchase the home.

Agent, however, is unable to provide any detailed documentation of Star's financial condition upon request. The NCAA and State X University contemplate bringing a suit against Agent; however, they decide against it after weighing their chances for success against the costs of litigation. Finally, although State X's "Sports Agent Statute" requires sports agents to register with State X, an exemption is given to attorneys and financial managers. This enables Agent to avoid registering and complying with the statute's other provisions.

Star, State X University, the NCAA and collegiate and professional athletics in general have been injured by Cagey Agent's conduct. Agent, however, has not encountered any penalties or sanctions, and Agent continues to operate his business unchanged. What can be done?

I. INTRODUCTION

As agents' fees and incomes have skyrocketed,[1] the lucrativeness of the profession has resulted in incredible growth in the number of practicing sports agents.[2] The rise in the salaries and other income of athletes, the growth in the number of player agents, and the expansion of the role of the agent in today's sports world can be isolated as the roots of some of the profession's current problems. Athletes who were once thought to have been protected by their agents are now perceived as *needing* protection *from* those agents.[3]

This Comment explores a relatively new attempt at regulating the conduct of professional sports agents—the imposition of criminal sanctions against agents.[4] First, this Comment examines current regulations that impose civil liability on sports agents and uses the problems inherent in these regulatory schemes to illustrate why criminal penalties are the only effective means available to cure the present abuses in the profes-

1. The rise in agents' income can be illustrated by the corresponding rise in athletes' salaries. In 1967, the average major league baseball player earned $19,000. Fichtenbaum, Rosenblatt & Sandomir, *How Golden the Goose*, SPORTS INC., Jan. 2, 1989, at 29. Assuming an average agent commission of five percent, an agent's income from a single player would be $950. In 1988, the average major league salary had ballooned to $438,000. *Id.* Assuming the same five percent commission, an agent's income from a single player would be $21,900.

2. Current reports estimate the number of agents between 2,000 and 20,000. Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV., 701, 703 (1987); Steinberg, *Time to Revise Game Rules?*, SPORTING NEWS, Nov. 16, 1987, at 10.

3. *See* Neff, *Den of Vipers—A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 77 [hereinafter Neff, *Den of Vipers*].

4. See *infra* notes 73-297 and accompanying text for a detailed discussion of agent criminal liability.

sion. Second, this Comment examines state statutory provisions designed to impose criminal penalties and specifically focuses on the provisions of the Alabama Athlete Agents Regulatory Act of 1987 (the Act).[5] Third, the Comment analyzes the case of *United States v. Walters*[6] which appears to be the first federal attempt at criminal prosecution of sports agents for misconduct relating to the recruitment and representation of athletes. Specifically, this section focuses on the numerous federal statutory provisions under which sports agents Norby Walters and Lloyd Bloom were prosecuted. Finally, this Comment examines the current status of the profession in light of the prosecution and subsequent acquittal of agents Walters and Bloom and the author proposes federal legislation that imposes criminal sanctions on player agents.

II. STATEMENT OF THE PROBLEM

The number of documented cases of abuses and indiscretions by agents grows daily.[7] Many attempts to control this epidemic problem, however, have proved unsuccessful. First, although agents have always been subject to civil liability,[8] this process typically provides little relief to the violated player, and it does not serve as a deterrent to future agent misconduct.[9] An unscrupulous agent can merely factor into his fees a possible damage award as a cost of doing business. Second, non-legisla-

5. ALA. CODE §§ 8-26-1 to -41 (Supp. 1989). This Comment specifically examines Alabama's statute because it represents a significant attempt by a state legislature to regulate sports agents through criminal statutes. Additionally, prior to the enactment of Alabama's statute, the state made a unique attempt to prosecute an agent under a statute prohibiting tampering with sports contests. See *infra* notes 73-151 and accompanying text for a discussion of these state provisions.

6. 711 F. Supp. 1435 (N.D. Ill. 1989), *rev'd*, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. (7th Cir. Sept. 17, 1990).

7. Dennis Gilbert, a Beverly Hills baseball agent who represents at least 25 major league players, including Jose Canseco, has been reported to be currently under investigation by the Major League Baseball Players Association for illegally soliciting clients and retaining them with inducements. Hudson, *Players Association Investigating Canseco's Agent*, L.A. Times, July 11, 1990, at C1, col. 2. Lance Luchnick, a Texas sports agent who represents former University of Alabama linebacker Keith McCants, recently pled guilty to a reduced misdemeanor charge of violating Alabama's sports agent registration law and was fined $5,000. *McCants' Agent Fined $5,000 for Violating Registration Law*, L.A. Times, May 21, 1990, at P10, col. 1. Luchnick is currently being sued by seven National Basketball Association first-round draft picks and is named in 11 bankruptcy proceedings. Munson, *Contract Killings*, The Nat'l Sports Daily, June 29, 1990, at 37, col. 1. Recently, three sports agents pled guilty to mail fraud in Gainesville, Fla., and are locked up in a halfway house for six months. Their payments to University of Florida athletes during their NCAA eligibility may force the school to forfeit nearly $1,000,000 in revenue from post-season play. Munson, *supra*, at 36, col. 2.

8. See *infra* notes 41-46 and accompanying text for a discussion of civil liability and an example of a civil suit against a sports agent.

9. Sobel, *supra* note 2, at 722.

tive regulation[10] lacks any mandatory participation by agents and has virtually no enforcement power.[11] Finally, state legislative regulations, such as those imposed by California,[12] are hampered by limitations on jurisdiction as well as other problems.[13] As a result, sports agents almost universally ignore state regulations.[14]

III. BACKGROUND

A. The Evolution of the Player Agent Profession

Professional athletics in America dates back to shortly after the American Civil War when the first professional baseball league was formed.[15] In those days, athletes were paid "next to nothing,"[16] thus their primary motivation for participating in athletics was a love for the game. Low salaries and the generally tame business environment that surrounded competitive sports marked the infancy of professional athletics.

As the country moved through the Industrial Revolution and into the twentieth century, professional athletics grew in popularity.[17] Professional sports evolved out of its modest beginnings as athletes with heightened skills contributed to professional sports' refinement and modernization.[18] During these early times, the few sports agents[19] that ex-

10. *See infra* notes 49-57 and accompanying text.

11. See *infra* notes 49-57 and accompanying text for a discussion of the problems with non-legislative regulation.

12. *See infra* notes 58-71 and accompanying text.

13. See *infra* notes 66-71 and accompanying text for a discussion of the problems with state legislative regulations.

14. *See* Comment, *Regulation of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1078 (1988) (authored by David Lawrence Dunn).

15. HOUSE COMM. ON THE JUDICIARY, ORGANIZED BASEBALL: REPORT OF THE SUBCOMMITTEE ON THE STUDY OF MONOPOLY POWER, H.R. REP. NO. 2002, 82d Cong., 2d Sess. 16-19 (1952).

16. In 1866, a complaint was made that the Philadelphia Athletics were paying three of their ballplayers the "high" salary of *twenty* dollars per week for their athletic services. *Id.* at 17.

17. *See* 28 THE NEW ENCYCLOPEDIA BRITANNICA 175 (15th ed. 1988).

18. *See id.* at 177.

19. Generally, the word "agent" describes "a person authorized by another to act on his account and under his control." RESTATEMENT (SECOND) OF AGENCY § 1 comment e (1958). For purposes of this Comment, the word "agent" will be used to represent a sports agent, athlete agent, or sports representative. For background information on agents, see generally Kohn, *Sports Agents Representing Athletes: Being Certified Means Never Having To Say You're Qualified*, ENT. & SPORTS LAW., Winter 1988, at 1; Massey, *The Crystal Cruise Cut Short: A Survey of the Increasing Regulatory Influences Over the Athlete-Agent in the National Football League*, 1 ENT. & SPORTS L.J. 53 (1984); Ruxin, *Unsportsmanlike Conduct: The Student-*

isted worked for the "major stars" in sports and their primary function was to assist in contract negotiations.[20]

It was not until the late-1960's that sports agents rose to prominence, when the growth of players' salaries, complexity of contract terms[21] and other intricacies in the negotiating process exposed athletes to potentially unfair treatment at the negotiating table.[22] Representation by a skilled negotiator removed some of this unfairness and, as a result, salaries soared and athletes became wealthier.[23] Thus, the benefits that sports agents brought to their clients helped to establish the agents' role in modern professional athletics.

Today, professional sports is a booming industry.[24] The role of the professional athlete has expanded to a social status well beyond the boundaries of the playing field as many in society view athletes as role

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Athlete, the NCAA, and Agents, 8 J.C. & U.L. 347 (1981-82), *reprinted in* LAW & AMATEUR SPORTS 191 (R. Waicukaski ed. 1982); Sobel, *supra* note 2; Note, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815 (1981) [hereinafter Note, *The Agent-Athlete Relationship*]; Note, *Agents of Professional Athletes*, 15 NEW ENG. L. REV. 545 (1980) [hereinafter Note, *Agents of Professional Athletes*].

20. *See* Sobel, *supra* note 2, at 702-03. One of the earliest recorded examples of agent representation occurred in 1925, when the "Galloping Ghost," Red Grange, signed a $100,000 contract to play with the Chicago Bears that was negotiated by his manager, C.C. "Cash and Carry" Pyle. Ruxin, *supra* note 19, at 347 (citing M. PACHTER, CHAMPIONS OF AMERICAN SPORT 266 (1981)). It should be noted that some agents in these early times offered other services as well. For example, Babe Ruth was represented by "a former sports cartoonist named Christy Walsh, who steered the Babe into annuities, [which enabled Babe] to weather the stock market crash of 1929." Neff, *Den of Vipers*, *supra* note 3, at 76.

21. Contracts began routinely to include provisions calling for deferred payments, incentives, signing bonuses, guarantees and non-cash compensation. Sobel, *supra* note 2, at 705.

22. *See* Ehrhardt & Rodgers, *Tightening the Defense Against Offensive Sports Agents*, 16 FLA. ST. U.L. REV. 634, 637 (1989); Neff, *Den of Vipers*, *supra* note 3, at 76. Additionally, before 1968, National Football League teams did not allow players to be accompanied by their advisors during contract negotiations. Sobel, *supra* note 2, at 703 n.3.

23. *See* Note, *The Agent-Athlete Relationship*, *supra* note 19, at 818-19. Recent average salaries in the four major professional sports leagues evidenced the growth of this business. The average salaries for the four major leagues in 1988 were: the National Basketball Association, $587,000; Major League Baseball, $438,000; the National Football League, $240,000; and, the National Hockey League, $188,000. Fichtenbaum, Rosenblatt & Sandomir, *supra* note 1, at 29.

24. *See* McManus, *Sports, TV & Money: An Explosion Without End; When Money Talks, NBA Is Ready To Listen*, L.A. Times, June 25, 1989, at C5, col. 1. Recently, the television networks bidded for an estimated $2.7 billion in sports television rights contracts with: the National Football League, the National Basketball Association, the NCAA basketball tournament, the College Football Association and Big Ten/Pac-10 football, and the domestic rights to the 1994 Winter Olympic Games. *Id.* Additionally, sports marketing is worth $2.6 billion annually in the United States in event sponsorships and another $8 to $12 billion annually in related advertising, promotion and merchandising. Cox, *Masters of the Green*, USA Today, April 6, 1990, at 1B, col. 3.

models.[25] Many professional athletes endorse both sports and non-sports products.[26] Additionally, the modern athlete is expected to contribute to his or her community.[27] As the role of the athlete has expanded, so has the role of the modern sports agent.

Initially, the agent's role was limited to the negotiation of player contracts.[28] Today that role encompasses four recognized functions of sports agents: negotiating the athlete's employment agreement;[29] soliciting, negotiating and securing additional income opportunities such as commercial product endorsements;[30] providing financial advice and income management services;[31] and providing general guidance on legal and tax matters.[32] An individual agent provides some combination of these services, and the agent's fee is commensurate with the number of services he or she offers.[33]

Ideally, an agent's principal role is to maximize the athlete's earning potential while establishing a foundation for the athlete's lifetime financial stability.[34] Too often, agents neglect this role by abandoning their professional and moral responsibilities in favor of personal greed.[35] Although many agents are competent, honest and trustworthy, a substantial number prove to be unscrupulous and deceitful, thereby posing a severe threat to both athletes and organized sports.[36] This group of "bad agents"[37] has drawn public contempt toward sports agents in general, and has focused attention on the problems that plague the profession.[38]

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25. *See* Steinberg, *supra* note 2, at 11.

26. For a brief discussion of product endorsements by professional athletes, see Sobel, *supra* note 2, at 707-08.

27. Former New York Jet defensive end, Mark Gastineau, contributed $500 to New York's Mt. Sinai Hospital every time he sacked the opposing quarterback. O'Connell & Welling, *How Leigh Steinberg Rises Above His 'Sleazoid Profession,'* BUS. WEEK, Jan. 14, 1985, at 63; see *id.*; Steinberg, *supra* note 2, at 11, col. 5, for other examples of professional athletes contributing to their communities.

28. *See* Sobel, *supra* note 2, at 705.

29. *Id.* at 705-07.

30. *Id.* at 707-08.

31. *Id.* at 708.

32. *Id.* at 709.

33. Agent fees range anywhere from two to ten percent of the contract or endorsement value. *See* NATIONAL FOOTBALL LEAGUE PLAYERS' ASSOCIATION, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS § 4(c) (1983) [hereinafter NFLPA REG.].

34. Ehrhardt & Rodgers, *supra* note 22, at 639.

35. *Id.* In addition to refining and drafting a player contract or endorsement agreement, an agent's professional responsibilities include ensuring that his client understands all the legal rights and responsibilities under these negotiated agreements. *Id.*

36. *Id.*

37. Neff, *Den of Vipers*, *supra* note 3, at 76.

38. *Id.*

Common problems associated with player agents fall into five major categories: (1) income mismanagement; (2) excessive fees; (3) conflicts of interest; (4) incompetence; and (5) overly aggressive client recruitment practices.[39] These types of indiscretions have exposed agents to civil liability and have resulted in both legislative and non-legislative regulation.[40]

B. Agent Wrongdoings and Civil Liability

General principles of agency and contract dominate the vast number of civil suits brought against sports agents.[41] Thus, player-agent disputes are generally treated similar to other service contracts such as those between an automobile owner and his mechanic. However, a successful claimant, with either a settlement or court judgment, will normally only receive compensatory *ex post facto* damages.[42] This is because the majority of civil suits brought against sports agents allege income mismanagement, for example, failed investments,[43] which generally only involve negligent conduct for which punitive damages are not awarded.[44] Consequently, civil suits under agency and contract theories do not provide

39. Sobel, *supra* note 2, at 710.

40. Currently 19 states have in place legislation aimed directly at sports agents. *See* ALA. CODE §§ 8-26-1 to -41 (Supp. 1989); ARK. STAT. ANN. §§ 17-48-101 to -203 (Supp. 1989); CAL. LAB. CODE §§ 1500-1547 (West 1989); FLA. STAT. ANN. §§ 468.451-.457 (West Supp. 1989); GA. CODE ANN. §§ 43-4A-1 to -18 (Harrison Supp. 1989); IND. CODE ANN. §§ 35-46-4-1 to -4 (Burns Supp. 1989); IOWA CODE ANN. §§ 9A.1-.12 (West 1989); KY. REV. STAT. ANN. §§ 518.010,.080 (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. §§ 421-430 (West 1987 & Supp. 1990); MD. CODE ANN. art. 56, §§ 632-640 (Supp. 1989); MICH. STAT. ANN. § 28.643(5) (Callaghan 1988); MINN. STAT. ANN. § 325E.33 (West Supp. 1990); MISS. CODE ANN. §§ 73-41-1 to -23 (Supp. 1988); NEV. REV. STAT. ANN. §§ 398.005-.095, 598.065 (Michie Supp. 1989); OHIO REV. CODE ANN. §§ 4771.01-.99 (Page Supp. 1988); OKLA. STAT. ANN. tit. 70 §§ 821.61-.71 (West 1989); PA. CONS. STAT. ANN. § 7107 (Purdon Supp. 1989); TENN. CODE ANN. §§ 49-7-2101 to -2109 (Supp. 1989); TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.001-.008 (Vernon Supp. 1990), TEX. REV. CIV. STAT. ANN. art. 8871 (Vernon Supp. 1990). For an explanation of the laws in Alabama, California, Louisiana, Oklahoma, and Texas, see Sobel, *supra* note 2, at 724-80. For an explanation of the laws in Florida, Georgia, Indiana, Minnesota, Ohio, and Tennessee, see Ehrhardt and Rogers, *supra* note 22, at 652-74.

41. *See* Sobel, *supra* note 2, at 708-09; Note, *The Agent-Athlete Relationship*, *supra* note 19, at 833-34. A publicized example of a civil suit employing contract and agency principles to an agent-athlete dispute was the case of professional basketball star Kareem Abdul-Jabbar against his agent, Tom Collins, for 59 million dollars, alleging numerous violations including breach of fiduciary duty and breach of contract. Papanek, *A Lot of Hurt*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 89. Abdul-Jabbar's case was recently settled and as part of the settlement agreement, no details of the arrangement may be disclosed to the public. Munson, *supra* note 7, at 37, col. 4.

42. Compensatory damages generally only "compensate the injured party for the injury sustained, and nothing more." BLACK'S LAW DICTIONARY 352 (5th ed. 1979).

43. *See* Sobel, *supra* note 2, at 719.

44. *See* Note, *Agents of Professional Athletes*, *supra* note 19, at 563-69 (describing a com-

adequate redress. The application of general legal principles only protects the players after an injury has occurred and essentially offers no protection prior to their entering into a contractual relationship with the agent.[45] As a result, an inundation of other mechanisms designed to regulate player agents have been implemented in an attempt to provide agents with incentive to act fairly from the outset of the player-agent relationship.[46]

Agent regulation can be classified into two groups:[47] (1) non-legislative regulation, normally imposed by private groups such as the Association of Representatives of Professional Athletes (ARPA),[48] and (2) legislative regulation, imposed through state statutes.

1. Non-legislative regulation

The ARPA seeks to improve the standards of agents and is the only self-regulating organization within the sports agent profession. It has adopted a Code of Ethics[49] and has encouraged agent competence by sponsoring professional education programs.[50] Under this Code of Ethics, the ARPA has also attempted to promulgate broad rules designed to combat the problems of incompetent representation, improper client recruitment practices and excessive fees.[51] Unfortunately, because ARPA membership is voluntary, its rules are overbroad, and the organization lacks any developed enforcement mechanisms, ARPA regulations have been rendered completely ineffective.[52]

Other associations, such as the National Collegiate Athletic Associ-

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pensatory judgment awarded to several NFL players against their agent in an unreported case).

45. Sobel, *supra* note 2, at 722. Pre-contract protection is afforded in many of the state statutes which require the inclusion of specific warning statements to the athlete in the signed representation agreement. See *infra* notes 135-36 and accompanying text for a discussion of these warnings.

46. *See infra* notes 49-71 and accompanying text.

47. Regulations imposed by various players' associations, such as the National Football League Players' Association (NFLPA), are often recognized as a third group of agent regulations. *See* Sobel, *supra* note 2, at 724-86; Comment, *supra* note 14, at 1043-49. Although this group of regulations appears to be effective because they prevent athlete-members from using non-certified agents in contracting with the league's teams, these regulations also possess limitations in content, scope, and jurisdiction that hinder their effectiveness. *See* Sobel, *supra* note 2, at 724-86; Comment, *supra* note 14, at 1043-49.

48. Comment, *supra* note 14, at 1040-41.

49. ASSOCIATION OF REPRESENTATIVES OF PROFESSIONAL ATHLETES, DIRECTORY AND CODE OF ETHICS 3-8 (1985), *reprinted in* G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 284-90 (1986).

50. Comment, *supra* note 14, at 1040.

51. *Id.*

52. *Id.* at 1040-41.

ation (NCAA), have also encountered difficulty in their attempts at agent regulation.[53] Groups like the NCAA are internal bodies in the sense that they derive all their powers from their own constitutions.[54] Thus they have no power to regulate player agents, either directly or indirectly through student-athletes.[55] Since sports agents are not required to follow the NCAA rules, most simply ignore them.[56] As a result, it is apparent that non-legislative regulations by the ARPA and the NCAA "lack the scope and enforcement power to meaningfully attack" the problems with player agents.[57]

2. Legislative regulation—California's legislative attempt

Legislative regulation offers an alternative solution to the problem of inadequate or improper representation. Legislative regulations do not possess some of the problems illustrated by their non-legislative counterparts because legislative regulations apply to *all* agents in a given jurisdiction and carry with them the enforcement power of the state.[58] This form of regulation which has been enacted in California, has, however, proven to be equally ineffective.

In 1981, California passed the Athlete Agencies Act (the California Act),[59] the nation's first statutory regulation of sports agents.[60] The California Act contains numerous licensing requirements for agents including educational and training prerequisites.[61] The California Act also imposes licensing fees and other charges on practicing agents, and even requires the posting of a $25,000 surety bond to ensure compensation to

53. For a comprehensive analysis of the NCAA's authority and the deficiencies inherent in its rules, see Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903 (1972).

54. Sobel, *supra* note 2, at 728.

55. *Id.* Although NCAA rules prohibit players from further participation in their sport upon a discovered rule violation (e.g., signing a representation agreement with an agent prior to the expiration of the athlete's collegiate eligibility), the majority of athletes are either unaware of the NCAA rules or blatantly ignore them in hopes of not getting caught. *See* R. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 35-36 (1982) (reporting contentions that 60% to 75% of top-round NFL draftees had made commitments to be represented by agents before their NCAA eligibility had expired). The current rules provide no direct sanctions against agents, therefore, they have little, if any, deterrent effect on agent conduct. See also *infra* note 329 for a discussion on the fairness of the current NCAA rules.

56. *See* Comment, *supra* note 14, at 1042-43.

57. *Id.* at 1078.

58. *Id.* at 1049.

59. Athlete Agencies Act, ch. 929, 1981 Cal. Stat. 3487 (codified as amended at CAL. LAB. CODE §§ 1500-1547 (West 1989)).

60. Comment, *supra* note 14, at 1049.

61. *See* CAL. LAB. CODE §§ 1511(d), 1512 (West 1989).

an athlete for damages resulting from possible agent misconduct.[62] The California Act further requires all representation contracts to be on an approved form[63] and also sets a maximum fee percentage.[64] Violation of most of this act's provisions can result in license revocation or suspension or even criminal liability.[65]

Although the California regulations appear to address many of the inadequacies of non-legislative regulation, most agents have ignored the California Act.[66] The reasons for agent non-compliance include jurisdictional limitations[67] and the fact that this act only covers those agents who engage in "contract negotiations."[68] As a result, the California Act does not apply to agents who perform only money-handling, investment or promotional services.[69] Further, attorney-agents who are members of the State Bar of California are not considered "athlete agents" and are not covered by this act when "acting as legal counsel."[70] Although the California Act was a legislature's first attempt at state statutory regulation of sports agents, many other state schemes that followed have suffered equally poor results.[71]

IV. ANALYSIS

Both non-legislative and legislative regulations have been ineffective in deterring sports agent misconduct. Congress has not yet responded by enacting a federal criminal statute; however, some states, recognizing the growing number of agent indiscretions, have attempted to impose crimi-

62. *See id.* § 1519.

63. *See id.* § 1530.

64. *See id.* § 1531(b).

65. *Id.* §§ 1527, 1547. See *infra* notes 72-324 and accompanying text regarding criminal liability in general.

66. *See* Comment, *supra* note 14, at 1051; *see also* CAL. LAB. CODE §§ 1500-1547. As of early 1988, only 17 agents had registered under the California Act and were subject to its provisions. Kohn, *supra* note 19, at 11.

67. *See* Comment, *supra* note 14, at 1051. Some agents, although they transact business in California, lack requisite "minimum contacts" to be subject to the jurisdiction of the state. *Id.* Although the Labor Commissioner considers the Act to cover not only agents with a residence or office in California, but also out-of-state agents with client athletes living or working in the state, the scope of California's jurisdiction is unclear and as a result, out-of-state agents generally use the vagueness of jurisdiction requirements to excuse their ignorance of the Act. *Id.* at 1051-52.

68. *Id.* at 1052.

69. *Id.*; *see* CAL. LAB. CODE §§ 1500-1547.

70. Comment, *supra* note 14, at 1053.

71. Oklahoma's statute provides a useful example of a state statutory scheme that was poorly drafted and that has not been complied with by sports agents. See *id.* at 1056-59, for a discussion of the inadequacies in this legislation.

nal sanctions against sports agents.[72] Lack of state participation, jurisdictional limitations and statutory exemptions, however, have restricted the effectiveness of these state attempts, thereby illustrating the need for federal action in this area.

A. A State's Valiant Attempts at Imposing Criminal Sanctions on Sports Agents

This Comment next examines Alabama's attempt at imposing criminal sanctions on sports agents which represents one of the more significant state efforts to date. First, this Comment examines Alabama's attempted prosecution of a sports agent under a statute that prohibits tampering with a sports contest.[73] Second, this Comment examines Alabama's legislative attempt through a comprehensive statute that imposes stiff criminal penalties for agent violations.[74]

1. Alabama's unique attempt at criminal prosecution of a sports agent—*Abernethy v. State*[75]

Kevin Porter was a star football player attending the University of Auburn on a football scholarship.[76] On August 3, 1987, prior to the start of his senior year, Porter signed a three-year contract with sports agent Jim Abernethy at Abernethy's office in Atlanta, Georgia.[77] In the contract, Abernethy agreed to "represent [Porter] in the negotiation of professional sporting contracts and commercial endorsement contracts."[78] Under the terms of the contract, Porter was to pay Abernethy five percent of Porter's base salary for each contract that Abernethy negotiated on Porter's behalf and ten percent of Porter's endorsement fees negotiated by Abernethy.[79]

Prior to signing the contract, Porter revealed to Abernethy that "he needed money because his mother was in serious financial trouble."[80] Abernethy gave Porter a lump-sum payment of $2,000[81] upon signing the contract, in an effort to help Porter and to secure the representation

72. *See, e.g.*, FLA. STAT. ANN. §§ 468.453(3), .454(2) (West Supp. 1989); GA. CODE ANN. § 43-4A-11(a) (Harrison Supp. 1989); IND. CODE ANN. § 35-46-4-4 (Burns Supp. 1989).

73. *See* ALA. CODE § 13A-11-143 (1982).

74. *See* ALA. CODE §§ 8-26-1 to -41 (Supp. 1989).

75. 545 So. 2d 185 (Ala. Crim. App. 1988).

76. *Id.* at 186. Porter was ranked the number one cornerback in the nation when he entered his senior year. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

agreement. In addition, Abernethy agreed to give Porter $900 each month, plus $400 for Thanksgiving and $500 for Christmas.[82] Abernethy also promised to pay Porter $100 for each interception he made.[83] Porter received $900 in September and that same amount in October of 1987, but the payments then stopped because Abernethy dissolved his sports agency the following month.[84]

Porter played in all eleven of Auburn's 1987-1988 season football games.[85] However, after a December 15, 1987 newspaper article in the *Atlanta Constitution* publicized Porter's dealings with Abernethy, Auburn University and the NCAA declared Porter ineligible and banned him from playing in the Sugar Bowl.[86]

Abernethy was indicted and, at a jury trial, was convicted of tampering with a sports contest.[87] The indictment charged that:

> Abernethy . . . did with intent to influence the outcome of a sports contest . . . knowingly tamper with a sports participant . . . in a manner contrary to the rules and usages purporting to govern the sports contest in question, to-wit: by providing [Porter] with monetary consideration pursuant to a contract relating to [Porter's] athletic performance and athletic services, in violation of governing rules of the National Collegiate Athletic Association and its Constitution [and] in violation of [section] 13A-11-143 [of the] Alabama Code 1975.[88]

Section 13A-11-143 of the Alabama Code[89] defines the crime of tampering with a sports contest. It provides, in part:

> (a) A person commits the crime of tampering with a sports contest if, with intent to influence the outcome of a sports contest, he . . . [t]ampers with any sports participant . . . in a manner contrary to the rules and usages purporting to govern the sports contest in question. . . . Tampering with a sports contest is a Class A misdemeanor.[90]

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*; *see* ALA. CODE § 13A-11-143 (1982). Abernethy was also indicted for commercial bribery and unlawful trade practice, but was acquitted at a jury trial of both of these charges. *Abernethy*, 545 So. 2d at 186.

88. *Abernethy*, 545 So. 2d at 187. *See* ALA. CODE § 13A-11-143 (1982).

89. ALA. CODE § 13A-11-143.

90. *Id.*

Although the statute on its face appears to be an effective means of controlling player agents, it has been impotent in its application.

The Alabama Court of Criminal Appeals reversed Abernethy's conviction in a decision which construed the tampering statute in a manner quite favorable to Abernethy and sports agents in general.[91] First, the court noted that Abernethy's tampering with Porter's eligibility in violation of the NCAA rules was not a criminal offense unless done with the *specific intent* to influence the outcome of a sports contest.[92] Then, the court construed the term "outcome of a sports event" as used in the statute as meaning the final score of the football game.[93] On appeal the state argued that Abernethy possessed the necessary criminal intent under two theories: (1) that Abernethy knew of the NCAA rules prohibiting the professionalization of athletes;[94] and (2) that he promised to give incentives of $100 to Porter for each interception he made.[95]

Under its first theory of intent, the state argued that Abernethy knowingly intended that Auburn University play an athlete ineligible under NCAA rules,[96] which in turn risked a potential automatic loss through forfeiture of each game of that season.[97] The court dismissed this theory rather easily, by stating its position that "even an intentional violation of the [NCAA] rules resulting in a *player* being declared ineligible does not constitute the offense of tampering with a sports contest . . . *unless* an intent to . . . influence the final score of the game [also existed]."[98] Further, the court reasoned that any connection between the intentional violation of the NCAA rules by Abernethy and an Auburn loss through forfeiture was speculative and not based on a legitimate inference from the evidence.[99]

Under its second theory of intent, the state argued that by providing the performance incentives to Porter, Abernethy intended to give himself an advantage over other agents and also to heighten Porter's draft value,

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91. *Abernethy*, 545 So. 2d at 187. The court followed the rule of statutory construction adopted by the Alabama Supreme Court in *Clements v. State*, which held that "criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation." 370 So. 2d 723, 725 (Ala. 1979), *rev'd on other grounds sub nom.* Beck v. State, 396 So. 2d 645 (Ala. 1980).

92. *Abernethy*, 545 So. 2d at 188.

93. *Id.*

94. *Id. See* NCAA CONST. art. III, § 1(a), (c), (g)(5), *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 7-52 (1988).

95. *Abernethy*, 545 So. 2d at 189.

96. *See* NCAA CONST. art. III, § 1(c).

97. *Abernethy*, 545 So. 2d at 188.

98. *Id.* (emphasis added).

99. *Id.* at 189.

thereby increasing the amount of money both Abernethy and Porter would receive upon Porter signing a National Football League contract.[100] In dismissing the second theory of intent, the court noted that the offer of performance incentives did not support a legitimate inference that Abernethy intended to influence the outcome of a sports contest.[101] The court further emphasized that, like the first theory, the second theory showed "that Abernethy *intended* for Porter to play every game and that having Porter declared ineligible would be *against* Abernethy's own financial interest and frustrate the very purpose of the agent contract."[102] Additionally, the trial testimony of Porter indicated that the performance incentives did not have a detrimental effect on his performance in Auburn's football games.[103]

After rejecting both of the state's arguments, the court then commented that "the crime of tampering with a sports contest was obviously not intended to and does not, embrace the agent contract type of situation involved in this case."[104] In further support of its decision, the court also cited the trial judge's comment made in response to the defense counsel's motion for a judgment of acquittal at the close of the state's evidence: "it's obvious to me that these statutes have been stretched to almost the breaking point in order to try to embrace the Defendant's conduct within the four corners of these statutes. . . . And I have some doubts as to whether any one of these statutes apply [sic]."[105] The analyses of both the trial judge and the appellate court indicate the express rejection of imposing criminal liability on a sports agent for this sort of conduct under the Alabama "tampering" statute.

2. The Alabama Athlete Agents Regulatory Act[106]

By remarkable coincidence, on August 3, 1987, the same day Kevin Porter signed the contract with Jim Abernethy, the Alabama Athlete Agents Regulatory Act became effective.[107] Although the Act was specifically designed to control and regulate the activities of sports agents such as Jim Abernethy, the court in *Abernethy* did not examine the sports agent's conduct under the Act since the legislation did not provide

100. *Id.* at 188.
101. *Id.*
102. *Id.* (emphasis added).
103. *Id.*
104. *Id.* at 190.
105. *Id.*
106. ALA. CODE §§ 8-26-1 to -41 (Supp. 1989).
107. *Abernethy*, 545 So. 2d at 190.

for retroactive effect.[108] However, this legislative attempt clearly signified another effort by the state of Alabama to regulate and sanction the conduct of sports agents.

In general, the Act: creates a commission[109] to monitor the rules for mandatory registration of sports agents;[110] requires the posting of adequate surety bond coverage;[111] sets out the form and content of the contract to be used by sports agents;[112] requires the agent to establish a trust fund when the agent is the recipient of the athlete's salary;[113] requires detailed records to be kept by sports agents[114] and allows for inspection of these records by the commission;[115] establishes rules regarding the advertisement of sports agents' services;[116] sets limits on agents' fees where the athlete fails to obtain or be paid for employment;[117] and, provides rules of procedure for settling any disputes under the Act.[118] The most powerful section of the Act, however, is its *penalty* provision which states that "[a]ny person . . . who violates *any provision* of this chapter shall be guilty of a *Class C felony*, punishable by a fine of not more than $5,000.00 or imprisonment for a period of not less than one year nor more than 10 years, or both."[119] This penalty provision creates a felony violation for all offenses under the Act, ranging from the failure to properly register[120] to the failure to place in ten-point type on the face of a player-agent contract a statement that the athlete's amateur standing may be jeopardized by entering the contract.[121] A detailed examination of the Act's more important provisions is provided in the following section in order to fully demonstrate its broad implications.

a. mandatory registration of sports agents provisions

The Act provides that "[n]o person shall engage in or carry on the occupation of an athlete agent either within the state or with a resident of

108. *Id.* at 191; *see* ALA. CODE §§ 8-26-1 to -41.
109. ALA. CODE § 8-26-3.
110. *Id.* §§ 8-26-4 to -12, -17 to -21, -40.
111. *Id.* §§ 8-26-14 to -16.
112. *Id.* §§ 8-26-22 to -24, -39.
113. *Id.* § 8-26-25.
114. *Id.* § 8-26-26.
115. *Id.* § 8-26-27.
116. *Id.* § 8-26-33.
117. *Id.* § 8-26-35.
118. *Id.* §§ 8-26-36 to -38.
119. *Id.* § 8-26-41 (emphasis added).
120. *Id.* § 8-26-4.
121. *Id.* § 8-26-23.

the state without first registering with the commission."[122] Failure to comply with the mandatory registration provision not only voids any contracts negotiated by the agent,[123] but immediately subjects the agent to the criminal penalty provision.[124] Additionally, the Act requires that agent applicants, prior to issuance of a registration, provide an affidavit certifying any formal training or experience in this type of work,[125] post a surety bond for malpractice coverage,[126] and disclose the identity of anyone having financial interests with the agent.[127] Although these provisions are certainly not unique to Alabama,[128] they would certainly have a unique effect on an agent who fails to comply with these provisions. Alabama's serious criminal penalty provision forces agents to continually conform their conduct to the statute's substantive mandates or otherwise face stiff criminal penalties.

Section 8-26-7 of the Act allows the Alabama Athlete Agent Regulatory Commission (the Commission) to deny registration to an applicant for athlete agent status for failure to comply with *any* of the registration provisions.[129] This is typical of state registration or licensing regulations.[130] However, technically, an athlete agent who fails to comply with *any* of the numerous registration provisions and acts as an agent is guilty of a felony under the broad terminology of section 8-26-41, which classifies a violation of "any provision" as a felony.[131]

Despite its ability to prosecute an athlete agent who fails to comply with one of the procedural provisions, it may be more likely that the Commission would simply refuse to register the agent. The practical effect of the statute's criminal liability provision, however, is that it appears to force athlete agents in Alabama to register. This factor, coupled with the other strict requirements of the Act that are designed to ensure

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122. *Id.* § 8-26-4. Section 8-26-2 defines an "athlete agent" as:

> Any person who, as an independent contractor, directly or indirectly, recruits or solicits any athlete to enter into any agent contract or professional sports services contract, or for a fee procures, offers, promises, or attempts to obtain employment for any athlete with a professional sports team or as a professional athlete. . . .

Id. § 8-26-2(3).

123. *Id.* § 8-26-40.

124. *Id.* § 8-26-41.

125. *Id.* § 8-26-5(5).

126. *Id.* §§ 8-26-14 to -16.

127. *Id.* § 8-26-11.

128. *See, e.g.*, CAL. LAB. CODE §§ 1500-1547 (West 1989) (provisions similar to those in Alabama).

129. ALA. CODE § 8-26-7.

130. *See, e.g.*, CAL. LAB. CODE § 1513 (West 1989); GA. CODE ANN. § 43-4A-7 (Harrison Supp. 1989) (both authorizing the state labor commissioner to refuse to grant a registration).

131. ALA. CODE § 8-26-41.

competent agents of high integrity,[132] make the Alabama statute an effective tool in combatting some of the problems created by sports agents.

b. other important provisions

Beyond its registration requirements, the Act also attempts to regulate other aspects of the relationship between the athlete and the sports agent. To begin with, the Act requires that all contracts used by athlete agents be on a form approved by the Commission.[133] Approval of an individual agent's contract form is generally granted unless the contract form appears to be oppressive to the athlete.[134] More importantly, however, the Act requires the inclusion of certain information in the contract. Among the most important of these requirements is that the contract "contain in close proximity to the signature of the athlete a notice in at least 10-point type stating that the athlete may jeopardize his or her standing as an amateur athlete by entering into the contract."[135] Additionally, the Act contains rules validating the inclusion of any arbitration agreement in an agent contract.[136] Finally, if the athlete agent is the recipient of the athlete's salary, the agent is also required to establish a trust fund in which any payment made to the athlete must be deposited directly.[137]

As with a violation of the registration requirements, an athlete agent's failure to comply with either the contract or trust fund provisions immediately exposes the agent to criminal liability under the broad mandate of section 8-26-41.[138] However, unlike the registration provisions, which are generally procedural requirements, the contract and trust fund provisions are of a substantive nature.[139] This suggests that a violation of these provisions may more likely result in criminal prosecution since revocation of an athlete agent's registration would not completely address the violation.

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132. *See id.* §§ 8-26-5 to -7.

133. *Id.* § 8-26-22.

134. *Id.*

135. *Id.* § 8-26-23. This notice serves the purpose of informing all athletes of the serious consequences of signing an agent representation agreement prior to the expiration of their collegiate eligibility.

136. *Id.* § 8-26-39.

137. *Id.* § 8-26-25.

138. *Id.* § 8-26-41.

139. As a general rule, laws which fix duties and establish rights and responsibilities for persons are substantive in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised are procedural. State v. Gibson Circuit Court, 239 Ind. 394, 397, 157 N.E.2d 475, 478 (1959).

c. *the likely effect of the Alabama Act on sports agents like Jim Abernethy*

Had the principles of the Alabama Athlete Agents Regulatory Act been applied in *Abernethy*, the state could have prosecuted Mr. Abernethy under a statute more directly relevant to agent misconduct than the tampering with a sports contest statute.[140] First, if Abernethy was not a registered athlete agent when he entered into the contract with Porter, he would have been in violation of the mandatory registration provision[141] and *technically* would have been guilty of a felony under section 8-26-41.[142] Alternatively, if Abernethy had been properly registered, but his contract with Porter did not contain the required disclosure on the face of the agreement that Porter "may jeopardize his . . . standing as an amateur athlete by entering into the contract,"[143] Abernethy would have been equally guilty of a felony for his failure to comply with that provision. Additionally, although the Act does not specifically prohibit or criminalize the making of a sports contract with a student athlete, the Act does provide that the Commission may refuse to grant, revoke, or suspend the registration of any athlete agent applicant who "[h]as engaged in conduct which violates or causes a student athlete to violate any rule or regulation promulgated by the National Collegiate Athletic Association governing student athletes and their relationship with athlete-agents."[144] Since Abernethy's contract with Porter clearly was in violation of the NCAA rules,[145] this should have led to suspension or revocation of Abernethy's registration under this section of the Act or alternatively, should have been adequate grounds for denying him registration if he had attempted to apply. To summarize, it appears that sports agents such as Jim Abernethy would face either criminal prosecution or censorship of their practice as a result of conduct that violates the strict provisions of the Alabama Athlete Agents Regulatory Act.[146]

d. *the problems with Alabama's legislative attempt*

Although the Alabama Athlete Agents Regulatory Act represents a marked improvement in a state legislature's attempt at imposing criminal liability on sports agents, the Act still possesses many deficiencies. First,

140. *See* ALA. CODE § 13A-11-143.
141. *See id.* § 8-26-4 (Supp. 1989).
142. *See id.* § 8-26-41.
143. *Id.* § 8-26-23.
144. *Id.* § 8-26-7(a)(4).
145. *See supra* notes 77-86 and accompanying text.
146. *See* ALA. CODE §§ 8-26-1 to -41.

the Act does not cover agents who merely provide legal, tax or financial planning advice or who merely manage an athlete's money.[147] By insulating this population of sports agents, the statute provides an easy means for many sports agents to escape coverage under the statute. Second, the Act applies only to Alabama-resident agents and to non-resident agents representing Alabama-resident athletes.[148] This jurisdictional limitation severely restricts both the scope and effectiveness of the statute's other provisions.[149] Finally, although the Act requires the inclusion of prescribed language on an agent contract,[150] the Act fails to require agents to submit contracts to a regulatory body either before or after entering into the contractual agreement. By failing to monitor these contractual agreements, Alabama may have opened the door for widespread abuses by agents of many of the statute's important provisions.[151]

B. A Federal Attempt at Imposing Criminal Sanctions on Sports Agents

The growth in the number of practicing sports agents has expanded the problems created by sports agent misconduct well beyond the scope of state and administrative regulations. This Comment next examines the "national attempt" at controlling sports agent misconduct by analyzing federal criminal liability as it exists today. After a brief discussion of the types of agent misconduct that are subject to criminal liability, this Comment specifically analyzes *United States v. Walters*.[152] *Walters* appears to represent the federal government's first attempt at criminally prosecuting sports agents for misconduct relating to the recruitment and representation of athletes. Although the prosecution in *Walters* was initially successful, the United States Court of Appeals for the Seventh Circuit recently reversed the agents' convictions based on two procedural errors committed by the trial court. This Comment highlights the problems associated with using the existing federal statutes against sports agents.

147. Sobel, *supra* note 2, at 741; *see* ALA. CODE § 8-26-2(3).

148. Sobel, *supra* note 2, at 747; *see* ALA. CODE §§ 8-26-3(k), -4.

149. See *infra* notes 319-21 and accompanying text for a discussion of state jurisdictional limitations.

150. Sobel, *supra* note 2, at 763; *see* ALA. CODE §§ 8-26-22, -23.

151. *See* ALA. CODE §§ 8-26-22, -23.

152. 711 F. Supp. 1435 (N.D. Ill. 1989), *rev'd*, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. (7th Cir. Sept. 17, 1990).

1. The types of agents and the types of conduct that are subject to criminal liability

Sports agents, like other "sophisticated" businessmen, deal in a complex environment where the pressures to succeed have created an enormously competitive marketplace luring many to disregard the law. Many agents are entrusted as financial fiduciaries for their clients, and they typically handle player money, investments and taxes.[153] In addition, agent recruitment of athletes requires intense solicitation through the mails, by telephone and in face-to-face meetings. All of these general activities typically conducted by most agents[154] can result in potential criminal liability.

The types of activities included under "white collar crime"[155] have been expanded to reach much of the work performed by all types of athlete agents. Examples of white collar crimes that typically can affect athlete agents include: embezzlement, extortion, tax evasion, conspiracy, mail and wire fraud and racketeering.[156] Although this list is not exhaustive, it generally encompasses much of the improper conduct applicable to athlete agents. A sports agent whose function is limited to negotiating a player contract is as restricted by criminal statutes as the agent who provides full accounting and legal services. However, members of the latter group are more likely to be exposed to more criminal statutes regulating agent activities simply because their activities are more complex and diverse in nature. For example, an agent who manages his clients' assets potentially is exposed to embezzlement statutes, whereas an agent who merely negotiates his clients' contracts is not.

White collar crime, by its very nature, may go undetected. Its violators often may be educated and possess the necessary business and legal knowledge to carefully avoid exposure to criminal liability. However,

153. *See* Sobel, *supra* note 2, at 708-09.

154. Only very few of the more successful agents have the luxury of not having to actively solicit clients. Agents in this category are probably not going to be subject to criminal statutory provisions relating to the recruitment of players because in these situations it is the *athletes who seek out the agents.* Leigh Steinberg is an example of an agent that fits into this exception to the general category of agents who must actively solicit athlete-clients. O'Connell & Welling, *supra* note 27, at 62.

155. A modern working definition of "white collar crime" focuses on the act, not the actor: "white collar crime" comprises "non-violent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special skills and opportunities . . . ." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981).

156. M. PICKHOLZ, S. HORN & J. SIMON, GUIDE TO WHITE COLLAR CRIME: A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR 7-9 (1986).

enforcement agencies realizing that these problems exist have focused their investigative efforts skillfully, thereby capturing "new markets" of white collar criminals.[157] Recently, two sports agents, Norby Walters and Lloyd Bloom, were prosecuted under several "white collar" criminal statutes.[158] Although the trial court's conviction was reversed on appeal, the trial court's analysis of the federal criminal statutes suggests that sports agents might be the "newest market" of white collar criminals to have been tapped. Furthermore, although much of the conduct engaged in by these two agents is not characteristic of the profession in general,[159] some of the activities for which they were indicted and prosecuted illustrate that the "white collar" criminal statutes now clearly extend to the sports agent profession.

2. An example of specific violations of the federal criminal statutes through the conduct of sports agents Norby Walters and Lloyd Bloom in *United States v. Walters*

The use of federal criminal statutes to prosecute sports agents offers some hope that the federal government may want to curb agent misconduct. However, for purposes of punishing agent misconduct that is not as egregious as that of Norby Walters and Lloyd Bloom, existing federal statutes may be inadequate. The following subsections analyze the federal statutes used to prosecute Walters and Bloom and then discuss the appellate court's reversal of these prosecutions. This analysis illustrates the problems inherent in the federal statutes' universal application to sports agents.

a. the prelude to the indictment

Norby Walters began his professional career, like many other sports agents, in the entertainment business.[160] Walters created Norby Walters Associates, Inc. (NWA), a booking agency for famous black entertainers.[161] Smart and hardworking, Walters built an extremely successful

157. An example of a "new market" is the rise in the number of prosecutions of insider trading in the 1980's. 128 CONG. REC. 29,531 (1982) (SEC Memorandum in support of the Insider Trading Sanctions Act of 1982 discussing how the SEC has in recent years stepped up its efforts to protect the securities markets by initiating more insider trading prosecutions).

158. *See Walters*, 711 F. Supp. 1435.

159. See *infra* notes 186-97 and accompanying text for a discussion of Walters' and Bloom's alleged conduct as outlined in the indictment.

160. Neff, *Agents of Turmoil*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 36 [hereinafter Neff, *Agents of Turmoil*].

161. *Id.* Some of Walters' clients included Miles Davis, Luther Vandross, Patti LaBelle, Janet Jackson, Kool and the Gang, and Ben Vereen. *Id.*

business.[162] Lloyd Bloom worked as a bouncer, a professional party-giver and a debt collector at his father's agency.[163]

In early 1985, Bloom approached Walters and suggested that they team up to recruit and represent college athletes.[164] Bloom's plan was simple: he would use his sports knowledge to recruit athletes and Walters would use his skills as a booking agent to complete the deal.[165]

Walters and Bloom organized World Sports & Entertainment, Inc. (WSE), as a corporation to recruit and represent college athletes.[166] After athletes had entered into representation agreements with WSE, Walters and Bloom would negotiate the athletes' professional contracts.[167] Walters and Bloom targeted the market of poor, black athletes with needy families.[168] Through phone calls, written solicitations and face-to-face meetings, Walters and Bloom were able to use their persuasiveness and cultural knowledge to formulate and deliver a "high-velocity sales pitch."[169] According to the indictment,[170] the agents' standard sales pitch was an offer of between $2,500 and $5,000 up front, with monthly payments thereafter of $250 in return for a signed exclusive representation contract.[171] The sales pitch proved effective, as WSE signed at least thirty athletes, including some of the biggest names in college sports.[172]

After the flash and glitter of Walters' and Bloom's presentation wore off, many WSE athletes became disenchanted with the two agents.[173] Complaints of broken promises[174] and a general dissatisfaction with WSE's management of players' careers, started the chain of events that eventually toppled Walters and Bloom.[175]

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162. *Id.* at 37.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Walters*, 711 F. Supp. at 1437.

167. *See* Neff, *Agents of Turmoil*, *supra* note 160, at 39.

168. *Id.*

169. *Id.* at 37. National Football League wide receiver Tim McGee said, "He had the speech patterns down. . . . He talked like the black guys on the corner . . . ." *Id.*

170. *See infra* notes 186-97 and accompanying text.

171. Selcraig, *The Deal Went Sour*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32.

172. Neff, *Agents of Turmoil*, *supra* note 160, at 34. Some clients of Walters and Bloom included National Football League players Tim McGee, Doug Dubose, Reggie Rogers, Rod Woodson, Tony Woods, Terrence Flagler, Chris Carter, Ronnie Harmon, Paul Palmer and John Clay. Selcraig, *supra* note 171, at 34-38.

173. Neff, *Agents of Turmoil*, *supra* note 160, at 40.

174. Walters often used his booking agent business to lure young black athletes by promising to introduce them to famous entertainers and celebrities. Selcraig, *supra* note 171, at 34-38.

175. *See* Neff, *Agents of Turmoil*, *supra* note 160, at 40.

Some of WSE's dissatisfied signees defected to other agents.[176] Walters reacted by suing the athletes and speaking out against them in the press.[177] Walters' actions publicized the inner dealings of WSE and, in effect, brought WSE under tremendous scrutiny from other clients, other agents, and the legal authorities.[178]

Interestingly, at this same time, Kathy Clements, an associate of sports agent Steve Zucker, was slashed and beaten by an unidentified attacker in her Chicago office.[179] Zucker and Clements had signed three defectees from WSE and claimed that Walters and Bloom had upbraided them over the phone for doing so.[180] Although no solid evidence was ever found linking Walters or WSE to the Clements' attack, the Federal Bureau of Investigation (FBI) was suspicious of the possible connection.[181] The FBI was also concerned about other reports linking Walters and Bloom to illegal activities, and as a result, opened an investigation in May of 1987.[182] A federal grand jury inquiry accompanied this investigation into Walters' and Bloom's work as sports agents.[183] After a seventeen-month FBI investigation in which dozens of college and professional players and several college administrators testified,[184] the federal grand jury issued an indictment on August 24, 1988 against Norby Walters and Lloyd Bloom in connection with their signing of forty-four athletes to professional contracts before their college eligibility had expired.[185]

b. the indictment

In a seven-count indictment,[186] Walters and Bloom generally were accused of dealing with a reputed organized-crime figure, cheating one athlete out of his signing bonus, and threatening at least four clients with

176. *Id.*
177. *Id.* at 42.
178. *Id.*
179. *Id.* at 34.
180. *Id.*
181. *Id.* at 35. The Clements attack was not mentioned in the federal grand jury indictment. Selcraig, *supra* note 171, at 33.
182. Neff, *Agents of Turmoil*, *supra* note 160, at 35.
183. *Id.*
184. *See id.*; Selcraig, *supra* note 171, at 32.
185. Selcraig, *supra* note 171, at 32.
186. The original indictment containing eight counts was superseded by a seven-count indictment filed February 1, 1989. *Walters*, 711 F. Supp. at 1438 n.2. The superseding indictment added the allegations concerning concealment from the Grand Jury. *Id.* It changed slightly the property allegations of the mail fraud charges. *Id.* It also dropped one of the mail fraud counts alleging a scheme to defraud the University of Illinois. *Id.* Finally, it altered somewhat the factual allegations underlying several counts. *Id.*

violence if they attempted to break their contracts with WSE.[187] The contracts provided Walters and Bloom with exclusive rights to represent the players when they "turned pro"[188] and often gave Walters and Bloom a power of attorney.[189] These contracts were routinely postdated so as to make it appear that they were properly signed after the players had completed their last year of collegiate eligibility.[190]

Specifically, the indictment listed among others the following charges: Count One of the indictment charged Walters and Bloom with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO);[191] Count Two of the indictment charged Walters and Bloom with the substantive offense of mail fraud;[192] Counts Three through Five alleged similar mail frauds victimizing Michigan State University, the University of Iowa and Purdue University respectively;[193] Count Six charged a "conventional" conspiracy;[194] and, Count Seven of the indictment charged Walters and Bloom with the substantive violation of section 1962(c) for conducting the affairs of NWA and WSE through a pattern of racketeering activity as outlined in Count One.[195]

Prior to the start of their jury trial, Walters and Bloom filed motions to dismiss the indictment on numerous grounds.[196] The underlying

187. Selcraig, *supra* note 171, at 32. The indictment specifically alleged that Walters and Bloom offered players clothing, concert and airline tickets, automobiles, cash, interest-free loans, hotel accommodations, use of limousines, insurance policies, trips to entertainment events, introductions to celebrities, and cash to their families in exchange for the athletes' signatures on contracts. *Id.*

188. *Id.*

189. Neff, *Agents of Turmoil*, *supra* note 160, at 40.

190. *Id.*

191. 18 U.S.C. §§ 1961-1968 (1988). Section 1962(d) prohibits a conspiracy to engage in any of RICO's prohibited activities. *Id.* § 1962(d). In this count, Walters and Bloom were accused of conspiring to violate RICO section 1962(c) by conducting and participating in the conduct of the affairs of NWA and WSE through a pattern of racketeering activity consisting of multiple acts of: extortion, collection of extensions of credit by extortionate means, mail fraud, wire fraud and the use of interstate facilities in furtherance of unlawful activity. *Walters*, 711 F. Supp. at 1438.

192. *Walters*, 711 F. Supp. at 1438. The basis of the charge was the defrauding of the University of Michigan, which awarded scholarships to two football players based on false player eligibility documents mailed by Walters and Bloom. *Id.* Walters and Bloom were alleged to have improperly completed and mailed these forms and to have instructed their clients to do the same. *Id.*

193. *Id.*

194. *Id.* at 1439; *see* 18 U.S.C. § 371 (1988). Walters and Bloom were accused of agreeing to collect debts by extortionate means, to commit mail and wire fraud and to conceal information from the Grand Jury. *Walters*, 711 F. Supp. at 1439.

195. *Walters*, 711 F. Supp. at 1439.

196. *Id.* at 1437. Although Walters and Bloom submitted separate motions and briefs, each indicated that they wished to join in the other's motions. *Id.* at 1439 n.2.

theme of these motions attempted to distinguish sports agents from traditional offenders of the federal statutes.[197] Analyzing the theories adopted by the court in denying these pre-trial motions will aid in understanding the applicability of the federal criminal statutes to sports agents in general. The following analysis also illustrates that because much of Walters' and Bloom's conduct was egregious in nature, many of the criminal statutes under which they were prosecuted (and the court's interpretations thereof) may be inapplicable to the general practices of the majority of agents today. Additionally, the Seventh Circuit's subsequent reversal of the trial court's conviction along with the analysis of the trial court's decision highlights the further problems in the current statutory scheme and illustrates the need for federal criminal statutes tailored to sports agents.

c. an analysis of sports agents and the federal criminal statutes

1. RICO racketeering violations under section 1962(c)

In Count Seven of the federal grand jury indictment, Walters and Bloom were charged with the substantive violation of RICO for conducting the affairs of NWA and WSE through a pattern of racketeering activity.[198] The relevant section of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[199]

The two main elements, therefore, of a section 1962(c) violation are (1) an "enterprise," as defined by the statute, and (2) a *pattern* of racketeering activity.[200]

In attacking the RICO charge, Bloom[201] asserted that WSE was not an "enterprise" under section 1962(c).[202] In rejecting this argument, the

197. *See id.* at 1437.

198. *Id.* at 1439.

199. 18 U.S.C. § 1962(c).

200. *Id.* § 1961(4), (5).

201. Although most of the challenges to the indictment were presented jointly by Walters and Bloom, the challenge of WSE as an enterprise under section 1962(c) was made solely by Bloom. *Walters*, 711 F. Supp. at 1439 n.3, 1448. For purposes of this Comment, all references will be made to the two acting together in their arguments.

202. *Id.* at 1448; *see* 18 U.S.C. § 1962(c). Bloom presented this same argument in challenging Count One of the indictment, conspiracy to violate RICO section 1962(c). *Walters*, 711 F. Supp. at 1448. Bloom also argued that he was prejudiced by the improper enterprise allegation

district court initially focused on the statutory definition of an "enterprise."[203] Section 1961(4) of RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ."[204] In *United States v. Neapolitan*,[205] the Court of Appeals for the Seventh Circuit found that the central element to an enterprise was its "structure."[206] Although no absolute definition of "structure" exists, to prove a RICO "enterprise" under section 1962(c), according to the United States Supreme Court, "structure" may be evidenced by an "ongoing organization, formal or informal, [which exists for] a common purpose of engaging in a course of conduct [and whose] various associates function as a continuing unit."[207] This requirement of "structure" in a RICO enterprise necessitates more than a mere "group of people who get together to commit a 'pattern of racketeering activity.' "[208]

Conversely, when an enterprise is a legal entity, this "structure" is easy to find.[209] In *United States v. Anderson*,[210] the Court of Appeals for the Eighth Circuit held that Congress intended that "a group of individuals associated in fact although not a legal entity" can constitute a RICO enterprise under section 1962(c), as long as it sufficiently possesses an "ascertainable structure."[211] These distinctions illustrate the central role of the concept of "enterprise" under RICO: "the criminal infiltration and manipulation of organizational structures."[212] Further, in *Anderson*, the court noted that Congress intended for RICO to also apply to groups which, though not "legal" entities, possess "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal."[213]

Relying on the statutory definition of "enterprise" and the Seventh and Eighth Circuits' interpretations thereof, the *Walters* court held that

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because the enterprise tied him to the organized crime activities of Norby Walters Associates during the period of 1981 to 1984, prior to the time Bloom joined WSE. *Id.* at 1448-49. The court dismissed this argument. *Id.*

203. *Walters*, 711 F. Supp. at 1448.

204. 18 U.S.C. § 1961(4).

205. 791 F.2d 489 (7th Cir. 1986).

206. *Id.* at 500.

207. United States v. Turkette, 452 U.S. 576, 583 (1981).

208. *Neapolitan*, 791 F.2d at 500.

209. *Id.* at 499. Section 1961(4) of RICO includes "legal entities" in its definition of "enterprise." 18 U.S.C. § 1961(4).

210. 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

211. *Id.* at 1372.

212. *Neapolitan*, 791 F.2d at 500.

213. *Anderson*, 626 F.2d at 1372.

the government had adequately pled a RICO enterprise.[214] The court noted that WSE had no separate existence apart from NWA, which was a legal corporation.[215] As a legal entity, the "structure" requirement for a RICO enterprise was met, and accordingly both NWA and WSE were subject to section 1962(c).[216] Even if Walters' and Bloom's operation had not been classified as a legal entity, their "group" should have, in all likelihood, possessed the ascertainable "structure" necessary for a RICO "enterprise." The operations of Walters and Bloom through WSE were directed toward an economic goal of profiting through the representation of professional athletes.[217] Additionally, the systematic program through which they recruited and represented athletes further evidenced the "structure" of a RICO "enterprise." Thus, under either of the theories available, the government adequately proved a RICO enterprise.

Under RICO, once the existence of an "enterprise" has been established, the final step in the prosecution of a section 1962(c) violation is to show that the enterprise conducted its affairs through a "pattern of racketeering activity."[218] "Racketeering activity" is broadly defined to include activities ranging from violent offenses chargeable under state law to most acts indictable under title 18 of the United States Code.[219] A pattern of racketeering activity under section 1962(c) requires two or more of these acts.[220] This broad definition of racketeering has the practical effect of enlarging the section's scope to include everyday business activities which involve a "bending of the rules."[221] For example, by mailing, on more than one occasion, documents containing incorrect eligibility information (two acts of mail fraud),[222] Walters and Bloom would have *technically* conducted WSE's affairs through a pattern of racketeering activity in violation of section 1962(c).[223]

While two acts of mail fraud may *technically* suffice to complete a RICO violation, the United States Supreme Court in *Sedima S.P.R.L. v. Imrex Co.*[224] stated that RICO requires "*continuity plus [a] relationship*

214. *Walters*, 711 F. Supp. at 1448.

215. *Id.*

216. *See* 18 U.S.C. § 1962(c).

217. *See supra* notes 166-67 and accompanying text.

218. *See* 18 U.S.C. § 1962(c).

219. *See id.* § 1961(1).

220. *Id.* § 1961(5); *see id.* § 1962(c).

221. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 156, at 132; *see* 18 U.S.C. § 1961(1).

222. For a discussion of the mail fraud violations, see *infra* notes 246-74 and accompanying text.

223. *See* 18 U.S.C. § 1962(c).

224. 473 U.S. 479 (1985).

. . . to produce a pattern."[225] It is, therefore, doubtful that only two acts of mail fraud by a sports agent in furtherance of one scheme to defraud sufficiently demonstrates "continuity" as required under *Sedima*. However, the above example, illustrates that a sports agent's activities may fit the broad definition of a RICO enterprise and further misconduct may result in a technical violation of section 1962(c).[226]

2. Extortion violations under section 1951 of the Hobbs Act

Counts One and Seven of the federal Grand Jury indictment also alleged, in part, that Walters and Bloom committed extortion in violation of section 1951 of the Hobbs Act (the Hobbs Act)[227] by "threatening three student-athletes with physical harm, and one student-athlete with harm to his reputation, if they did not honor their representation agreements with WSE."[228] The Hobbs Act provides, in pertinent part that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.[229]

Bloom and Walters argued that the indictment failed to state an offense under the Hobbs Act for two reasons. First, the indictment did not allege the wrongful use of actual or threatened force (a "claim-of-right" defense).[230] Second, the indictment failed to allege an effect on interstate commerce.[231]

Under the claim-of-right defense, Walters and Bloom contended that they had a legitimate claim to the representation agreements with the student-athletes, and therefore, their threats of force to retain this "property" could not be in violation of the Hobbs Act.[232] This defense had previously been recognized by the United States Supreme Court in

225. *Id.* at 496 n.14.

226. *See* 18 U.S.C. § 1962(c).

227. *See id.* § 1951.

228. *Walters*, 711 F. Supp. at 1449.

229. 18 U.S.C. § 1951(a).

230. *Walters*, 711 F. Supp. at 1449. Under the claim of right defense, the person seeking to obtain the property claims a legal interest in it, and therefore the attempt to regain control of this property is asserted as not being in violation of the law. *See* United States v. Enmons, 410 U.S. 396, 399-400 (1973).

231. *Walters*, 711 F. Supp. at 1449.

232. *Id.*

United States v. Enmons,[233] a case involving a labor dispute in which officials of labor unions used violence to obtain higher wages and other employment benefits for striking employees.[234] In *Enmons*, the Court relied on the legislative history of the Hobbs Act, which clearly indicated that Congress did not intend for the Act to apply to labor disputes. Every circuit court after *Enmons* has limited the claim-of-right defense to situations where there is a clear congressional intent that the Hobbs Act not apply.[235] As Congress did not express an intent to exclude athlete representation contracts or similar property from liability under the Hobbs Act, it follows that any use of actual or threatened force to regain such property will not be excluded from the statute. Accordingly, the district court in *Walters* rejected Walters' and Bloom's claim-of-right defense stating that there was "no clear congressional intent that the Hobbs Act [should] not apply."[236]

Bloom and Walters also argued that the indictment failed "to establish that [any] alleged extortionate activity affected or interfered with interstate commerce."[237] In rejecting this defense, the district court cited a Seventh Circuit opinion, *United States v. Anderson*,[238] for the proposition that the Hobbs Act extends to the limits of the commerce clause[239] and thus "reaches conduct where the effect on interstate commerce is *slight* and where there is no actual effect proved but there is a realistic probability of an effect."[240]

Walters and Bloom had allegedly used threats to enforce contracts made with student-athletes at major universities and in professional sports leagues.[241] Additionally, college and professional players and teams travel in interstate commerce; therefore, they could have an effect on interstate commerce in a variety of ways.[242] Furthermore, the com-

233. 410 U.S. 396 (1973).

234. *Id.* at 398.

235. *Walters*, 711 F. Supp. at 1449. *Enmons* represents the only current case where the clear congressional intent specifically mandated that the Hobbs Act not apply. *See* S. REP. No. 307, 97th Cong., 1st Sess. 677 (1981).

236. *Walters*, 711 F. Supp. at 1449.

237. *Id.* The Hobbs Act applies to conduct that "in any way or degree obstructs, delays, or affects [interstate] commerce or the movement of any article or commodity in [interstate] commerce. . . ." 18 U.S.C. § 1951(a). Therefore, if Bloom's and Walters' defense were successful, their conduct would be outside the purview of the statute.

238. 809 F.2d 1281 (7th Cir. 1987).

239. *Id.* at 1286.

240. *Id.* (emphasis added).

241. *Walters*, 711 F. Supp. at 1438.

242. *Id.* at 1450. For example, these teams stimulate a large amount of business in the communities where the teams participate. Generally, this business involves goods such as food and sports merchandise that travel through interstate commerce. *See* Becketts, *How the A's*

missions that Walters and Bloom would have been paid from these players would have been paid in part from teams which operate across state lines.[243] Applying this reasoning, the district court had no difficulty in establishing that Walters' and Bloom's activities had the necessary minimum effect on interstate commerce under the Hobbs Act.[244]

Because almost all professional sports involve interstate competition, under the *Walters* court's rationale, an agent contracting with a student or professional athlete is engaging in activity that affects interstate commerce.[245] Additionally, since a claim-of-right defense does not protect sports agents, from the courts' analysis in *Walters*, it appears that sports agents who are found to have made improper threats are subject to criminal liability under the Hobbs Act.

3. Mail fraud violations under section 1341[246]

Counts Two through Five of the federal Grand Jury indictment alleged that Walters and Bloom defrauded four universities[247] of money and property by causing to be mailed and mailing false eligibility information upon which certain student-athletes were awarded scholarships.[248] The United States Supreme Court has held that the two elements of the federal offense of mail fraud are: (1) a scheme to defraud victims of money or property, and (2) the mailing of a letter, etc., for the purpose of executing the scheme.[249] In further defining these elements, the Court has held that it is not necessary that the scheme contemplate the use of the mails as an essential element of mail fraud.[250] Additionally, to sustain a conviction for mail fraud, it need not be shown that the

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Use Show Biz to Pack'em In, S.F. Chronicle, August 20, 1990, at C1, col. 2 (discussing the Oakland A's numerous business ventures in the Bay Area).

243. *Walters*, 711 F. Supp. at 1450.

244. *Id.*; *see* 18 U.S.C. § 1951.

245. *See Walters*, 711 F. Supp. at 1449-50.

246. The relevant language of the mail fraud statute is identical to the federal wire fraud statute. 18 U.S.C. § 1343 (1988). This discussion of the mail fraud allegations applies with equal force to the wire fraud allegations.

247. *Walters*, 711 F. Supp. at 1438. The four universities were the University of Michigan, Michigan State University, Purdue University and the University of Iowa. *Id.*

248. *Id.*

249. Pereira v. United States, 347 U.S. 1, 8 (1954); *see also* United States v. Maze, 414 U.S. 395 (1974); United States v. Goldberg, 455 F.2d 479, 480 (9th Cir.), *cert. denied*, 406 U.S. 967 (1972); Hickman v. United States, 406 F.2d 414, 415 (5th Cir.), *cert. denied*, 394 U.S. 960 (1969); Milam v. United States, 322 F.2d 104, 109 (5th Cir. 1963), *cert. denied*, 322 U.S. 736 (1964); Blue v. United States, 138 F.2d 351, 358-59 (6th Cir. 1943), *cert. denied*, 322 U.S. 911 (1944); Alexander v. United States, 95 F.2d 873, 877 (8th Cir.), *cert. denied*, 305 U.S. 637 (1938); United States v. Sheiner, 273 F. Supp. 977, 982 (S.D.N.Y. 1967), *aff'd*, 410 F.2d 337, 341 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969).

250. *Pereira*, 347 U.S. at 8.

scheme was successful or that the victims actually relied upon false representations.[251] In short, the statute does not require the government to prove that anyone, in fact, was defrauded.[252] Rather, to sustain a conviction under the mail fraud statute, the government need only prove that some actual harm or injury was contemplated by the scheme.[253]

The first element of mail fraud requires a scheme to defraud victims of money or property.[254] Walters and Bloom sought dismissal of the substantive mail fraud counts for failure of the government to satisfy this element under what is commonly referred to as a "*McNally*" argument.[255] Walters and Bloom alleged that *McNally v. United States*[256] restricted the scope of the mail fraud statute to schemes which defraud victims of money or property, and that the universities were not defrauded of money or property.[257]

McNally involved a self-dealing patronage scheme by *de facto* state officials who allegedly defrauded the citizens and state of Kentucky of certain intangible rights, such as the right to have the commonwealth's affairs conducted honestly.[258] The Supreme Court held that the victims were not deprived of "money or property" by this scheme because the right to an honest government is an "intangible right" which is not protected by the mail fraud statute.[259]

Intangible rights, however, are not automatically excluded from protection by the mail fraud statute. The "money and property" distinction raised in *McNally* was clarified in *Carpenter v. United States*,[260] which involved a scheme to appropriate confidential news information from the *Wall Street Journal*.[261] In *Carpenter*, the Supreme Court ruled that this confidential information was property, stating that "its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes [and that] *McNally* did not limit the scope of [section]

251. United States v. Jackson, 451 F.2d 281, 283 (5th Cir. 1971), *cert. denied*, 405 U.S. 928 (1972). It is not even essential that the victim of the scheme be deceived as long as there is evidence of a scheme or artifice to deceive. *Id.*

252. United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

253. *See* United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); United States v. Dixon, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976).

254. *Pereira*, 347 U.S. at 8.

255. *Walters*, 711 F. Supp. at 1442.

256. 483 U.S. 350 (1987).

257. *Walters*, 711 F. Supp. at 1443.

258. *McNally*, 483 U.S. at 361 n.9.

259. *Id.*

260. 484 U.S. 19 (1987).

261. *Id.* at 22-24.

1341 to tangible as distinguished from intangible property rights."[262]

In *Walters*, the government alleged that Walters and Bloom defrauded the universities of two types of property: (1) money and property in the form of tuition, room, board, fees and other financial assistance provided to student-athletes based on the false certifications; and (2) the universities' right to control allocation of their limited number of athletic scholarships.[263] The *Walters* court found that the first part of the indictment did not conflict with *McNally* and that the defendants had violated the Hobbs Act since the property deprivation consisted of tangible property and money.[264] The court further rejected Walters' argument that the universities were not defrauded of money or property because they suffered no economic loss based on the Supreme Courts' holding in *Carpenter*, that a victim need not suffer economic or monetary loss in order to be defrauded under the statute.[265]

The second type of alleged property deprivation, the universities' right to control allocation of their limited number of athletic scholarships, posed a different problem. The difficulty in distinguishing between tangible property such as the scholarships and intangible property, such as the right to control the allocation of the scholarships has been discussed in the common-law definition of property:

> The word "property," in law, is not the material object itself, but it is the right and interest or domination which is rightfully and lawfully obtained over the material object, with the unrestricted right to its use, enjoyment and disposition, either limited or unlimited in duration.[266]

Based on this definition, the *Walters* court concluded that the second alleged property right, the "right to control," merged with the first bundle of alleged property rights, scholarship money, room and board, etc., to represent but "one property right."[267] Additionally, the court pointed out that the intangible property right to control disposition of property is protected by the mail fraud statute under the Supreme Court's opinion in

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262. *Id.* at 25.

263. *Walters*, 711 F. Supp. at 1443.

264. *Id.* at 1444; *see* 18 U.S.C. § 1951.

265. *Id.* The premise that a mail fraud victim must suffer economic or monetary loss in order to be defrauded has been rejected by other courts as well. *See, e.g.*, United States v. Thomas, 686 F. Supp. 1078 (M.D. Pa.), *aff'd*, 866 F.2d 1413 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 1958 (1989); United States v. Cooper, 677 F. Supp. 778 (D. Del. 1988).

266. *Walters*, 711 F. Supp. at 1445.

267. *Id.* Note that the overlap between the two alleged property deprivations in the indictment did not prejudice Walters and Bloom, and, therefore, was not fatal to the validity of the indictment. *Id.*

Carpenter.[268]

In summary, *Walters* demonstrates that conduct by sports agents similar to that of Walters and Bloom, whereby an agent misrepresents material facts about a student-athlete's eligibility status, is sufficient to maintain a prosecution under the mail fraud statute. Moreover, a scheme to defraud the victim of money or property need not result in the university actually losing money. It is sufficient that the scheme contemplate such a result.

The second element of mail fraud requires the mailing of a letter for the purpose of executing the scheme.[269] A perpetrator need not actually place an item in the mail,[270] rather one must either cause the mails to be used or reasonably foresee that the mails would be used in furtherance of the scheme.[271] Walters and Bloom did not dispute this element in their motion to dismiss the indictment,[272] and, generally, it appears that prosecutors have had little difficulty in establishing a "mailing" for purposes of satisfying this element.[273]

The district court's analysis of the mail fraud statute in *Walters* indicates that it will impose criminal liability on a sports agent who attempts to represent a student-athlete prior to the expiration of his college eligibility. Under the analysis, such an agent would be in violation of the mail fraud statute if he "uses the mails" to submit false eligibility certifications to the student-athlete's school.[274]

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268. *Id.*; *see also Carpenter*, 484 U.S. at 26 (intangible property right in keeping confidential news stories); United States v. Lytle, 677 F. Supp. 1370, 1381 (N.D. Ill. 1988) (employer's intangible property right to its employee's faithful services).

269. *Pereira*, 347 U.S. at 8.

270. United States v. MacKay, 491 F.2d 616, 619 (10th Cir. 1973), *cert. denied*, 416 U.S. 972 (1974).

271. *See Pereira*, 347 U.S. at 8-9; United States v. Moss, 591 F.2d 428, 436 (8th Cir. 1979); United States v. Conte, 349 F.2d 304, 306 (6th Cir.), *cert. denied*, 382 U.S. 926 (1965). Indirect proof of a defendant "having caused" a mailing is acceptable. *See* United States v. Joyce, 499 F.2d 9, 15-16 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). Where, for example, there is testimony about customary office procedure, there is no need to identify and to elicit testimony from the person who actually put the envelope in the mails. *Id.*

272. *See Walters*, 711 F. Supp. at 1442-46.

273. *See, e.g.*, *Pereira*, 347 U.S. at 7-8 (defendant's delivery of check to his bank was sufficient to establish subsequent foreseeable mailing); *Moss*, 591 F.2d at 36-37 (defendant caused mailing under the statute even though the mailing emanated from non-defendant).

274. Note that Walters alleged a due process claim by asserting that the court's "novel and unprecedented" interpretation of the mail fraud statute failed to put him on notice that his conduct might be criminal. *Walters*, 711 F. Supp. at 1446. The court dismissed this claim by finding that the fraudulent nature of Walters' transactions with the student-athletes was sufficiently clear to have afforded him notice. *Id.* This opinion may serve as notice to agents who contemplate such conduct in the future.

4. Conspiracy violations under sections 1962(d) and 371

Counts One and Six of the federal grand jury indictment charged Walters and Bloom with a RICO and conventional criminal conspiracy, respectively.[275] Criminal conspiracy is defined as an agreement between two or more persons formed for the purpose of committing an unlawful act or accomplishing a lawful act through unlawful means.[276] The requisite elements necessary to establish a conspiracy differ depending upon the underlying act. While all conspiracy statutes require an agreement[277] and a specific intent to achieve a certain objective,[278] for example, the unlawful act or the lawful act by unlawful means, some conspiracy statutes require the additional element of an overt act.[279] The inherent vagueness in the definition of criminal conspiracy and the difficulty that exists in distinguishing its different elements have prompted many commentators to characterize the crime of conspiracy as giving prosecutors a unique weapon in their arsenal.[280] These problems were illustrated classically in Walters' and Bloom's motion to dismiss the two conspiracy charges in their indictment.[281]

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275. *Id.* at 1438-39.

276. *See* United States v. Caplan, 633 F.2d 534, 542 (9th Cir. 1980).

277. *See* Goldstein, Jr., *The* Krulewitch *Warning: Guilt by Association*, 54 GEO. L.J. 133, 135 (1965). The unlawful agreement has often been characterized as the "gist" of the offense of conspiracy. Toliver v. United States, 224 F.2d 742, 744 (9th Cir. 1955). No formal agreement is necessary to constitute a conspiracy; such agreement may be inferred from facts appearing in evidence. United States v. Cudia, 346 F.2d 227, 229-30 (7th Cir.), *cert. denied*, 382 U.S. 955 (1965).

278. *See* Goldstein, Jr., *supra* note 277, at 135. To establish the element of intent, the accused must be shown to have knowledge of the purpose of the conspiracy. Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943). Additionally, " 'conspiracy to commit a particular substantive offense [(e.g., mail fraud)] cannot exist without at least the degree of criminal intent necessary for the substantive intent itself.' " Ingram v. United States, 360 U.S. 672, 678 (1959) (quoting Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 939 (1959). Note that the conspiracy to commit the substantive offense and the substantive offense itself are separate and distinct offenses, and that proof of one is not necessarily proof of the other. Carter v. United States, 333 F.2d 354, 356 (10th Cir. 1964).

279. Generally, an overt act is defined as some step taken by one of the conspirators in furtherance of the conspiracy. *See* Goldstein, Jr., *supra* note 277, at 135; *see, e.g.*, 18 U.S.C. § 371 (1988); ARIZ. REV. STAT. ANN. § 13-1003(A) (1989); CAL. PENAL CODE § 184 (West 1988). It is not necessary that the overt act be completed, but only that some step, even very slight, be taken towards furthering the conspiracy. Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 946 (1959). The function of the overt act is to show that agreeing or conspiring has progressed from field of thought and talk into action. Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959). *But see* 18 U.S.C. § 1962(d) (no overt act required).

280. *See, e.g.*, Goldstein, *supra* note 277, at 135; Klein, *Conspiracy-The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1, 3 (1957); Note, *Mass Demonstrations and Criminal Conspiracies*, 16 HASTINGS L.J. 465, 467-68 (1965).

281. *See Walters*, 711 F. Supp. at 1447.

Bloom and Walters sought dismissal of the two conspiracy counts[282] on the grounds that each count constituted multiple conspiracies.[283] With respect to the RICO conspiracy charge, the district court rejected the defendants' argument that they were being charged improperly with multiple conspiracies,[284] by relying on the Seventh Circuit's treatment of multiple conspiracies in *United States v. Neapolitan*.[285] The *Walters* court held that as long as the government alleges that the defendants entered into a *single agreement* to violate RICO then the indictment states a proper section 1962(d) charge of conspiracy.[286] Although this ruling validated the RICO conspiracy charge in the indictment against Walters and Bloom, it apparently was predicated on a factual and legal determination that a *single agreement* existed. The finding of a "single agreement" is not difficult in a RICO conspiracy because it has been determined that the concept of enterprise[287] links a number of otherwise distinct crimes and/or conspiracies into one proceeding.[288] However in a conventional conspiracy charge, proving a single agreement is a more difficult and factually intensive inquiry.[289]

The indictment also alleged a conventional conspiracy[290] by Walters and Bloom to commit several crimes in connection with their representation of student-athletes.[291] With respect to the second conspiracy charge, the court dismissed the defendants' contention that this count improp-

282. 18 U.S.C. §§ 371, 1962(d) (1988).

283. *Walters*, 711 F. Supp. at 1447-48. The counts accused Walters and Bloom of conspiring to: collect debts through extortionate means; commit mail and wire fraud; conceal information from the grand jury; and, violate section 1962(c). *Id.* at 1438-39. Under the Federal Rules of Criminal Procedure, two or more offenses can be charged in the same indictment, but each offense must be charged in a separate count. FED. R. CRIM. P. 42(a). Charging several conspiracies in the same count violates this rule and can often be fatal to an indictment. *See Walters*, 711 F. Supp. at 1447.

284. *Walters*, 711 F. Supp. at 1447.

285. *Id.*

286. *Id.* at 1447.

287. See *supra* notes 202-17 and accompanying text for a discussion of a RICO "enterprise."

288. *Neapolitan*, 791 F.2d at 501.

289. *See* United States v. Napue, 834 F.2d 1311, 1332 (7th Cir. 1987) (stating that a single agreement is "often a difficult element to prove because a conspiracy's essential characteristics are secrecy and concealment. . . ."). Recognizing this difficulty in proving a single agreement, the Seventh Circuit has held that direct evidence of the agreement is not required and that the agreement can be inferred from the circumstances. United States v. Percival, 756 F.2d 600, 607 (7th Cir. 1985).

290. 18 U.S.C. § 371.

291. *Walters*, 711 F. Supp. at 1447. "The specific crimes are the mail and wire fraud victimizing the universities, the collection of debts by extortionate means victimizing the student-athletes, the mail and wire fraud victimizing one particular athlete, Paul Palmer, and the concealment of information from the grand jury." *Id.*

erly alleged multiple conspiracies.[292] The court cited *United States v. Napue*,[293] which defined the difference between single and multiple conspiracies as follows:

> Separate conspiracies exist when each of the conspirators' agreements has its own end, and each transaction constitutes an end itself. If, on the other hand, the agreements between the conspirators represent stages or different functions to be performed in the formulation of a larger scheme, the object of which is to effectuate a single unlawful result, then there is a single conspiracy . . . .[294]

Applying this test, the district court in *Walters* felt that, based on the facts alleged, the separate crimes conceivably could be part of a larger scheme by Walters and Bloom to act as business agents for college football players.[295] Furthermore, as one court has stated, "there may be a single conspiracy even though the commission of two or more offenses is contemplated."[296]

In *Walters*, the government successfully alleged two conspiracies for purposes of the indictment. Although prosecutors are generally also successful in proving the elements of a conspiracy charge at trial, problems of proof sometimes exist as a result of the vague definition and the imprecise nature of the crime itself.[297] Given the unique nature of sports agents' activities, a conspiracy charge against a sports agent should generally require an especially careful analysis of the facts and a proper application of the law in order to maintain an effective prosecution.

d. the conviction and reversal

Upon completion of a month long trial and a week of deliberation, on April 13, 1989, a jury found Walters and Bloom guilty on five of the seven indictment counts.[298] On June 19, 1989, Judge George M. Marovich sentenced Walters to five years in custody to be followed by five years of probation and Bloom to a three-year sentence to be followed

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292. *Id.* at 1448.

293. *Id.* at 1447-48; United States v. Napue, 834 F.2d 1311 (7th Cir. 1987).

294. *Napue*, 834 F.2d at 1332 (citations omitted).

295. *Walters*, 711 F. Supp. at 1448.

296. United States v. Bruun, 809 F.2d 397, 406 (7th Cir. 1987).

297. *See* Goldstein, Jr., *supra* note 277, at 136.

298. United States v. Walters, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. at 4 (7th Cir. Sept. 17, 1990). The jury acquitted Walters and Bloom of the mail fraud charges involving the University of Iowa and Michigan State University as outlined in counts III and V of the indictment. *Id.*

by five years of probation.[299] Walters and Bloom immediately appealed their conviction contending several errors were committed during their trial that should render these convictions invalid.[300]

On September 17, 1990, the United States Court of Appeals for the Seventh Circuit reversed Walters' and Bloom's convictions and remanded with instructions for new trials.[301] *Without addressing any of the substantive counts* under which Walters and Bloom were convicted, the appellate court cited two *procedural errors* committed by the trial court that were sufficiently prejudicial to warrant a reversal: (1) the refusal of the court to instruct the jury that Walters' actions may have been predicated on the advice of counsel,[302] and (2) the court's denial of Bloom's motion to sever his trial from Walters'.[303] The Seventh Circuit's reversal of Walters' and Bloom's convictions once again illustrates the need for a comprehensive federal statute tailored to address the conduct of sports agents. Without such legislation, the Seventh Circuit opinion in

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299. *Id.*

300. *Id.*

301. *Id.* Although the appellate court left open the possibility of a retrial, prosecutors might determine a retrial to be too costly and complex. Mortensen, *Conviction of Walters, Bloom is overturned*, The Nat'l Sports Daily, Sept. 18, 1990, at 12, col. 1. A retrial also seems unlikely since the two lead prosecutors, U.S. Attorney Anton Valukas and Assistant U.S. Attorney Howard M. Pearl, are now in private practice. *Id.* Additionally, Pearl now works with Dan K. Webb, the attorney who defended Bloom, thereby presenting further problems with a possible retrial. *Id.*

302. *Walters*, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. at 5-6. On appeal, Walters argued that because he discussed with his attorneys the potential legal ramifications of entering into representation agreements with collegiate athletes prior to contracting with these athletes, his actions were taken in good faith upon the advice of his attorneys, and therefore, he did not form the specific intent necessary to commit fraud upon the universities. *Id.* at 5. The Seventh Circuit held that since Walters had presented sufficient evidence on which to support his theory of defense, he deserved a jury instruction explaining this theory. *Id.* at 6. The court further held that the trial court's failure to provide a jury instruction on Walters' theory of defense infected the fairness of his trial. *Id.* As a result, Walters' conviction was reversed and his case was remanded so as to provide him such an opportunity. *Id.*

303. *Id.* at 7-9. At his trial, Bloom argued that Walters' pursuit of an advice-of-counsel defense forced him to waive his attorney-client privilege. *Id.* at 7. He, therefore, requested that the trial court sever his trial from that of Walters'. *Id.* On appeal, Bloom contended that the trial court's denial of his motion to sever his trial was reversible error. *Id.*

The Seventh Circuit found that Bloom was acting as an individual when he sought the advice of his attorneys, not as an officer of WSE. *Id.* at 8. Therefore, the court held that Bloom was protected by the attorney-client privilege. *Id.* The court further held that since Bloom was forced to observe his attorneys testify at trial about the intimate discussions to which he had been a party, and in so doing he was denied an opportunity to pursue his own defense, he was prejudiced by the violation of the attorney-client privilege. *Id.* The denial of Bloom's motion for severance, therefore, was outside the trial court's discretion and as such, the Seventh Circuit reversed Bloom's conviction and remanded his case so that he could be given another trial in which to pursue his own defense free from that of his co-defendant. *Id.* at 9.

Walters unfortunately will stand as a signal to sports agents that no matter how effective the current general criminal statutes appear, numerous defenses are available to allow sports agents to escape their reach.

C. *Criminal Liability of Sports Agents as it Exists Today*

Although the government successfully prosecuted its case at trial, *Walters* nevertheless illustrates some of the problems with applying the current federal statutes against sports agents.[304] First, many of the federal statutes examined in *Walters*, especially RICO, have been criticized for their overuse and misapplication.[305] This criticism has resulted in a continual narrowing of RICO's scope in an attempt to limit its application to the traditional offenses outlined in the statute.[306] Second, Walters' and Bloom's physical threats and acts of violence[307] separated them from the large majority of practicing sports agents. It appears that it was because of this egregious conduct that the government decided to investigate and prosecute the two agents. The current federal statutes appear to be broad enough to address more typical examples of widespread agent abuses such as the payment of money to student-athletes prior to the expiration of their collegiate eligibility and agents instructing student-athletes to keep representation agreements secret until the athlete's collegiate eligibility has expired. However, absent egregious conduct similar to that of Walters and Bloom, it is doubtful that any agent misconduct will be identified. Third, the fact that Walters and Bloom publicized their activities and sought action against their clients[308] assisted the gov-

304. For a discussion of all of Walters' and Bloom's activities, see *supra* text accompanying notes 166-80.

305. *See* Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 674 (1990) (commenting how most civil RICO cases "should not be in federal court [since they] involve commonplace commercial controversies [that are] recharacterized by resourceful attorneys to conform with the requirements of RICO. . . ."); Lynch, *RICO: The Crime of Being A Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662-63 (1987) (noting that "prosecutors have relied [on the expansive nature of RICO] to strike at those—whether or not they fit any ordinary definition of 'racketeer' or 'organized criminal'—who commit crimes in conducting the affairs of businesses. . . ." (footnotes omitted)); Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 623 (1990) (noting that Justice Antonin Scalia and three other Supreme Court Justices threatened to find RICO unconstitutionally vague when presented with the appropriate case in the future).

306. *See* Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 655 (1990) (stating that "the federal courts have reacted [to RICO's overuse] by reinterpreting RICO more narrowly. . . ." (citations omitted)); Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 643 (1990) (noting that the Department of Justice has recently exercised restraint in its use of RICO).

307. *See supra* text accompanying note 187.

308. *See supra* text accompanying note 177.

ernment in establishing its case. Finally, no matter what the law reads, defense attorneys will raise a barrage of various defenses in an attempt to exclude sports agents from the scope of the statutes. Even though these defenses were unsuccessful before the trial court in *Walters*, the Seventh Circuit reversed Walters' and Bloom's convictions based on two procedural theories of defense raised on appeal.[309] Additionally, other defenses may prove to be successful in the future as more cases come before the courts.

Besides the numerous defenses available to sports agents, the scope of the federal statutes presents another problem. Although RICO[310] is an exceptionally broad statute, it requires the violation of a RICO predicate offense[311] in order to take effect. The majority of these predicate offenses do not incorporate the typical sports agent abuses that plague the profession.[312] Only the more atypical agent activities, such as extorting student athletes through physical threats, fall under the purview of RICO.[313] The same problem exists with the Hobbs Act.[314] Since, in all likelihood, the majority of agents do not resort to threatening their clients with physical harm in attempting to maintain a contractual agreement, these statutes do not apply. The mail fraud[315] and conspiracy[316] statutes appear to be broad enough to encompass some of the more "typical" agent conduct; however, the government generally prosecutes these violations in conjunction with other "more substantive" offenses.

Although the state statutes are more detailed, and they explicitly address sports agent conduct, they possess their own set of problems. First, only nineteen states currently have statutes regulating sports agents. Further, many of these provide only minimal criminal sanctions, if any. As illustrated in *Abernethy v. State*,[317] a state without the aid of specific statutes designed to regulate sports agents will have a difficult time prosecuting a sports agent under a "general" sports statute such as

309. *See* United States v. Walters, 711 F. Supp. 1435, 1439-51 (N.D. Ill. 1989), *rev'd*, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. (7th Cir. Sept. 17, 1990).

310. 18 U.S.C. §§ 1961-1968 (1988).

311. *Id.* § 1961.

312. Typical agent problems such as income mismanagement, excessive fees, conflicts of interest, incompetence, and overly-aggressive client recruitment practices, normally do not involve RICO predicate offenses. *See id.* § 1961(1).

313. *See id.*

314. 18 U.S.C. § 1951 (1988). See *supra* notes 227-45 and accompanying text for a discussion of the Hobbs Act.

315. 18 U.S.C. § 1341 (1988).

316. *Id.* §§ 371, 1962(d).

317. 545 So. 2d 185 (Ala. Crim. App. 1988). See *supra* notes 66-95 and accompanying text for a discussion of this case.

"tampering with a sports contest."[318] Second, state statutes are limited in their scope due to jurisdictional restrictions.[319] Ohio is the only state that incorporates a long-arm statute into its act.[320] Ohio's long-arm provision enables an Ohio court to "exercise personal jurisdiction over a [non-resident] agent . . . as to a cause of action arising from the athlete agent entering into an agent contract with [an Ohio collegian even when the athlete is outside the state]."[321] However, many agents have attempted to avoid this provision through out-of-state solicitations and secret signings.[322] Third, many state statutes, such as California's, contain exemptions for attorneys or financial managers.[323] These exemptions most likely insulate a large population of sports agents from the effect of the statute. Finally, the majority of state statutes provide only a general regulatory scheme of licensing and registration requirements.[324] Although these features are important, the statutes do not explicitly address substantive agent misconduct—the area most in need of prohibitory sanctions.

V. A RECOMMENDATION FOR A FEDERAL CRIMINAL STATUTE TAILORED FOR SPORTS AGENTS

Prominent sports agent Mike Trope once stated that he will not heed regulations unless they are "laws of the United States and you can go to prison for ten years if you break them."[325] Although Trope's view may not represent the majority of sports agents, it clearly illustrates the need for federal criminal sanctions. Sports agents operate in an extremely competitive environment where gaining an edge on a competitor lures many into "breaking the rules."[326] However, if there are either no rules to follow or no substantial penalties for violating existing rules, sports agents seeking to survive and prosper in this competitive environment may find few deterrents in choosing to pursue an improper course of conduct.

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318. *See* ALA. CODE § 13A-11-143 (1982).

319. Comment, *supra* note 14, at 1051, 1057, 1062, 1078.

320. OHIO REV. CODE ANN. § 4771.06 (Page Supp. 1988).

321. *Id.*

322. Ehrhardt & Rodgers, *supra* note 22, at 57.

323. *See, e.g.*, CAL. LAB. CODE § 1500(b) (West 1989). The attorney exemption only applies to certain provisions of the California Act. For example, California licensed attorneys are not required to post a $25,000 surety bond. *Id.* § 1519. *But see id.* §§ 1530.5, 1531(c), 1535.5, 1539 (including members of the California Bar within the section's coverage).

324. *See, e.g.*, ARK. STAT. ANN. §§ 17-48-101 to -203 (Supp. 1989); CAL. LAB. CODE §§ 1500-1547 (West 1989); IOWA CODE ANN. §§ 9A.1-.12 (West 1989).

325. McLeese, *A Whole New Ballgame for Lawyers*, STUDENT LAW., Oct. 1980, at 40, 46.

326. *See* Ehrhardt & Rodgers, *supra* note 22, at 40-43.

The concept of federal statutory regulation of sports agents is hardly new.[327] Any proposal for federal regulation, however, must look beyond mere licensing and registration requirements. A comprehensive federal scheme should include prohibitory sanctions against the current widespread agent abuses.

First, the legislation needs to include a provision making it a felony for a sports agent to sign an athlete to a representation agreement before the athlete's collegiate eligibility has expired.[328] Second, the legislation should make any payments to a student-athlete illegal, when such payments are either in exchange for a signed representation agreement or in promise for the same sometime in the future. These two provisions would harmonize the proposed federal regulation of sports agents with the current NCAA rules governing amateur athletics, whose purpose is to delay the professionalization of college athletes until their collegiate eligibility expires.[329] Currently, the NCAA rules have no enforcement power; therefore, this part of the proposed federal legislation is necessary to successfully address the NCAA's current concerns. By criminalizing "early" and "purchased" representation agreements, the legislation would respect the purpose of the NCAA rules by restricting agents from using their persuasive skills to lure college athletes into signing representation agreements that violate NCAA rules.

Third, the legislation should include specific rules regarding the solicitation of collegiate athletes. A comprehensive statute addressing this problem should prohibit agents from providing "anything of significant value"[330] to a player in order to solicit that player as a client, or to any-

327. In 1982, the National Sports Lawyers Association began drafting a proposed federal statute to regulate sports agents, the Professional Sports Agency Act of 1985. This has yet to be introduced before Congress. Comment, *supra* note 14, at 1069.

328. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8871 (Vernon Supp. 1990).

329. *See* NCAA CONST. art. II-2(a). It should be noted that a large number of respected commentators have criticized the current NCAA rules governing amateur athletics. *See, e.g.*, Roberts, *Protecting the College Athlete from Unscrupulous Agents*, 5 SPORTS LAW. 8 (1987); Klein, *College Football: Keeping 'em Barefoot*, Wall St. J., Sept. 4, 1987, at 13, col. 1. This criticism generally attacks the NCAA rules prohibiting collegiate athletes from receiving any money (including from outside employment) without forfeiting their amateur status. One commentator observed that the NCAA rules require athletes "to live by utopian standards" and to "take a kind of vow of poverty when they accept college [athletic] scholarships." Roberts, *supra*, at 8; *see also* Klein, *supra*, at 13, col. 1. Other commentators have observed that the NCAA rules are the product of a "decades-long gentlemen's agreement between the NFL and the college powers-that-be" and that this has allowed "[t]he pros [to] get a free farm system that supplies them with well-trained, much-publicized employees" while "[t]he colleges get to keep their players the equivalent of barefoot and pregnant." *Id.* at 13, col. 2. See Sobel, *supra* note 2, at 783-85 for further criticism of the current NCAA rules.

330. *See, e.g.*, ALA. CODE § 8-26-33 (Supp. 1989).

one else, in return for a personal recommendation. Also, similar to a provision adopted by the National Football League Players' Association,[331] the statute should prohibit agents from providing false or misleading information to anyone in the context of soliciting clients, including the use of titles or business names implying professional credentials which the agent does not have. Additionally, like the California and Alabama acts, the statute should prohibit agents from offering anything of value, including free or reduced-price legal services, to college employees in return for client referrals.[332]

Fourth, the legislation should include provisions for the crimes of extortion, mail and wire fraud, embezzlement, racketeering and conspiracy, in language similar to that of the existing federal statutes discussed in part in *United States v. Walters*.[333] By incorporating these provisions, this uniquely tailored legislation would address egregious agent conduct in a single body of law recognized to govern the profession, rather than the current scheme which attempts to fit sports agent conduct into more general statutes.

Fifth, the legislation should adopt provisions in addition to those in existing federal statutes, thereby creating a package of laws designed to deal with the unique problems created by the sports agent profession. These provisions should address the types of misconduct, such as income mismanagement, excessive fees, conflicts of interest and overly aggressive client recruitment practices,[334] that ordinarily stem from the general functions that sports agents perform. By addressing these problems currently plaguing the profession, in strict prohibitory language accompanied by equally strict criminal penalty provisions making these practices a felony, the legislation should serve as an effective deterrent to willful athlete agent misconduct.

Finally, of course, in order for the criminal sanctions to be effective, the legislation should contain registration and licensing requirements similar to those found in the Alabama and California statutes.[335] Unlike many state statutory schemes, however, no exemptions should be given.

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331. NFLPA REG. § 5(c) (1983).

332. *See, e.g.*, ALA. CODE § 8-26-34(b) (Supp. 1989); CAL. LAB. CODE § 1539(b) (West 1989).

333. 711 F. Supp. 1435 (N.D. Ill. 1989), *rev'd*, Nos. 89-2352, 89-2353, 89-3285, 89-3286, slip op. (7th Cir. Sept. 17, 1990). See *supra* notes 198-297 and accompanying text for a discussion of these federal statutes.

334. See Sobel, *supra* note 2, at 710 (discussion of sports agent misconduct).

335. *See* ALA. CODE §§ 8-26-4 to -10 (Supp. 1989); CAL. LAB. CODE §§ 1510-1528 (West 1989). For a discussion of proposed federal regulations specifically regarding registration requirements, see Comment, *supra* note 14, at 1074-78.

Any person practicing as a sports agent under the broadest of definitions should be within the scope of the statute. Additionally, as is the case in several statutory schemes, failure to register as a sports agent under the legislation's guidelines should be a felony.[336] Only a comprehensive piece of legislation, void of any loopholes, can effectively address today's sports agents abuses and serve as a deterrent to this "new breed" of white-collar crime.

VI. CONCLUSION

There was a time when the stereotypical agent was the gutsy character who took on the "big bad owner" and wrung from him what was due to the athlete.[337] But as athletes started making hundreds of thousands of dollars, then millions, ethical agents watched helplessly as the self-serving, the incompetent, and indeed, the criminal, debased the profession's image.[338] Unfortunately, such is the current status of a profession which lacks any enforceable set of uniform rules or regulations to help guard against widespread misconduct such as income mismanagement, excessive fees, conflicts of interest and overly-aggressive client recruitment practices.

The majority of sports agents possess a sharp business acumen that allows them to skillfully maneuver around any potential civil liability. Additionally, non-legislative regulation, such as professional association rules, involve non-mandatory membership and, accordingly, lack any developed enforcement mechanisms for compliance. Finally, although some attempts at legislative regulation avoid these problems, they are typically fraught with jurisdictional limitations, exemptions, insignificant penalties for violations and other loopholes. Such legislative schemes generally lack the necessary structure to address existing problems in the profession.

Norby Walters and Lloyd Bloom represent just two examples of the undoubtedly countless number of sports agents who operate their businesses illegally and unethically, consciously aware that very little can or will be done to prevent this conduct. The only solution to deal with this problem of sports agent misconduct is a comprehensive federal statute tailored to address the unique work of sports agents. Congress must take

336. *See, e.g.*, ALA. CODE § 8-26-41 (Supp. 1989); FLA. STAT. ANN. § 468.453(3) (West Supp. 1989); GA. CODE ANN. § 43-4A-11(a) (Harrison Supp. 1989); IND. CODE ANN. § 35-46-4 (Burns Supp. 1989); KY. REV. STAT. ANN. § 518.080(2) (Michie/Bobbs-Merrill Supp. 1988).

337. Neff, *Den of Vipers*, *supra* note 3, at 76.

338. *Id.*

the initiative and "reline the playing field" of this multi-million dollar profession with a powerful and exhaustive piece of legislation that can spark more desireable attitudes and conduct in sports agents. Only then will the public and sports world's perception of athlete agents improve, thereby shifting the focus back to the plethora of beneficial services that sports agents provide athletes, and providing the group a new revitalized public image as "*good* agents."

*Ash Narayanan**

* The author's work on this Comment has inspired the formation of Pro-Am Management, Inc. © ("Pro-Am"), an athletic management firm. As a co-founder, the author will strive to ensure that Pro-Am embody the spirit of this Comment. The author also wishes to thank Professor Lon Sobel for his editorial comments.