

February 2020

## Double Fault: How the NCAA's No-Agent Rule Serves Legal and Policy Errors into the Courts of Tennis

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### Recommended Citation

Christopher M. Hartley, *Double Fault: How the NCAA's No-Agent Rule Serves Legal and Policy Errors into the Courts of Tennis*, 72 Ark. L. Rev. 553 (2020).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss3/1>

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# **DOUBLE FAULT: HOW THE NCAA'S NO-AGENT RULE SERVES LEGAL AND POLICY ERRORS INTO THE COURTS OF TENNIS**

Christopher M. Hartley\*

## **I. INTRODUCTION**

From the courts of law to the courts of policy, collegiate tennis is hamstrung by the National Collegiate Athletic Association's (NCAA) no-agent rule.<sup>1</sup> The casual college or professional tennis fan may not be aware of the problem as the visible effects of the rule tend to make it seem like it is more of an individual player's problem rather than a major concern for NCAA member schools. After all, it is the individual tennis player who loses a collegiate athletic opportunity if they violate the no-agent rule.<sup>2</sup>

However, the hidden effects of the rule can also hinder college and university athletic departments in the form of potential losses of top-prospect student-athletes as well as squandered recruiting efforts. The rule may also dissuade prospective collegiate tennis players from taking advantage of valuable career talent-management resources, resulting in a mutually unfavorable situation for the athletes, schools, and tennis profession. As long as college remains an attractive option

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1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2018-2019 NCAA DIVISION I MANUAL, Bylaw 12.3.1, at 71 (2018), [<https://perma.cc/X7MZ-SD6T>] [hereinafter NCAA MANUAL]. The National Collegiate Athletic Association's name, purpose, and fundamental policy are listed on page one of the NCAA Manual.

2. *See id.*

for tennis players considering a professional career, this issue will remain relevant for all parties involved.<sup>3</sup>

While the policy shortcomings of the NCAA's no-agent rule are easier to articulate than the legal ones, the rule is not impervious to legal challenge. Recent court cases suggest the road leading to successful challenges of the rule is at least becoming paved.<sup>4</sup> Courts are entertaining criticism of the rule from prospective collegiate athletes who have fallen victim to it.<sup>5</sup> Scholarly articles critical of the rule have catalyzed policy adjustments.<sup>6</sup> To be sure, the rumblings of discontent portend more changes in the future.

To date, however, the NCAA's no-agent rule still exists, and the NCAA has not exempted any one sport from the rule.<sup>7</sup> If the call for complete abandonment of the rule has never been made, this Article engages that discussion and serves the proposal into the court of tennis. Given the rule's questionable policy effects on the sport of tennis, as well as the potential for increased legal and policy challenges as long as the rule exists, this Article calls for the outright removal of the NCAA's no-agent rule for prospective collegiate tennis players.

## II. IN PURSUIT OF AMATEURISM: NCAA RULES FACE SCRUTINY

As the regulating body for many university and college athletic teams, the NCAA champions as one of its commitments the standard of "maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and

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3. See Nina Pantic, *College Has Helped Shape the Careers and Lives of Many Pro Players*, TENNIS.COM, (Oct. 25, 2017), [<https://perma.cc/XP64-U39G>].

4. See, e.g., *Bloom v. NCAA*, 93 P.3d 621, 626 (Colo. App. 2004); *Oliver v. NCAA*, 920 N.E. 2d 203, 213-14 (Ohio C.P. Erie Cnty. 2009).

5. See *Banks v. NCAA*, 977 F.2d 1081, 1087 (7th Cir. 1992); *Oliver*, 920 N.E.2d at 213-14.

6. See, e.g., J. Winston Busby, *Playing for Love: Why the NCAA Rules Must Require a Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 149, 171-74 (2012); T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 181, 188, 197-98 (2010); Matthew Stross, *The NCAA's "No-Agent" Rule: Blurring Amateurism*, 2 MISS. SPORTS L. REV. 167, 172-73, 189 (2013).

7. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 NCAA DIVISION I MANUAL, Bylaw 12.3.1, at 71 (2019), [<https://perma.cc/22WL-ZMFT>] [hereinafter NCAA MANUAL, 2019-2020].

athletes competing in the professional model.”<sup>8</sup> Indeed, many sports fans choose to attend or watch intercollegiate athletics because collegiate athletes, who are not paid for their contributions to the university, are playing for the “love of the game” thus resulting in a more uncorrupted form of competition than their sports’ professional counterparts.<sup>9</sup> For schools participating in Division I athletics, the NCAA’s “rulebook” is the NCAA Division I Manual (the Manual), which includes its constitution and bylaws.<sup>10</sup> Much of the Manual’s contents are focused on the mission of preserving amateurism in collegiate athletics.<sup>11</sup>

However, some NCAA rules that are focused on maintaining that line of demarcation have been criticized in recent sports law and law review articles.<sup>12</sup> Often, critiques point out the inconsistencies when certain rules are applied to aspiring collegiate athletes who are considering the prospect of a professional athletic career in lieu of college.<sup>13</sup> These arguments include claims that the interests of amateurism are not served by the rules or that the rules put the student-athletes in an unfair position because the student is not personally involved in an alleged rule infraction.<sup>14</sup> Frequently, these discussions center around the NCAA’s no-agent rule, which forecloses a student-athlete’s eligibility to compete at the intercollegiate level if they have ever received the services of an agent.<sup>15</sup>

This Article further develops the critiques of the NCAA no-agent rule and examines the issue through the lens of collegiate and professional tennis. Tennis is uniquely situated in this debate because it is arguably the NCAA sport in which its college-bound athletes flirt with the prospect of “going pro” at an earlier age than athletes in other NCAA sports.<sup>16</sup> Whether a football or basketball

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8. NCAA MANUAL, *supra* note 1, at xii.

9. See Saul Pink, *Why College Football Players Shouldn’t Get Paid*, INT’L DATELINE (Dec. 7, 2017), [<https://perma.cc/JP4H-C73R>].

10. See NCAA MANUAL, *supra* note 1, at iii-v, 8.

11. See *id.* at xii.

12. See Busby, *supra* note 6, at 141, 148-49; Stross, *supra* note 6, at 172-73, 178.

13. See Lockhart, *supra* note 6; Stross, *supra* note 6, at 169, 171, 180-81.

14. See Busby, *supra* note 6; Stross, *supra* note 6, at 173, 177-78, 184.

15. See Busby, *supra* note 6, at 148-49; Lockhart, *supra* note 6, at 181; Stross, *supra* note 6.

16. See, e.g., Ben Rothenberg, *Path to Pros Rarely Crosses Campus*, N.Y. TIMES, Feb. 10, 2013, at D6 [hereinafter Rothenberg, *Path to Pros*]; Ben Rothenberg, *Some Chafe at*

player's skills will give them a solid chance to compete in the professional ranks is often not fully realized until they enter collegiate athletic competition. For baseball, the process starts earlier, with many high school players discovering they have professional potential during their high school years such that a decision to forego a collegiate baseball career and directly enter professional baseball's minor leagues is a relatively common occurrence.<sup>17</sup>

In tennis, that professional aspiration and preparation process also starts earlier than in many other sports that field teams in intercollegiate competition.<sup>18</sup> Tennis players desiring to play at the elite collegiate level have been known to start to playing tennis as early as the age of three, compete in junior tournaments as early as thirteen, and compete in professional tournaments (where cash prizes are awarded) as early as fourteen.<sup>19</sup> The key part about the previous sentence is that it pertains to aspiring *collegiate* tennis players. But it could have just as easily referred to aspiring *professional* tennis players. That is because both sets of players engage in the exact same things at the same young age. In addition to the previously mentioned

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*Rules Meant to Protect Youngest Girls*, N.Y. TIMES, Sept. 10, 2017, at D2; Jim Brockman, *Chang Captures Battle of Sophies*, HERALD-TRIBUNE (May 23, 2018), [<https://perma.cc/WD4G-DDTW>].

17. See *Probability of Playing College and Professional Baseball*, HIGH SCH. BASEBALL WEB, [<https://perma.cc/GYZ7-UQKH>] (last visited Sept. 16, 2019), for statistics revealing that while going from high school baseball directly to the professional ranks is still a slim probability, it is more likely to happen than in other sports, such as basketball and football. See also Stross, *supra* note 6, at 183-84 (explaining how baseball's minor league system that many aspiring professionals enter demands a different standard of amateurism than other sports).

18. See Rothenberg, *Path to Pros*, *supra* note 16. Part of this dynamic is fueled by the fact that tennis is largely an individual sport, whereas collegiate tennis is one of the few places where tennis is played both as an individual sport and a team competition.

19. See, e.g., INT'L TENNIS FED'N, 2019 ITF WORLD TENNIS TOUR JUNIORS REGS. 82-83 (2019), [<https://perma.cc/Y63Z-US7D>]; INT'L TENNIS FED'N, 2019 MEN'S & WOMEN'S ITF WORLD TENNIS TOUR REGS. 138-39 (2019), [<https://perma.cc/6PH2-NP3K>] [hereinafter 2019 ITF MEN'S & WOMEN'S REGULATIONS]; ATP, THE 2019 ATP OFFICIAL RULEBOOK 91 (2019), [<https://perma.cc/7TH7-878G>] (listing the rules and regulations of the Association of Tennis Professionals (ATP)); WOMEN'S TENNIS ASS'N, 2019 WTA OFFICIAL RULEBOOK 253-56 (2019), [<https://perma.cc/569Q-J7MU>] (listing the Women's Tennis Association's (WTA) rules). To be eligible to compete in the ITF World Tennis Tour Juniors competition, per ITF's regulations, players must be between the ages of thirteen and eighteen. Players can earn ranking points but are not eligible to win cash prizes in junior tournaments. ITF World Tour, ATP, and WTA, all require players to be at least fourteen years old. It is at this level of tournament play that players are eligible to win cash prizes.

activities, both types of tennis players hire personal coaches, enroll in and train at elite tennis academies, and seek specialized schooling at a very young age in order to facilitate the many on-court hours required just to be competitive in both the collegiate and professional domains.<sup>20</sup>

For both classes of young athletes, the factors that weigh into the decision of whether one's tennis career might evolve into a full-time profession are present during these formative years. While the young tennis player does not have to decide to go pro by a certain age, preparations must start early if that option is to remain on the table.<sup>21</sup> One of the common items of preparation for the more talented young tennis players is to hire an agent: an action which, under current NCAA rules, forecloses any prospect of eventually competing in intercollegiate tennis if the professional career fails to materialize.<sup>22</sup> To be sure, players that reach the elite professional ranks usually display the promise that would inspire hiring an agent at a very young age.<sup>23</sup>

This Article proposes a change to the NCAA no-agent rule with respect to tennis. It urges the NCAA to abandon the no-agent rule for tennis players who have yet to matriculate into a college or university, but to continue applying the rule to athletes currently competing in NCAA athletics.

To provide valuable perspective, Part III of this Article describes the environment of lower-level professional tennis tournaments in which both high school and collegiate players participate. Further illustrating this process and showcasing the effect of the no-agent rule, Part IV introduces the story of two tennis players whose collegiate tennis aspirations were foreclosed

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20. See Rothenberg, *Path to Pros*, *supra* note 16 (quoting Nicole Gibbs, who describes the minimal differences between the quality of play in college and professional tennis); see also Kamakshi Tandon, *More to Rafa Than Meets the Eye*, ESPN (Aug. 26, 2011), [<https://perma.cc/Y27L-BR5W>] (noting that Rafael Nadal, now a highly successful professional tennis player, attended a sports boarding school at a young age).

21. See generally U.S. Tennis Ass'n, *The Progressive Development of a High Performance Player*, UTSA: PLAYER DEV., [<https://perma.cc/ES2Q-J8TG>] (last visited Sept. 29, 2019); Rothenberg, *Path to Pros*, *supra* note 16.

22. See Al Roth, *Junior Tennis Players: Turn Pro or Go to College?*, MKT. DESIGN (Sept. 30, 2010), [<https://perma.cc/8A62-597S>] (discussing the agent feeding frenzy at junior tennis tournaments). The article also explains how European players do not enjoy collegiate rule structure to help protect them from that frenzy. See also NCAA MANUAL, *supra* note 1.

23. See Roth, *supra* note 22.

by the rule. Part V sets up the legal and policy questions to be addressed. Part VI outlines the NCAA rules applicable to tennis players who have earned money at tournaments and/or hired an agent. Part VII highlights several critiques of the no-agent rule set forth by various law journals. Part VIII explores the general contract law issues at play when a prospective professional tennis player hires an agent. Part IX highlights several court decisions that address the no-agent and other NCAA eligibility rules. Part X then discusses the follow-on policy problems resulting from the contract law conundrum created by the no-agent rule and whether the rule serves its intended purpose. Finally, part XI proposes changes to the NCAA's no-agent rule with respect to the sport of tennis.

### III. THE TENNIS "MINOR LEAGUES"

Charlottesville, Virginia, is just one of many small cities across the United States that hosts professional tennis tournaments.<sup>24</sup> The city hosts a men's tournament in October and a women's event in April.<sup>25</sup> These tournaments are part of a "circuit" of tournaments that occur across the United States and around the world literally twelve months out of the year.<sup>26</sup> The United States Tennis Association (USTA) regulates the events that occur in the United States, known as the "Pro-Circuit,"<sup>27</sup> while the International Tennis Federation (ITF) sanctions all such tournaments held around the world.<sup>28</sup> Worldwide, there can be as many as ten or more of these tournaments occurring the same

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24. See generally *2019 USTA Men's Competitive Pathway Calendar*, UTSA [<https://perma.cc/ACJ7-JS6C>] (last updated June 21, 2019) [hereinafter *UTSA, 2019 Men's Calendar*] (the cities hosting men's professional tournaments in 2019 includes Norman, Oklahoma, and Champaign, Illinois); *2019 USTA Women's Competitive Pathway Calendar*, UTSA [<https://perma.cc/6Q6N-8882>] (last updated Sept. 26, 2019) [hereinafter *UTSA, 2019 Women's Calendar*] (the cities hosting women's professional tournaments in 2019 includes Midland, Michigan and Pelham, Alabama).

25. See *UTSA, 2019 Men's Calendar*, *supra* note 24, and *UTSA, 2019 Women's Calendar*, *supra* note 24, for the complete UTSA Pro Circuit men's and women's schedules.

26. U.S. TENNIS ASS'N, 2019 USTA PRO CIRCUIT PROGRAM 1, 7 (2019), [<https://perma.cc/A7TW-PNRM>] [hereinafter *UTSA PROGRAM*].

27. *Id.* at 7.

28. For the full listings of the International Tennis Federation's world-wide schedules and results, see INT'L TENNIS FED'N, [<https://perma.cc/SB5G-E3L7>] (last visited Sept. 29, 2019).

week.<sup>29</sup> These are the “minor leagues” of professional tennis. The level of the tournament is influenced by the prize money available, and the tournaments field players who generally have world rankings of 100 through 1,000 and beyond.<sup>30</sup>

While attending a tournament like the one in Charlottesville as a spectator, several things stand out. First, there are rarely any crowds and typically only a handful of fellow spectators.<sup>31</sup> Indeed, some tennis matches go on without anyone courtside watching save for the occasional coach and the player’s host family.<sup>32</sup> Many of the players stay with these host families who are members of the tournament’s tennis facility venue.<sup>33</sup> The tennis club facility hosting the tournament asks for volunteers amongst its members to house the players while they participate in the tournament as a lodging cost-saving measure to the players.<sup>34</sup>

The hallways of the indoor sections of the tennis facility are lined with players sitting on any available seats or the floor, with their tennis gear by their side, as they await their next match or practice session.<sup>35</sup> All the while, the chatter between the players often entails asking each other whether they will participate in the following week’s tournament, often a few states away, how they plan to travel to that tournament, and if they are amenable to sharing a ride.<sup>36</sup> Frugality is the watchword; there are no fancy cars, and players often avoid staying at local hotels because it is simply too expensive.<sup>37</sup> Make no mistake, this is an expensive endeavor. However, the money that is spent by the players goes to ensuring they have good equipment (their racquets), paying for coaches, funding their travel to the various tournaments, as well

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29. *Id.*

30. See generally INT’L TENNIS FED’N, *Rankings List*, ITF, [https://perma.cc/G37A-DHQW] (last updated Sept. 23, 2019).

31. David Waldstein, *The Lonely Road to Tennis Glory*, N.Y. TIMES, June 25, 2017, at D1 [hereinafter Waldstein, *The Lonely Road*].

32. See *id.*; see also David Waldstein, *Tennis’s Lowest Pro Rung Offers Little Reward, but Thousands Play On*, N.Y. TIMES, Aug. 18, 2017, at SP1 [hereinafter Waldstein, *Thousands Play On*]. The author of the present article supplements the cited descriptions of professional tennis tournaments with some of his own personal observations.

33. See Waldstein, *The Lonely Road*, *supra* note 31.

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

as paying for food—more expensive than meets the eye as these are diets of elite athletes who engage in some form of fitness or tennis training many hours a day.<sup>38</sup>

The purpose of this description is to paint a clearer, and often unseen, picture of the lives of most professional tennis players. This is not the world of elite players like Roger Federer or Serena Williams, though Roger and Serena recognizably started their careers in similar venues.<sup>39</sup> Further, this is probably not what the casual tennis fan envisions a tennis tournament would look like; all casual fans have seen is the television produced glitz and glamor of one of tennis's four "grand slams" (tennis lexicon for one of the four largest "major tournaments" in the world: Wimbledon, Roland Garros (French Open), Australian Open, and U.S. Open).<sup>40</sup> Those who only tune in to the semifinals or finals of a major tournament like Wimbledon or the U.S. Open will recognize few, if any, of the names of players at these Pro Circuit tournaments. The difference between a typical tennis tournament at the Pro Circuit level and one of the grand slams is an off-the-chart magnitude, not just in terms of prize money involved.<sup>41</sup> One who attends the U.S. Open after attending only Pro Circuit events will be overwhelmed at the Open's size, while one who has only attended grand slam events and decides to check out a Pro Circuit tournament will wonder if they are at an actual tennis tournament at all.<sup>42</sup>

Some of the players participating in Pro Circuit tournaments are chipping their way up the world rankings and some are sliding

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38. See Waldstein, *The Lonely Road*, *supra* note 31; see also ASS'N PRESS, *Slams Pay Bills for Rank-and-File Players*, N.Y. TIMES, May 28, 2016, at SP10; Doree Lewak, *These U.S. Open Tennis Pros Are Pretty Much Broke*, N.Y. POST (Aug. 26, 2017), [<https://perma.cc/D6PC-RWEB>].

39. See *generally History*, ROGER FEDERER, [<https://perma.cc/ED4M-Q58M>] (last visited Sept. 29, 2019) (listing a year-by-year history of Roger Federer's career); *Serena Williams*, WTA, [<https://perma.cc/7DND-T33R>] (last visited Sept. 29, 2019) (outlining Serena Williams's career).

40. *Grand Slam Overview*, ITFTENNIS, [<https://perma.cc/KF5D-BTMH>] (last visited Sept. 29, 2019).

41. *Compare 2019 U.S. Open Prize Money*, US OPEN, [<https://perma.cc/DP9E-9HSQ>] (the available prize money for men's and women's singles in the 2019 U.S. Open totaled \$42,860,000), with *UTSA PROGRAM*, *supra* note 26, at 46-47 (listing the prize money awarded in USTA Pro Circuit events for 2018, ranging from \$25,000 to \$100,000).

42. See *2019 U.S. Open Sets All-Time Attendance Record*, US OPEN, [<https://perma.cc/3RHQ-AF6L>] (Sept. 8, 2019) (2019 U.S. Open attendance totaled 853,227); see also Waldstein, *The Lonely Road*, *supra* note 31.

down.<sup>43</sup> A few will make a meteoric rise to the elite rankings of world tennis. Some are mid-teens who are training at elite tennis academies.<sup>44</sup> Others are collegiate players taking the opportunity to see how they measure up against the rising professionals.<sup>45</sup> Still, others may have been competitive enough to play on the big stage at one point in their careers, but this is the level at which they are able to compete: just playing for the love of the game.<sup>46</sup> Collegiate players test the waters at these tournaments to see if they want to pursue a professional career upon graduation.<sup>47</sup> Pre-collegiate players (juniors) often find themselves deciding whether to forgo college and immediately pursue the professional path.

With all the differences between the players who participate in these lower-level tournaments, there is one common denominator: while playing in these tournaments, the players generally are not making more money than they are spending on the sport, given the high costs of travel and the relatively meager tournament prize money available at this level.<sup>48</sup> Of course, that is assuming the player advances far enough in any given tournament to see a measurable fraction of that tournament's total "purse" of prize money.<sup>49</sup>

The bottom line is, this is the often unseen and tough underbelly of professional tennis. It is the rough and tumble world of tennis's minor leagues: a place where most players will not make it to the tennis elite but continue playing with the competitive fire necessary to get a chance at that level, and if for nothing else, to play for the love of the game. Players are

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43. See Waldstein, *The Lonely Road*, *supra* note 31.

44. *Tennis Program*, IMG ACAD., [https://perma.cc/9MFV-Y8KM] (last visited Sept. 29, 2019).

45. David Waldstein, *As Tennis Tries to Thin Its Pro Ranks, the College Game May Suffer*, N.Y. TIMES (May 22, 2018), [https://perma.cc/E952-4GSM] [hereinafter Waldstein, *The College Game*].

46. See Waldstein, *The Lonely Road*, *supra* note 31.

47. See Waldstein, *The College Game*, *supra* note 45.

48. See, e.g., ASS'N PRESS, *supra* note 38; Lewak, *supra* note 38; Michael Bane & Danielle Gescheit, *Rich Rewards for Those at the Top in Tennis, but What of the Rest?*, THE CONVERSATION (Jan. 18, 2015, 2:21 PM), [https://perma.cc/2L5V-6DNU]; Waldstein, *Thousands Play On*, *supra* note 32; Miguel Morales, *How the 92nd-Ranked Tennis Player in the World Earns a Comfortable Living*, FORBES (Aug. 26, 2013), [https://perma.cc/EAF2-WZYV]; Wayne A. Grove, et al., *Why So Many Tennis Players Go Pro Even Though Few Make it*, THE CONVERSATION (Jan. 4, 2018, 3:32 PM), [https://perma.cc/S2F3-9YHS].

49. See Morales, *supra* note 48.

typically ranked outside of the world's top 100, and there are few endorsements to help with expenses.<sup>50</sup> After all, who wants to invest in a player who will not even draw more than a handful of fans at any given tournament and get little to no media air time? If endorsements do exist, they are usually in the form of equipment sponsorships to, at minimum, help the players afford their tennis racquets.<sup>51</sup> Many tennis players spend an entire career playing in tennis's minor leagues, not dissimilar to baseball's minor leagues.<sup>52</sup>

#### IV. THE STORY OF TWO RISING TENNIS STARS

To show how the NCAA's no-agent rule can play a pivotal and disruptive role in the life of a tennis player going through this process, introductions are necessary for Maria Genovese (*nee* Shishkina) and Katerina Stewart. For similar, yet individually different reasons, Maria and Katerina are case studies for why the no-agent rule needs to be abolished.

Maria Genovese was a child tennis prodigy growing up in Kazakhstan.<sup>53</sup> Her coaches and parents alike knew at a young age that she was endowed with tennis talents that could launch her onto the world stage of elite tennis.<sup>54</sup> Not having the type of local training facility necessary to challenge and develop Maria's talents, her mother sold her business in Kazakhstan to accompany Maria to the IMG Academy in Bradenton, Florida.<sup>55</sup> It was certainly a risk; after all, Maria was only seven years old, but all indications pointed to her being the real deal.<sup>56</sup> By the age of eleven, she signed a scholarship deal to train at IMG Academy.<sup>57</sup> Shortly thereafter she signed a sponsorship deal with Under

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50. See Waldstein, *The Lonely Road*, *supra* note 31.

51. *See id.*

52. See Morales, *supra* note 48; Waldstein, *The Lonely Road*, *supra* note 31.

53. See, e.g., Lindsay Berra, *Future Shock*, ESPN THE MAG (June 15, 2010), [<https://perma.cc/ZX9B-MDRH>]; Telephone Interview with Maria Genovese, Student, Tyler Community College (Apr. 22, 2018); E-mail from Maria Genovese, Student, Tyler Community College, to author (Jan. 10, 2019, 15:42 EST) (on file with author).

54. See Berra, *supra* note 53.

55. Telephone Interview with Maria Genovese, *supra* note 53; see also Berra, *supra* note 53.

56. See Berra, *supra* note 53.

57. *See id.*

Armour.<sup>58</sup> Maria's junior tennis world ranking cracked the top 100 by the time she was fourteen.<sup>59</sup> It appeared the risk was destined to pay off.

However, two unfortunate and untimely wrist injuries and surgeries stifled her career.<sup>60</sup> Because of the gap in playing time to tend to the injuries, she lost her ranking, sponsors, and agents.<sup>61</sup> When she resumed play, she found it difficult to regain the footing she once had. Her ranking flat lined, and she found herself at a crossroads: whether she could afford to continue to pursue a professional career or whether, instead, she could go to college, where, despite her depressed world rankings, she still had the talent to earn a scholarship for tennis and compete at a high-level in the NCAAs.<sup>62</sup>

However, due to the NCAA's no-agent rule, it turned out Maria could not afford the collegiate route. The NCAA deemed her ineligible to compete in NCAA governed intercollegiate athletics due to her agency and sponsorship deals, in direct violation of the rule.<sup>63</sup> Even with agency, sponsorship, and partial scholarship to the IMG Academy helping with her tennis expenses up to that point, Maria did not have enough money to afford college without scholarship help.<sup>64</sup> The scholarship help she would have relied upon was an athletic scholarship to play intercollegiate tennis. So instead of pursuing a four-year degree, Maria enrolled at Tyler Junior College in Texas.<sup>65</sup> This was a far cry from where Maria and her family envisioned things would end up after uprooting from Kazakhstan and moving to the United States.<sup>66</sup>

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58. Mic Huber, *Shishkina Picking Up the Pieces*, HERALD-TRIB. (Mar. 26, 2016), [<https://perma.cc/5UGV-2JUV>].

59. Telephone Interview with Maria Genovese, *supra* note 53; Huber, *supra* note 58.

60. Huber, *supra* note 58.

61. *Id.*

62. Telephone interview with Maria Genovese, *supra* note 53.

63. *See* NCAA MANUAL, *supra* note 1.

64. Telephone interview with Maria Genovese, *supra* note 53.

65. *Id.* *See generally* Phil Hicks, *NJCAA Tennis: ASA Miami Edges TJC, Hillsborough for National Title*, TYLER MORNING TELEGRAPH (May 9, 2019), [<https://perma.cc/CJ9H-R58U>].

66. Upon completely two years at Tyler Junior College, Maria is now playing NAIA level tennis at Georgia Gwinnett College. *2019-20 Women's Tennis Roster*, GEORGIA GWINNETT GRIZZLIES, [<https://perma.cc/N8XC-G6SY>] (last visited Nov. 6, 2019).

Katerina Stewart represents a similar occasion where the no-agent rule foreclosed a collegiate tennis option. Katerina, a rising young American tennis star, was the runner-up in the Charlottesville tournament in 2015 and had skyrocketed to a world ranking of 158 that summer.<sup>67</sup> Her ranking allowed her to play in the qualifying rounds of the four biggest stages of professional tennis between 2014 and 2016: the major tournaments of Wimbledon, U.S. Open, French Open, and Australian Open.<sup>68</sup> Indeed, she was on nearly every short list of young American tennis player on the rise.<sup>69</sup>

However, not only did Katerina make the tough decision to go to college and get a degree, thus putting her promising professional career on hold for four years, she made a bold and honorable choice to join the military by enrolling in the United States Military Academy Preparatory School, a one-year program which upon successful completion leads to appointment to the four-year program at the United States Military Academy at West Point.<sup>70</sup> Not only was Katerina's professional tennis career on hold during college, but the West Point's five-year active duty service requirement upon graduation meant that she would have to put off any realistic hope of continuing her professional tennis career for a total of nine years.<sup>71</sup> Still, she would be able to fulfill her dream of serving in her country's military while at the same time competing with the Army West Point Women's Tennis Team.<sup>72</sup>

Or so she thought. While reviewing Katerina's records to determine how much playing eligibility she would have once entering the military academy's four-year program—it was initially thought she would have to sit out one year due to academic ineligibility because of the alternative, online schooling

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67. Cindy Schmerler, 'Cadet Candidate Wimbledon': A Tennis Star Enlists Her Backup Plan, N.Y. TIMES (Aug. 23, 2016), [<https://perma.cc/4J26-VD85>]; see also Rick Vach, Tennis Briefs: USTA French Wild Card Race; Florida Cup Results, USTA FLA. (May 5, 2015), [<https://perma.cc/ZM76-8R2B>].

68. Tennis Australia: Grand Slams, TENNIS, [<https://perma.cc/7SP7-WTM8>] (last visited Oct. 14, 2019).

69. See Patrick Sauer, Katerina Stewart Quit Pro Tennis for the Army, Will It Derail Her Career?, VICE (Aug. 24, 2016), [<https://perma.cc/FY9C-YXJZ>].

70. See Schmerler, *supra* note 66.

71. Your Career After West Point, WEST POINT, [<https://perma.cc/DH57-NRGJ>] (last visited Oct. 1, 2019).

72. See Schmerler, *supra* note 66.

she completed while training for tennis—West Point’s compliance office learned that Katerina’s parents had previously hired an agent to help them navigate their daughter’s promising professional career.<sup>73</sup> It was not that anyone tried to hide that information, and it was disclosed when inquired about, but it was something that Katerina and her parents did not think would matter in terms of her playing tennis at the collegiate level.<sup>74</sup> West Point’s compliance office then advised Katerina and her parents that the NCAA was very strict about the no-agent rule and even if appealed, it was a very real possibility that the NCAA would deem Katerina ineligible to compete for all four years of her Academy enrollment.<sup>75</sup>

While Katerina still wanted to serve in the military, the thought of not being able to compete in tennis for her four collegiate years before her five-year service commitment and sitting on the sidelines unable to support her fellow cadets competing in collegiate tennis was just too much.<sup>76</sup> Ultimately, she decided to disenroll from the military academy preparatory school and resume her pro career.<sup>77</sup> It was a bold move to serve her country in the first place, and perhaps Katerina could still pursue that option in the future, but it would have to be a dream deferred.

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73. Interview with Katerina Stewart, Sanchez Casel Tennis Academy, in Naples, Fla. (June 1, 2018); Interview with Army West Point Intercollegiate Athletics Compliance Office, in West Point, N.Y.; Interview with Paul Peck, Head Coach, Army West Point Women’s Tennis, in West Point, N.Y. See Steve Navaroli, *Making Return to Tennis, Katerina Stewart Finds Her Outlook Has Shifted*, LANCASTER ONLINE (Aug. 10, 2017), [<https://perma.cc/8TJ8-9PE3>] (last visited Oct. 1, 2019).

74. Interview with Katerina Stewart, *supra* note 72; see Navaroli, *supra* note 72.

75. *Id.*

76. Interview with Katerina Stewart, *supra* note 72. Author’s note: Regarding Katerina Stewart’s decision upon hearing she would likely be ineligible to play college tennis: West Point champions the notion that its admitted cadets show incredible potential for increased potential in four “pillars”: military, academic, physical, and character. A well-rounded, admitted cadet would ideally show great potential in all four pillars, yet almost every cadet can point to one or two of those pillars that is their “strong suit,” which most likely catapulted their overall applicant file to an offer for admission. For Katerina, that strong suit was her athletic prowess on the tennis court, proving her propensity for potential in the physical pillar, having proved she could eventually compete at a very high professional level but opting for college. For the Academy, Katerina’s strongest contribution to the Corps of Cadets would be in the physical pillar through her athletic abilities in the sport of tennis. However, the NCAA no-agent rule disqualified her from intercollegiate competition rendering her unable to participate in the sport that made her stand out in the physical pillar.

77. See Navaroli, *supra* note 72.

## V. BREAK POINT: THE ISSUE

This leads to the crux of the problem: the no-agent rule profoundly affects the decision-making process of some tennis players aspiring to compete at high levels and disqualifies others who were not aware of the prohibition. The simplest question is, is it a fair rule? From a legal perspective, is there some type of recourse that could have changed the outcomes for these two athletes or others? Neither Maria or Katerina, nor their parents, were acting nefariously when hiring agents. Nor were the parents trying to sabotage the career options of their children. To the contrary, these parents were acting in their children's best interests. Their children's coaches and trainers advised them that their daughters possessed pro-level talents; the players themselves wanted to continue to compete and seek the next level; and the parents were new to this process and needed help navigating the unfamiliar waters of a child's budding pro-tennis career.<sup>78</sup> Additionally, the parents wanted to ensure their children had a professional voice representing them to help stave off any attempts to exploit their child's talents.<sup>79</sup>

Did these families know the agency agreement would foreclose the potential option of their child competing in NCAA athletics? Was that eventuality even on their radar screen? Did their children, the beneficiaries of the agency relationship, know it could foreclose a tennis playing option down the road? Could the child even be expected to have the maturity and life experience to make the agency agreement decision or draw the unforeseen conclusions that their parents were unable to draw?

The answer to all these questions is obviously no,<sup>80</sup> which sets up the questions this Article attempts to answer. Is there a viable legal recourse for these families and should there be a policy change to avoid putting future unwitting tennis players in the unenviable position of being deemed ineligible for collegiate competition based on their or their families' benign actions years ago? The legal question sets up a classic contract law discussion. The policy question then explores whether the potential legal pitfalls of the rule beg for the rule's elimination. This discussion

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78. See generally Schmerler, *supra* note 66; Berra, *supra* note 53.

79. See Schmerler, *supra* note 66; Berra, *supra* note 53.

80. *Id.*

is informed by the analysis of whether the goal of preserving amateurism in the world of tennis is really served by the no-agent rule.

#### **IV. THE CODE: RELEVANT NCAA RULES REGULATING PROFESSIONAL ACTIVITIES**

An examination of the NCAA bylaws regarding collegiate athlete eligibility in the context of sports agents requires a look at how the NCAA defines an agent:

An agent is any individual who, directly or indirectly:  
(a) Represents or attempts to represent an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or (b) Seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete's enrollment at an educational institution or from a student-athlete's potential earnings as a professional athlete. An agent may include, but is not limited to, a certified contract advisor, financial advisor, marketing representative, brand manager or anyone who is employed or associated with such persons.<sup>81</sup>

Further, the NCAA no-agent rule states the following:

An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.<sup>82</sup>

Note that this no-agent rule does not require one to have a written contract with or make any payments to an agent to result in violation of the rule. Immediately following the general rule is Bylaw 12.3.1.1, a recently revised exception that accommodates high school agency contracts by baseball and men's ice hockey players:

In baseball and men's ice hockey, prior to full-time collegiate enrollment, an individual who is drafted by a

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81. NCAA MANUAL, *supra* note 1, at Bylaw 12.02.1, at 61.

82. NCAA MANUAL, *supra* note 1.

professional baseball or men's ice hockey team may be represented by an agent or attorney during contract negotiations. The individual may not receive benefits (other than representation) from the agent or attorney and must pay the going rate for the representation. If the individual does not sign a contract with the professional team, the agreement for representation with the agent or attorney must be terminated prior to full-time collegiate enrollment.<sup>83</sup>

Bylaw 12.1.2.4, "Exceptions to Amateurism Rule," also provides accommodations for tennis players, but the exception involves acceptance of prize money at tournaments and does not relieve these players from NCAA athletic disqualification due to hiring an agent:

In tennis, prior to full-time collegiate enrollment, an individual may accept up to \$10,000 per calendar year in prize money based on his or her place finish or performance in athletics events. Such prize money may be provided only by the sponsor of an event in which the individual participates. Once the individual has accepted \$10,000 in prize money in a particular year, he or she may receive additional prize money on a per-event basis, provided such prize money does not exceed the individual's actual and necessary expenses for participation in the event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the individual (e.g., coach's fees or expenses, parent's expenses).<sup>84</sup>

In tennis, after initial full-time collegiate enrollment, an individual may accept prize money based on his or her place finish or performance in an athletics event. Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the individual (e.g., coach's fees or expenses, family member's expenses).<sup>85</sup>

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83. *Id.* at Bylaw 12.3.1.1.

84. *Id.* at Bylaw 12.1.2.4.2.1, at 66.

85. *Id.* at Bylaw 12.1.2.4.2.2.

Taking a step back and examining what the no-agent rule attempts to achieve requires a look at one of the “dominant” principles, Principle 2.9, the NCAA Manual highlights:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>86</sup>

Of the “Commitments to the Division I Collegiate Model,” this no-agent rule most closely relates to “The Commitment to Amateurism”:

Member institutions shall conduct their athletics programs for students who choose to participate in intercollegiate athletics as a part of their educational experience and in accordance with NCAA bylaws, thus maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model.<sup>87</sup>

This is followed by Article 12, “Amateurism and Athletics Eligibility,” which starts off with the following section with Bylaw 12.01, “General Principles.”

12.01.1 Eligibility for Intercollegiate Athletics. Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.

12.01.2 Clear Line of Demarcation. Member institutions’ athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.

12.01.3 “Individual” vs. “Student-Athlete.” NCAA amateur status may be lost as a result of activities prior to enrollment in college. If NCAA rules specify that an “individual” may or may not participate in certain activities, this term refers to a person prior to and after enrollment in a member institution. If NCAA rules specify a “student-

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86. *Id.* at Principle 2.9, at 4.

87. NCAA MANUAL, *supra* note 1, at xii.

athlete,” the legislation applies only to that person’s activities after enrollment.<sup>88</sup>

Few would complain about the foregoing NCAA’s commitment to amateurism in intercollegiate athletics and its rules to ensure common understanding of what defines an amateur and what does not. Preserving amateurism in intercollegiate athletics is what draws many to watch and support it. Collegiate sports is the last bastion of pure amateur sports before a few of these athletes make the jump to the professional ranks. The NCAA’s commitment to amateurism allows most collegiate athletes to compete on a field that is not filled with paid athletes.

However, in light of a typical career path of a tennis player with talents to compete at the highest collegiate level, is the no-agent rule legally problematic and an unnecessary obstacle? Can the rule be squared with the exceptions provided to tennis regarding prize money and baseball and hockey regarding agents and attorneys? This analysis will begin with a basic survey of contract law implications of a child-athlete’s agreement with an agent, followed by a policy analysis in light of the highlighted legal challenges. However, it is helpful to begin with a review of other writings on the topic.

## VII. CRITICAL REVIEWS OF NCAA ELIGIBILITY RULES

Several law journal articles have critiqued the no-agent rule in similar contexts as this Article, five of which are highlighted below. All of them take various positions in their criticisms, and most of them focus on the rule’s impact on a particular sport. In terms of court case precedent, three or four of the same cases repeatedly show up in most of these articles. Notably, it is the *Oliver v. NCAA* decision, discussed in more detail later in this Article, that is most frequently mentioned.<sup>89</sup>

Any serious inquiry into the NCAA’s no-agent rule must start with Professor Porto’s article, *What Recruiter’s Don’t Tell Athletes and Athletes Don’t Think to Ask: A Critique of the*

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88. *Id.* at Bylaw 12.01, at 61.

89. *Oliver v. NCAA*, 920 N.E. 2d 203 (Ohio C.P. Erie Cty. 2009).

*NCAA's Nonacademic Eligibility Rules.*<sup>90</sup> In addition to reviewing other NCAA Manual rules such as the “National Letter of Intent,” the “Transfer Rules,” and the “No Draft Rule,” the article provides a very plainspoken introduction to the “No-Agent Rule.”<sup>91</sup> As the title suggests, the article would serve as a good reference for any college-bound athletes whose talents are inspiring them to test the waters for a potential professional career. The article not only reviews the no-agent rule’s components—some of which are not intuitive to the casual sports fan—but it also discusses how the NCAA interprets the rule.<sup>92</sup> Also embedded in the article’s title is the reality that many talented young athletes who tread precariously close to NCAA rule violations are simply unaware of some of the traps for unwary that are highlighted in this Article.

Another good primer for learning about the no-agent and related NCAA eligibility rules is Professor Richard Karcher’s article, *The NCAA’s Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*<sup>93</sup> This Article is the one of four discussed in this comment that evaluates the no-agent rule’s impact on baseball.<sup>94</sup> However, Professor Karcher’s article is the only one that predates the *Oliver* decision.<sup>95</sup> Professor Karcher’s article begins with a thorough but general survey of the rule and poses the question, “who is the NCAA trying to protect?”<sup>96</sup> In doing so, Professor Karcher tees up the conundrum of the rule as it applies to all sports: if the NCAA is instituting the rule to protect athletes against exploitation, is the rule having the unintended impact of dissuading athletes from seeking assistance from

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90. See generally Brian L. Porto, *What Recruiter’s Don’t Tell Athletes and Athletes Don’t Think to Ask: A Critique of the NCAA’s Nonacademic Eligibility Rules*, 13 VA. SPORTS & ENT. L.J. 240, 244 (2014).

91. See *id.*

92. See generally *id.* at 259-65.

93. Richard Karcher, *The NCAA’s Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215 (2005).

94. See *id.* at 216; Busby, *supra* note 6, at 140; Lockhart, *supra* note 6, at 179-80; Stross, *supra* note 6, at 170.

95. See Karcher, *supra* note 92, at 216; *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio C.P. Erie Cnty. 2009).

96. Karcher, *supra* note 92, at 215-16.

available resources that can help shield them from such exploitation?<sup>97</sup>

In *The NCAA's "No-Agent" Rule: Blurring Amateurism*, Matthew Stross also thoroughly surveys the no-agent rule and its role in the NCAA bylaws.<sup>98</sup> He makes the case that the by-laws, in general, have already so badly blurred the lines between professionalism and amateurism that the no-agent rule is practically meaningless.<sup>99</sup> His theme is that the rule does not advance the cause of preserving amateurism in intercollegiate athletics.<sup>100</sup> While striking a dubious tone as to whether NCAA athletics are truly non-professional, he analyzes the issue through the unique lens of baseball and how high school players must be especially cautious of the no-agent rule when negotiating with a professional team.<sup>101</sup>

Continuing the theme of how the no-agent rule impacts baseball, T. Matthew Lockhart takes a closer look at the *Oliver* ruling and analyzes what it portends for the future in *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism."*<sup>102</sup> Lockhart also uses baseball as a case study, not coincidentally since *Oliver* decision involved a major league's baseball negotiations with a high school baseball player.<sup>103</sup> From the contract angle, Lockhart finds support in *Oliver* for the theory that the prospective NCAA athlete is a third-party beneficiary of the "contract" between the NCAA and its member colleges and universities—the contract being the NCAA rules that regulate the athletic programs at member schools.<sup>104</sup> As such, the prospective NCAA student athlete has standing to challenge the NCAA rules and would prevail if the court finds the rules arbitrary and capricious.<sup>105</sup> Lockhart discusses how the *Oliver* court found the no-agent rule to be arbitrary and capricious, ruling in favor of restoring the baseball player's collegiate eligibility.<sup>106</sup>

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97. *See id.*

98. *See generally* Stross, *supra* note 6, at 170.

99. *See id.* at 180-83.

100. *See id.* at 183-87.

101. *See id.* at 183-84.

102. *See generally* Lockhart, *supra* note 6.

103. *See id.* at 175-80.

104. *See id.* at 188-89, 191.

105. *See id.* at 188-89.

106. *See id.* at 193.

In *Playing for Love: Why the NCAA Rules Must Require a Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, J. Winston Busby focuses more generally on NCAA eligibility rules and uses football as an example in arguing that a prospective student-athlete should not be penalized for the NCAA violations or otherwise illegal activities of those acting at his or her behest if the athlete was not aware of these activities.<sup>107</sup> The issue involved Cam Newton's collegiate eligibility when it was determined his father had engaged in a pay-for-play marketing scheme in which he allegedly solicited money from boosters in exchange for his son's commitment to play football at Auburn University.<sup>108</sup> Busby surveys the NCAA eligibility process, highlighting the "restitution rule," through which the NCAA holds member schools accountable, and the "reinstatement" process, which deals with the eligibility of individual athletes.<sup>109</sup> While this Article acknowledges that the challengers to NCAA rules have often been unsuccessful in courts on various theories, such as antitrust arguments, it ultimately concludes that the rules do not serve the individual athlete's best interest when they penalize them for transgressions of which they had no knowledge or participation.<sup>110</sup>

An interesting postscript to the review of these articles, particularly the ones focused on baseball, is that the NCAA bylaws instituted a change after their publication. Bylaw 12.3.1.1, titled "Exception—Baseball and Men's Ice Hockey—Prior to Full-Time Collegiate Enrollment," allows baseball players to be represented by an agent or a lawyer during contract negotiations without losing their collegiate sports eligibility, so long as they, among other requirements, terminate the agency relationship prior to college enrollment.<sup>111</sup> This rule was not present in the 2015-16 NCAA Manual, but it was included in all future versions.<sup>112</sup> Without knowing exactly what precipitated

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107. J. Winston Busby, *Playing for Love: Why the NCAA Rules Must Require a Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135 (2012).

108. *See id.* at 137-38.

109. *See id.* at 150, 157-58.

110. *See id.* at 178-80.

111. NCAA MANUAL, *supra* note 1, at Bylaw 12.3.1.1, at 71.

112. NAT'L COLLEGIATE ATHLETIC ASS'N, 2016-2017 NCAA DIVISION I MANUAL, Bylaw 12.3.1.1, at 63 (2016); NAT'L COLLEGIATE ATHLETIC ASS'N, 2017-2018 NCAA

the addition of this rule, it is interesting to note that the new exception postdated all five of the scholarly articles reviewed above and would fully permit the agent/attorney involvement that caused the rule violation in the *Oliver* case.<sup>113</sup>

This Article builds on the common themes of these and other articles and attempts to critique the no agent rule via new avenues. This Article does not enter the fray of accusing the NCAA of being a money-making enterprise to the extent it is incapable of preserving amateurism, much like the Stross article reads.<sup>114</sup> However, it follows Stross's theme that amateurism at the NCAA is indeed blurred, and more importantly, that a draconian rule like the no-agent rule no more erodes amateur status on the tennis courts than some of the other quasi-professional accommodations the NCAA rules makes for the sport. Similar to the Lockhart article analysis,<sup>115</sup> this article looks at the no-agent rule through the lens of contract law but adds a discussion of the third-party beneficiary concept from a different angle—that in which the prospective NCAA student athlete is a third-party beneficiary in the “contract” between a parent and an agent. Continuing along the contract theme, this article also overlays the no-agent rule problem with the contract concepts of unconscionability and liberty to enter a contract.

## VIII. THE RALLY: THREE CONTRACT LAW THEORIES

### A. Voiding the Agency Agreement?

A starting point in the contract law analysis is determining whether the prospective student-athlete has any chance of retroactively voiding their own or their parents' agreement with the agent such that it is decided by the courts (and hopefully the NCAA) that the contract never existed. In contract law parlance, a minor's action of voiding a contract they entered is known as

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DIVISION I MANUAL, 71 (2017); NCAA MANUAL, *supra* note 1, at Bylaw 12.3.1.1; NCAA MANUAL, 2019-2020, *supra* note 7, at Bylaw 12.3.1.1, at 72 (2019).

113. *See infra* notes 200-01 and accompanying text.

114. *See generally* Stross, *supra* note 6.

115. *See generally* Lockhart, *supra* note 6.

“disaffirmance,” whereas if an adult wants to negate a contract they entered, it is called “rescission.”<sup>116</sup>

If it is the prospective NCAA student-athlete tennis player who actually signed the contract, the questions are whether a “minor”—a person who has not reached the age of “majority,”<sup>117</sup> (eighteen in most states)<sup>118</sup>—can legally enter contracts and whether they can get out of contracts they have once entered. Contrary to a commonly held belief, a minor can legally enter into enforceable contracts.<sup>119</sup> However, the contracts are voidable at their option, meaning that the minor, while still underage, may choose to revoke, or “disaffirm,” that contract.<sup>120</sup> Courts have generally honored the request of minors who later decide to void their contracts, so long as the contract is not for “necessities.”<sup>121</sup> Voiding these contracts is only at the option for the minor and not for the contracting adult.<sup>122</sup>

However, for the young tennis player, the idea of backing out of the contract with their agent is likely a non-sequitur. First,

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116. *See* *Harvey v. Hadfield*, 372 P.2d 985, 986 (Utah 1962) (“Since time immemorial courts have quite generally recognized the justice and propriety of refusing to enforce contracts against minors, except for necessities. It is fair to assume that because of their immaturity they may lack the judgment, experience and will power which they should have to bind themselves to what may turn out to be burdensome and long-lasting obligations. Consequently, courts are properly solicitous of their rights and afford them protection from being taken advantage of by designing persons, and from their own imprudent acts, by allowing them to disaffirm contracts entered into during minority which upon more mature reflection they conclude are undesirable.”)

117. 42 AM. JUR. 2D *Infants* § 6, Westlaw (database updated Aug. 2019).

118. *See, e.g.*, CAL. FAM. CODE § 6500 (West 1992); N.Y. DOM. REL. LAW § 2 (McKinney 1974); 23 PA. CONS. STAT. § 5101 (1990); TENN. CODE ANN. § 1-3-105 (2017).

119. *Harvey*, 372 P.2d at 986.

120. *See id.*

121. *See* *Gastonia Personnel Corp. v. Rogers*, 172 S.E.2d 19, 20 (N.C. 1970). There, Chief Justice Bobbitt quoted the following (in the original language) with approval:

An early commentary on the common law, after the general statement that contracts made by persons (infants) before attaining the age of twenty-one “may be avoided,” sets forth “some exceptions out of this generality,” to wit: “An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards.”

*Id.* at 20 (quoting COKE ON LITTLETON 172 (13th ed. 1788)); *see also* *Valencia v. White*, 654 P.2d 287, 288-89 (Ariz. Ct. App. 1982); Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”: From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 489 (1994) (“This narrow definition usually included ‘board, room, clothing, medical needs and education.’” (quoting *Valencia*, 654 P.2d at 289)).

122. *See* DiMatteo, *supra* note 120, at 487.

the tennis player is probably not focused on what might happen if their tennis career fails to progress as they had hoped. That is, the consideration of whether the agency agreement they or their parents just entered will imperil a collegiate tennis career is probably not first and foremost on their mind.<sup>123</sup> It follows that if the legal status of entering such a contract is not on the young player's mind, neither is the question whether there is anything they can do if they later decide the contract was not a good idea.

Similarly, the adult parents of the player who enter the agency contract are also unlikely to consider those worst-case scenarios. The "here and now" for both them and their child is trying to manage the career of a child with professional talents and aspirations. Only if the parents were dissatisfied with the product they received in the agency agreement, or if they thought it was not worth their investment, would they consider backing out of the deal.<sup>124</sup> Finally, the agents, like many businesses, are likely reticent to even allow minors to enter into these contracts to avoid the possibility of having a contract voided at the option of the minor.<sup>125</sup>

However, the question of whether a minor tennis player can void an agency agreement is all predicated on the assumption such action would make a difference to the NCAA. As a private organization, the NCAA typically enjoys significant deference from the courts.<sup>126</sup> Further, their bylaws related to the interplay of agents and prospective NCAA student-athletes appear straightforward. That is, "An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport" appears to be irrespective of whether the contract is later determined to be legally voided.<sup>127</sup>

But what if it is the more likely scenario of the parent signing the agency agreement? Would the minor tennis player have any

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123. See generally Lockhart, *supra* note 6, at 192-95.

124. *Id.*

125. I.B. *ex rel.* Fife v. Facebook, Inc., 905 F. Supp. 2d 989, 1000 (N.D. Cal. 2012) ("It is the policy of the law to . . . discourage adults from contracting with an infant.").

126. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 119 (2008) (describing years of judicial deference toward the NCAA).

127. NCAA MANUAL, *supra* note 1.

legal recourse after the agency agreement relationship with their parents has ended and the tennis player realizes the consequence of not being able to play professional tennis? That is, what if either Maria Genovese or Katerina Stewart or anyone similarly situated are on the precipice of signing to play tennis at the NCAA level and has third-person buyer's remorse of their parent's decision to enter that agency agreement? This question requires a discussion of the contract concept of third-party beneficiaries.

The previously cited Lockhart and Stross articles discuss the concept of third-party beneficiary status in the construct of the prospective collegiate athlete being the third-party beneficiary to the "contract" between the NCAA and its member school.<sup>128</sup> However, they do not examine the concept from the perspective of the minor athlete's status vis-à-vis their parent's contract with an agent. For starters, a minor tennis player's role in a contract between a parent and an agent is as close to the textbook definition of third-party beneficiary status as one could get.<sup>129</sup> The benefit to the parents entering the agency agreement is that they get advice and guidance on how to best navigate the uncharted waters of their child's promising professional tennis career.<sup>130</sup> They also get the benefits of the agent's legwork, which includes actively managing the player's career, helping determine which tournaments they should enter, and otherwise promoting and marketing the player's brand.<sup>131</sup> From the minor player's perspective, they are the party who reaps the most tangible benefits of these efforts, and indeed they are the entire reason the

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128. See Lockhart, *supra* note 6, at 188-89, 191; Stross, *supra* note 6, at 174, 179.

129. For example, A and B enter into an agreement whereby A agrees to give valuable consideration to C, whereas A is the promisor, B is the promisee, and C is the beneficiary of the promise. Third-party beneficiary law defines the rights of C to enforce the provisions of the contract between A and B. See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 774, at 727 (1952). See also *Gifford v. Corrigan*, 22 N.E. 756, 758 (N.Y. 1889) (recovery by third-party beneficiary is based on equities of the transaction); *Lawrence v. Fox*, 20 N.Y. 268, 269-75 (1859) (C may enforce contract where A paid \$300 for B's promise to pay C); *Meyerson v. New Idea Hosiery Co.*, 115 So. 94, 95 (Ala. 1927); *Chung Kee v. Davidson*, 36 P. 519, 521 (Cal. 1894); *Dean v. Walker*, 107 Ill. 540, 545 (1882); *McNamee v. Withers*, 37 Md. 171, 179 (Md. 1872); *Kaufman v. U.S. Nat'l Bank*, 48 N.W. 738, 739 (Neb. 1891); *Feldman v. McGuire*, 55 P. 872, 873 (Or. 1899); *Urquhart v. Brayton*, 12 R.I. 169, 171-72 (1878); *Tweeddale v. Tweeddale*, 93 N.W. 440, 443 (Wis. 1903).

130. See Ahiza Garcia, *So You Want to Be a Sports Agent? Here's What You Should Know*, CNN MONEY (May 26, 2018), [<https://perma.cc/NL9N-KANG>].

131. Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91, 91-92 (2010).

deal was entered. It is their tennis career that is managed and promoted much like one would expect a sports agent to do.

Could, then, a third-party beneficiary minor use their disaffirmance power to retroactively void a contract their parents entered when they were a minor? That remedy is probably not likely for a couple of reasons. First, the question of third-party beneficiary rights usually turns on whether the third party could sue the principal of a contract for non-performance of their end of the bargain.<sup>132</sup> An example situation in the tennis agency realm is when the minor tennis player feels the agent is not upholding his end of the deal, and the minor's parents are unable or unwilling to force this issue. In that situation, the legal question is whether the third-party's interests in the contract have "vested."<sup>133</sup> If those interests have vested, the minor tennis player would have standing to enforce the contract; if they have not, then the minor would not have standing.<sup>134</sup> However, it is unlikely the courts would entertain a case where the minor third-party beneficiary can disaffirm the contract because, as a third-party beneficiary, they are not actually considered a party to the contract, from a legal perspective.<sup>135</sup>

The second problem is that even if it were the parents who signed the contract and they wanted to rescind the contract, a retroactive rescission would not likely be allowed because, in most of these situations, the contractual duties are no longer present; that is the contractual duties for both parties have been

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132. See RESTATEMENT (SECOND) OF CONTRACTS § 304 (AM. LAW INST. 1981).

133. There are three classes of third-party beneficiaries: "(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary; (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds; (c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist." RESTATEMENT (FIRST) OF CONTRACTS § 133 (AM. LAW INST. 1932).

134. See *Gifford*, 22 N.E. at 757.

135. The Restatement's defining of the types of third-party beneficiaries is to help discern whether the third-party, who is not a party to the contract and thus ordinarily not able to demand enforcement of it, can nonetheless do so if they are the correct type of third-party beneficiary. See RESTATEMENT (FIRST) OF CONTRACTS § 133.

satisfied, or “discharged.”<sup>136</sup> If that is the case, then the contract does not technically exist anymore.<sup>137</sup> Thus, it is extremely difficult to rescind a contract for which both parties have already fulfilled their obligations. Most states have time periods by which a party or parties can rescind the contract, and if both parties have fulfilled their contractual duties, the most likely route to rescind would be if both parties mutually agree to rescind.<sup>138</sup> For a player or parents who have buyer’s remorse long after the contract is entered, it is unlikely the agent will agree to give their money back and even more unlikely a court could find a mutually acceptable way to make both parties whole.

From the NCAA’s perspective, the analysis of whether it is possible for a sports agency contract to be retroactively rescinded by the parent or minor may be for naught. That is, even if the parties were to mutually agree to rescind the contract or if a court ordered rescission as a contract dispute remedy, would that matter to the NCAA? The NCAA’s directive seems quite clear: “if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.”<sup>139</sup> Thus, even if a court ordered rescission of a contract and put the world on notice that the contract once entered by the two parties is no longer, would the NCAA rule, as written, still be violated?

As a private organization, the NCAA enjoys the advantage of autonomy, operated separately from publicly funded universities, as well as the corresponding deference by the courts.<sup>140</sup> Thus, unless a court decision or order directly relates to a contract the NCAA entered into, which is not the case here,

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136. RESTATEMENT (SECOND) OF CONTRACTS § 235.

137. *See id.*

138. *See generally* New York Tel. Co. v. Jamestown Tel. Corp., 26 N.E.2d 295, 297-98 (N.Y. 1940); Capstone Enters. v. Cty. of Westchester, 691 N.Y.S.2d 574 (N.Y. App. Div. 1999); Adrian Family Partners v. ExxonMobil Corp., 878 N.Y.S.2d 140, 142 (N.Y. App. Div. 2009) (citing New York state interpretation of the right to rescind a contract and the difficulty in doing so 1) after the contract benefits have been accepted, and 2) if the intent to rescind is not made clear in a prompt manner: “[A] plaintiff waive[s] its right to seek rescission of the . . . agreement by failing to promptly seek rescission after accepting the benefits of that agreement”). *See also* Megan Bittakis, *The Time Should Begin to Run When the Deed Is Done: A Proposed Solution to Problems in Applying Limitations Periods to the Rescission of Contracts*, 44 U.S.F. L. REV. 755, 759-60 (2010).

139. NCAA MANUAL, *supra* note 1.

140. *See* Mitten & Davis, *supra* note 125, at 119.

the NCAA is not directly impacted by the legal ramifications of the court ruling and could decide for itself whether to change its stance because of a prospective collegiate athlete's previous, but now voided, agency relationship.<sup>141</sup> Based on the NCAA's articulated commitment to amateurism and their clearly worded prohibition of an agreement with an agent,<sup>142</sup> valid contract or not, it is unlikely such a scenario would provide a prospective NCAA student athlete relief in the eyes of the NCAA.

The foregoing illustrates why an effort by a prospective collegiate athlete to dissociate from a previous agent arrangement presents more potential pitfalls than opportunities for success. The argument that the no-agent rule fails under an arbitrary and capricious standard seems more destined for success.

The better approach for finding a legal remedy if a prospective NCAA student-athlete has fallen victim to the no-agent rule is to explore the third-party beneficiary relationship theory in the same manner as the previous writings and court cases.<sup>143</sup> That is, the prospective NCAA student-athlete is a third-party beneficiary of the "contract" between the NCAA and the member schools it regulates. This would open the door to achieving standing, or the legal status of being able to challenge the rule in our court system.<sup>144</sup> Once standing is obtained, the three best remedies to explore would be obtaining a legal determination that the no-agent rule: (1) is arbitrary and capricious, (2) is unconscionable, or (3) improperly interferes with the liberty to contract.<sup>145</sup>

### B. An Arbitrary and Capricious Rule?

The NCAA bylaws, including the no-agent rule, give the NCAA an extremely lopsided bargaining position when it comes to a collegiate athlete's eligibility.<sup>146</sup> The NCAA sets the terms

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141. See NCAA MANUAL, *supra* note 1.

142. *Id.* at xii & 71.

143. See Lockhart, *supra* note 6, at 188-91; Stross, *supra* note 6, at 174, 179.

144. See Lockhart, *supra* note 6, at 188-89 (discussing the theory under which a student-athlete could establish standing as a third-party beneficiary in the contract between the NCAA and its member schools).

145. See *id.* at 189; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981); Mitten & Davis, *supra* note 125, at 120.

146. See Stross, *supra* note 6, at 178, 190.

for intercollegiate athletic teams and, as a private organization, the NCAA can set the rules as it wishes so long as they do not otherwise violate the law.<sup>147</sup> Thus, for the prospective collegiate athlete, it is a take-it-or-leave-it proposition. That is, if they want to compete at the Division I level, they must abide by the NCAA's rules. According to the NCAA, the necessity for these rules is to preserve the demarcation between collegiate and professional athletics.<sup>148</sup>

Enter the arbitrary and capricious contract theory.<sup>149</sup> Under an arbitrary and capricious analysis, one could first look at whether the stated goals of the NCAA necessitate the enforcement of its rules.<sup>150</sup> The goal of “retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports”<sup>151</sup> is the obvious thrust of many of these rules. At first glance, the no-agent rule seems to correlate well with the NCAA's principle that “student-athletes should be protected from exploitation by professional and commercial enterprises.”<sup>152</sup> After all, what universities and colleges would want agents lurking about campus to solicit contract deals with elite college athletes?

But the no-agent rule reaches deeper than that and regulates the contractual activities of athletes before they even set foot on campus.<sup>153</sup> Further, the no-agent rule is not seemingly attempting to disqualify prospective NCAA student-athletes who have engaged in criminal or other morally repugnant activity prior to playing sports for their college in a way that some university

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147. See Rachel Blechman, Student Challenges to Academic Decisions (unpublished manuscript) (on file with Stetson University College of Law) (citing *Sharick v. Se. U. of Health Scis., Inc.*, 780 So.2d 136 (Fla. Dist. Ct. App. 2000)) (supporting the concept that courts normally do not substitute their judgment for the professional judgment of academic institutions, unless there is bad faith or an arbitrary or capricious judgment rendered by the institution) [<https://perma.cc/9H3Z-NUQH>].

148. See NCAA MANUAL, *supra* note 1, at xii.

149. See Lockhart, *supra* note 6, at 188, n.85 (citing the doubts expressed in Mitten & Davis, *supra* note 125, at 121, about success in challenging NCAA eligibility rules given these challenges' lack of success in the courts, but noting that article was written prior to the *Oliver* decision).

150. See Busby, *supra* note 6, at 163 (quoting *Oliver v. NCAA*, 920 N.E.2d 203, 214 (Ohio C.P. Erie Cnty. 2009)) (stating that “the NCAA's amateurism rules furthered an ‘unreliable (capricious) and illogical (arbitrary)’ purpose”).

151. NCAA MANUAL, *supra* note 1, Const. art. 1.3.1, at 1.

152. *Id.* at Principle 2.9, at 4.

153. See Lockhart, *supra* note 6, at 176-77.

admissions departments might take issue to a prospective student's prior illegal drug use. Signing an agency agreement is a completely legal action and a prudent one. It is merely the athlete or parent exercising their right to contract a mutually beneficial service.<sup>154</sup>

In terms of tennis, it is dubious at best, whether the no-agent rule serves any of the NCAA's stated purposes. First, one needs to look no further than the exceptions the bylaws grant to tennis for players' acceptance of prize money at tournaments, both before and while competing in intercollegiate tennis.<sup>155</sup> While the bylaws set limits on the prize amount that can be pocketed to retain eligibility, this exception is an obvious accommodation to the reality that collegiate-caliber tennis players in their mid-teens are often entering and advancing in tournaments that hand out cash prize money.<sup>156</sup> The general formula is that if a tennis player's prize winnings do not exceed their expenses for the tournaments they enter, their collegiate eligibility is preserved.<sup>157</sup> This is in addition to the first \$10,000 of prize money per year the player can keep, unconditionally.<sup>158</sup> While the expenses portion of this equation cannot include anything other than the individual player's expenses,<sup>159</sup> such as expenses incurred by coaches or parents, this is not a difficult criterion to meet. Most players outside of the top 100 players in the world are not making more money than they are spending, given the expense of travel, lodging, and food at the various tournaments around the United States and worldwide.<sup>160</sup> Bottom line, it is a rare occasion where a tennis player who has never cracked the world top 100 in ranking would be deemed ineligible for collegiate play based on this rule alone.<sup>161</sup>

The foregoing analysis illustrates how the no-agent rule fails to even have a distant effect on the amateur status of a prospective student-athlete tennis player. As previously mentioned, tennis

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154. See Stross, *supra* note 6, at 189-90.

155. See NCAA MANUAL, *supra* note 1, at Bylaw 12.1.2.4.2, at 66.

156. See *id.*; see also 2019 ITF MEN'S & WOMEN'S REGULATIONS, *supra* note 19, at 14, 52, 73, 117-18.

157. NCAA MANUAL, *supra* note 1, at Bylaw 12.1.2.4.2.1, at 66.

158. *Id.*

159. *Id.*

160. See *supra* notes 35-38 and accompanying text.

161. See Waldstein, *Thousands Play On*, *supra* note 32.

players with the skills and talents to compete at either the collegiate or professional level are competing in tournaments at a young age.<sup>162</sup> They do so to improve their skills enough to remain competitive for collegiate scholarships, should they choose the collegiate route, and to be able to compete against other professionals, should they decide to forgo college. Indeed, the tournaments themselves are good litmus tests for the tennis player to determine whether they have the right stuff to compete in either elite collegiate tennis or in the professional ranks. The players are also winning cash-prize earnings in these tournaments, depending on how far they advance.<sup>163</sup> Bottom line, college-bound tennis players are playing for compensation, just like professionals, prior to and while competing in intercollegiate tennis. According to the NCAA bylaws, this professional activity does not disqualify a tennis player from NCAA athletics so long as the money earned is within the limits prescribed.<sup>164</sup>

To summarize, if as discussed above, the no-agent rule fails to even indirectly address the purpose and achieve the results for which the rule has been promulgated and enforced, then it is easy to see how a court might conclude the rule is arbitrary and capricious. In the *Oliver* case, Judge Tone opined, “Bylaw 12.3.2.1 is unreliable (capricious) and illogical (arbitrary) and indeed stifles what attorneys are trained and retained to do.”<sup>165</sup> Within the context of tennis, the foregoing analysis paints a strong case for how the rule is unreliable and illogical in the NCAA’s efforts preserve the amateur nature of collegiate athletics.

### C. An Unconscionable Result?

The third-party beneficiary analysis can also lead us to a discussion of contract unconscionability. That is, the prospective tennis player who has violated the no-agent rule could make a case that the no-agent rule, itself, yields unconscionable contract results. A court would deem a contract unconscionable if it is so one-sided that the unfairness to one of the parties is beyond what

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162. See *supra* note 19 and accompanying text.

163. See *supra* notes 154-55 and accompanying text.

164. NCAA MANUAL, *supra* note 1, Bylaw 12.1.2.4.2, at 66.

165. *Oliver v. NCAA*, 920 N.E.2d 203, 214 (Ohio Ct. Com. Pl. 2009).

the court would deem as fair dealing.<sup>166</sup> There are two types of unconscionability for contracts: procedural and substantive.<sup>167</sup> A court may find a contract is procedurally unconscionable when there are such inequalities in age, maturity, or intelligence between the contracting parties that it gives them vastly different relative bargaining power.<sup>168</sup> Substantive unconscionability occurs when a court determines that the terms of the contract are so overly harsh or one-sided that the most equitable remedy is not to enforce it.<sup>169</sup>

In the case of the prospective NCAA student-athlete tennis player, it would not be difficult to assert a claim of unconscionability of both varieties. First, there is an agency contract that the minor tennis player probably does not personally sign, most likely does not understand, and in some cases, does not even know about.<sup>170</sup> Second, the parents have entered the agreement with the best of intentions, hoping to help themselves manage the advancement of their child's tennis talent. Indeed, the NCAA's bylaws goal of preventing exploitation by commercial interests could be the very reason the parents decide to hire an agent.<sup>171</sup> Finally, when the minor tennis player feels their talents or life goals will be enriched and fulfilled by attending college and playing NCAA tennis, the NCAA deems that the existence of the agency relationship renders the player

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166. See U.C.C. § 2-302 (AM. LAW. INST. & UNIF. LAW COMM'N 2017) (providing "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination"). The Official Comments to U.C.C. § 2-302 further clarify how a court would test for unconscionability by stating: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *Id.* at cmt. 1 (citation omitted).

167. See M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 219 (2013).

168. See *id.* at 222-23.

169. See *id.* at 220-21.

170. Busby, *supra* note 6, at 139.

171. NCAA MANUAL, *supra* note 1, at Principle 2.9, at 4.

disqualified from NCAA competition.<sup>172</sup> To say that it is procedurally unconscionable for the NCAA to penalize a prospective collegiate athlete because of something they could not control, or did not even know about, is not a farfetched argument.

In light of the substantive unconscionability theory, it is also not difficult to make the argument that such a contract's terms are overly harsh or oppressive.<sup>173</sup> For this type of unconscionability, the victims in this case are both the school and the athlete. For the athlete, the revocation of the freedom to sign an agreement to play sports at any NCAA institution is an overbroad penalty for a prospective student-athlete who probably was not involved in the agency contract. For the NCAA member school, the terms of their contract with the NCAA prevent them from ever being able to sign a student to play tennis at their institution after there was much work done in recruitment and candidate file assessment to conclude that the prospective NCAA student-athlete is the right fit for their school.<sup>174</sup>

With the NCAA and member school contract so vulnerable to a challenge under both unconscionable contract theories, it would appear to be in the NCAA's best interest to adjust the rule. The unconscionability of the rule in grossly limiting the member schools and the athlete also points to another contracting principle that should give the NCAA pause about keeping the no-agent rule: the liberty to contract.

#### D. No Liberty to Contract?

There is a basic constitutional law concept of freedom to contract. The idea of liberty of contract evolved from the Due Process Clause of the Fourteenth Amendment. First mentioned in the *Slaughter House* cases, the *Allgeyer et al. v. Louisiana* case concluded the following about the liberty to contract:

The "liberty" mentioned in that [Fourteenth] amendment means, not only the right of the citizen to be free

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172. *Id.* at Bylaw 12.3.1, at 71.

173. Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 946 (1986).

174. See Interview with Paul Peck, *supra* note 72; Navaroli, *supra* note 76.

from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>175</sup>

This precedent and concept of the liberty to contract drew much support in the years after this case, as the Supreme Court struck down legislation that was thought to improperly impede an individual's or business's freedom to contract.<sup>176</sup>

Denying a prospective tennis player the ability to sign a commitment to play tennis at a NCAA regulated school because of a previous agency agreement could also be said to encroach on that player's liberty to contract. The NCAA is restricting the player's ability to contract with the entire class of NCAA regulated colleges and universities simply because of the previous contractual agreement.<sup>177</sup> It would be one thing if the NCAA's prohibition of contracting with a school was for a practical reason, such as prohibiting a prospective NCAA student-athlete from signing agreements to play at two or more schools. However, that is not what the NCAA is trying to prevent with the no-agent rule; consequently, the rule does not seem to have a practical or logical result. That is, the NCAA is restricting the player's ability to contract simply because of an agreement they may not have even personally signed when they were a minor.<sup>178</sup>

The survey of these four contract remedies for the prospective tennis player deemed ineligible from NCAA competition because of the no-agent rule admittedly reveal various chances for success. On the one hand, the discussion of potentially voiding an agency contract to undo the damage it did to the potential NCAA career is a stretch, based on the reasons discussed. The other three theories rely on a legal determination that the prospective player is a third-party beneficiary of the

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175. *Allgeyer et al. v. Louisiana*, 165 U.S. 578, 589 (1897).

176. See John Raeburn Green, *Liberty Under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497, 507 (1942).

177. NCAA MANUAL, *supra* note 1.

178. Busby, *supra* note 6, at 149-50.

contract between the NCAA and its member schools, which has been found to exist by the courts.<sup>179</sup>

There is reason to believe we have reached a tipping point for the NCAA's no-agent rule. The sum of the other three possible legal remedies, coupled with courts' lean towards entertaining those theories, suggests an environment where the no-agent rule will struggle to survive. As discussed in the next section, courts are not only starting to find that prospective collegiate tennis players do have legal relationships with the NCAA in the realm of a third-party beneficiary, but at least one of these court opinions also found that the no-agent rule is indeed an arbitrary and capricious rule.<sup>180</sup>

### IX. IN THE COURTS OF LAW: CLOSE TO AN OVERRULE?

As discussed in some of the previous writings about NCAA eligibility rules, there have been several relevant challenges of those rules in the courts. Certain legal theories such as suggesting the NCAA rules violate antitrust laws have largely been fruitless.<sup>181</sup> However, other challengers of the rules have at least succeeded in getting the court to hear their cases that argue the rules fail under the arbitrary and capricious theory.<sup>182</sup> Those judicial decisions have supported the notion that the prospective student-athlete is a third-party beneficiary to the contract between the NCAA and its member schools, thus giving the students the requisite standing to even bring such a challenge. A survey of these cases is instructive.

In *Banks v. NCAA*, a Notre Dame football player attempted to reinstate his final year of collegiate eligibility after he had entered the NFL draft.<sup>183</sup> The theory of his case was that the NCAA and its rules created an anticompetitive market in violation of federal antitrust rules.<sup>184</sup> In ruling for the NCAA, the Court stated *Banks* failed to "allege an anti-competitive impact

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179. See Lockhart, *supra* note 6, at 188-89.

180. See *infra* note 200 and accompanying text.

181. *Banks v. NCAA*, 977 F.2d 1081, 1093 (7th Cir. 1992).

182. *Oliver v. NCAA*, 920 N.E.2d 203, 214 (Ohio Ct. Com. Pl. 2009); *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004).

183. *Banks*, 977 F.2d at 1083.

184. *Id.* at 1084.

on a discernible market” and correspondingly dismissed Banks’s claim for “failure to state a claim upon which relief could be granted.”<sup>185</sup> The court ruling was quite supportive of the NCAA’s commitment to amateurism and agreed the rules helped the organization serve that purpose. They suggested that complete abdication of even some of those rules—a potential had Banks prevailed—“would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a ‘minor league’ farm system out of college football . . . .”<sup>186</sup>

*Gaines v. NCAA*, a similar antitrust challenge, was levied by a Vanderbilt football recruit.<sup>187</sup> Both Banks and Gaines sought injunctive relief to prevent the NCAA from enforcing their rules, at least for their unique circumstances.<sup>188</sup> The *Gaines* court similarly defended the NCAA’s commitment to amateurism and held that Gaines would have to overcome an “especially heavy burden” to convince the Court that injunctive relief could square with the NCAA’s commitments.<sup>189</sup> The Court ultimately held that the NCAA bylaws were outside the reach of Sherman Anti-Trust jurisdiction.<sup>190</sup>

The *Banks* and *Gaines* cases have two important distinctions from the circumstances of our case studies, Maria Genovese and Katerina Stewart. First, both football players knew at the time that they were violating NCAA rules that would render them ineligible to further compete in college football.<sup>191</sup> Maria and Katerina did not know, at the time, their actions would violate NCAA eligibility rules. In fact, they were not even members of an NCAA regulated organization at the time of their infractions.<sup>192</sup> Second, both cases involved athletes crossing the professional line (entering the draft) which rendered them

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185. *See id.* at 1094.

186. *Id.* at 1091.

187. *Gaines v. NCAA*, 746 F. Supp. 738, 740 (M.D. Tenn. 1990).

188. *Banks v. NCAA*, 977 F.2d 1081, 1084 (7th Cir. 1992); *Gaines*, 746 F. Supp. at 741.

189. *Gaines*, 746 F. Supp. at 742.

190. *Id.* at 744-45.

191. *See Banks*, 977 F.2d at 1083-84; *Gaines*, 746 F. Supp. at 740.

192. *See Lockhart*, *supra* note 6, at 187 (noting that student-athletes are regulated by some of the NCAA eligibility rules even before they are members of an NCAA regulated institution and juxtaposing that concept against the fact that the NCAA enjoys great deference from the courts in its status as a private organization).

ineligible to return to collegiate play.<sup>193</sup> For Maria, Katerina, and other tennis players, this scenario plays out all the time in that pre-collegiate players often enter professional tournaments, whether declaring or not, and the NCAA rules are amenable to such activity.

*Bloom v. NCAA* and *Oliver v. NCAA* are relevant cases in that they both entertained claims against NCAA eligibility rules based on third-party standing theory.<sup>194</sup> *Bloom* also involved a football player who had not entered the professional ranks in football, but had competed professionally in skiing, thus running afoul of NCAA football eligibility for endorsement arrangements while engaged in skiing.<sup>195</sup> The Court ruled against Bloom in finding that the NCAA rules rationally related to their legitimate purpose of maintaining the demarcation between collegiate and professional sports.<sup>196</sup> However, the Court entertained his argument after determining he had standing to challenge the NCAA bylaws as a third-party beneficiary.<sup>197</sup>

The *Oliver* court also supported the third-party standing claim and even ruled in favor of the NCAA rule challenger on the merits of his argument.<sup>198</sup> This case involved a baseball player who was found ineligible for NCAA baseball competition because he had his attorney present when negotiating a potential contract with the Minnesota Twins Major League Baseball organization.<sup>199</sup> The NCAA does not have a per-se “no-attorney” rule, but attorneys are still forbidden from attending these types of negotiations.<sup>200</sup> The Court ruled in favor of Oliver to the delight of NCAA eligibility rule antagonists under the theory that the rule was arbitrary and capricious and not rationally related to the stated goals of preserving amateurism in intercollegiate athletics.<sup>201</sup> The Court found it quite paradoxical that in trying to protect prospective student-athletes from exploitation, it forbids

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193. See *Banks*, 977 F.2d at 1083-84; *Gaines*, 746 F. Supp. at 740.

194. See *Bloom v. NCAA*, 93 P.3d 621, 623-24 (Colo. App. 2004); *Oliver v. NCAA*, 920 N.E.2d 190, 195 (Ohio Ct. Com. Pl. 2009).

195. *Bloom*, 93 P.3d at 622.

196. *Id.* at 626.

197. *Id.* at 623-24.

198. *Oliver*, 920 N.E.2d at 211-12.

199. *Id.* at 206-07.

200. NCAA MANUAL, *supra* note 1, at Bylaw 12.3.2.1.

201. *Oliver*, 920 N.E.2d at 215-16.

them from having competent representation at the time the athlete most needed it.<sup>202</sup>

While the *Oliver* case represented a monumental victory for student-athletes challenging NCAA bylaws that appear to be tangentially, at best, related to the goal of preserving amateurism, the Court's decision was ultimately vacated due to a settlement between Oliver and the NCAA, which included lifting a court injunction prohibiting the NCAA from enforcing the rule.<sup>203</sup> Still, the case gives some hope to those who have fallen victim to an NCAA rule violation, such as the no-agent rule, because it is yet another case that held the prospective NCAA student-athletes have standing to challenge the rules, and it found that the challenger prevailed on the merits of an arbitrary and capricious claim.<sup>204</sup>

#### **X. IN THE COURTS OF PUBLIC POLICY: UNFORCED ERRORS**

Before delving into the policy challenges of the NCAA no-agent rule, a quick review of our case studies is in order.<sup>205</sup> Maria Genovese and Katerina Stewart were on-the-rise tennis stars whose parents had entered agency agreements on their behalf. The parents' motives were completely benign, acting in the best interests of their daughters. Both Maria and Katerina hit a juncture in their careers where they decided to go to college and compete at the NCAA level. Both had the skills to be a part of an elite NCAA program. Neither knew at the time of their agency agreement that they would end up pursuing collegiate tennis. Maria's pursuit was driven by the fact that injuries during her junior tennis years impeded her development to be a consistent winner at the professional level. Katerina wanted to both play tennis and serve her country in the military; West Point was the perfect fit. Neither knew that having signed the agency agreement rendered them ineligible for collegiate competition until they reached the life event of entering college. Maria lost

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202. *See id.* at 214.

203. *See Busby, supra* note 6, at 163-64.

204. *See Oliver*, 920 N.E.2d at 212, 215-16.

205. *See supra* Part IV.

her appeals with the NCAA.<sup>206</sup> Katerina withdrew from the U.S. Military Academy Preparatory School when advised that her appeal to the NCAA would be difficult to win.<sup>207</sup> Maria simply could not afford to enroll in college without some type of scholarship. For Katerina, standing on the sidelines her entire college career was too much to bear; her talents beckoned her back on the tour of the Women's Tennis Association (WTA) where she is back to 282 in the world and playing in the minor leagues again.<sup>208</sup>

### **B. Tennis Players and Their Agents: It's All Part of the Business!**

This article does not intend to portray tennis agents as having nefarious motives while preying upon young tennis players simply trying to make some money off their talents. However, to be sure, these agents are engaged in a business enterprise and will seek out clients who they think have the potential to make money in the professional ranks. It is in their best interests to enter into agreements that will be mutually beneficial: the tennis player gets the direction they need to advance their career while the agent gets the payment and reputation of helping make it happen given his good judgment and years of expertise.

Additionally, the agents are an extension of tennis coaches, working on the player's career issues and reallocating that time to the coach in order to develop the player's game.<sup>209</sup> Indeed, the lower ranked player's paid coaches (and parents) are also their de facto agents, and there is certainly no NCAA rule forbidding a collegiate tennis recruit from having ever paid a coach in their career.

Further, the agents are not obligated to warn the developing tennis player that using their services will most likely disqualify her from collegiate competition,<sup>210</sup> and even if they did, the player

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206. Telephone interview with Maria Genovese, *supra* note 53.

207. Interview with Katerina Stewart, *supra* note 72.

208. See *Players: Katerina Stewart*, ITF, [https://perma.cc/53XD-UVCM] (last visited Nov. 6, 2019), for Katerina Stewart's profile and current ranking.

209. Maryann Hudson & Elliott Almond, *They Play by Their Own Rules: Colleges: Sports Agents Are Everywhere, and the NCAA Estimates 70% of Current Athletes Have Had Contact with Them*, L.A. TIMES (Oct. 13, 1995), [https://perma.cc/6YR2-MNP8].

210. See REVISED UNIFORM ATHLETE AGENTS ACT (UNIF. LAW COMM'N 2015).

is probably not focused on that eventuality. Thus, this Article is not intended to paint the agents as the bad guys in these scenarios; they certainly have interests, as do both parties in this equation. This leads us to an examination of the prudence of the NCAA's no-agent policy and whether it is serving the NCAA, the agents, or the players with the intent for which it was conceived.

### C. Unforced Errors: Inconsistent Policy

The NCAA bylaw exceptions that accommodate professional activity reveal that the NCAA does not consider tournament play—some of which pits prospective college players against seasoned professionals—and the prize money awarded at tournaments to cross the line of demarcation between collegiate and professional sports.<sup>211</sup> The obvious question is then, how would the prospective student-athlete's (or their parent's) hiring of an agent cause that line to be crossed? For Maria Genovese or Katerina Stewart, the prize money acceptance was not what doomed their collegiate tennis career; the no-agent rule did.<sup>212</sup> The hiring of an agent does not guarantee you have, or will attain, the earnings required to harm your eligibility under the rule; in some cases you may, in others you may not. Thus, we can disassociate the NCAA no-agent rule from the NCAA limits on the acceptance of the prize money.<sup>213</sup> It is therefore logical that the NCAA can retain or remove one rule without harming the purpose of the other. In this situation, the recommendation would be to eliminate the no-agent rule due to its lack of correlation with the professional earnings exception of the NCAA bylaws.

### D. Legal-Policy: Legal Headwinds Beg for Policy Change

A key reason for recommending changes to the NCAA no-agent rule is not just that it is misguided policy, but that it is so fraught with potential legal challenges identified in this Article that it seems only a matter of time before those legal disputes persuade the NCAA to make accommodations. Even with the

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211. NCAA MANUAL, *supra* note 1, at Bylaw 12.1.2.4, at 66.

212. *See id.* at 63, 66, 71.

213. *See id.*

typical deference yielded to the NCAA as a private organization, the courts may end up granting relief from the no-agent rule on an individual basis often enough for the NCAA to realize the exceptions start swallowing up the rule. As discussed above, a tennis player who previously signed, or whose parents signed, an agency contract may find it difficult to retroactively disaffirm that agreement and successfully doing so might not even make a difference in terms of satisfying the NCAA rules.<sup>214</sup> But with strong arguments about the arbitrary and capricious and potentially unconscionable nature of the no-agent rule, the NCAA may find itself on the losing end of future challenges. The *Oliver* case shows that the NCAA no-agent rule may already be on shaky ground and is not immune from a court challenge.<sup>215</sup>

But even if the NCAA staves off legal challenges of its bylaws in the future, the mere fact that the no-agent rule puts prospective tennis players in these legal binds suggests that a policy change would be prudent. Maria Genovese and Katerina Stewart are not the last tennis talents to find themselves in a position where they unwittingly sacrificed their collegiate eligibility. For every player who enlisted the support of an agent, there are others who decided to forgo the advice of an agent just to preserve amateurism because they knew of the risks. Even if the NCAA better educates and forewarns its prospective tennis players that hiring an agent will render them ineligible for collegiate competition, or even if every player were to read Professor Porto's article to become better informed,<sup>216</sup> does the sport of tennis really want to foster that dynamic? Would it not be better to allow tennis players or their parents to become better informed by hiring an expert in the field rather than further cultivating the often-unseen minefield of agency violations?

## XI. MATCH POINT: PROPOSED CHANGES

Based on the legal and policy issues highlighted in this Article, it is high time for the NCAA to remove the no-agent rule, at least for the sport of tennis. Perhaps the arguments posed will move the NCAA to remove the rule for other or all sports, but for

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214. See DiMatteo, *supra* note 120, at 486-88; NCAA MANUAL, *supra* note 1.

215. See *Oliver v. NCAA*, 920 N.E. 2d 203, 214 (Ohio Ct. Com. Pl. 2009).

216. See generally Porto, *supra* note 89.

now it is clear that the rule fails to serve the amateurism interests of the NCAA, disadvantages rising stars in the tennis world, and is fraught with potential legal and policy inconsistencies. At minimum, the no-agent rule causes the NCAA to abdicate its responsibility to engage in fair dealing with all parties with which it enjoys a contractual relationship.<sup>217</sup>

Empathetic to the NCAA's main goal of preserving amateurism in intercollegiate sports,<sup>218</sup> the no-agent rule should still apply to tennis players for as long as they are enrolled in an NCAA regulated institution. To allow otherwise would infest colleges and university with agents trying to exploit the talents of collegiate athletes. This would not serve the interests of the member universities and would run directly counter to the NCAA's goals of avoiding such athlete exploitation. Indeed, it would make a mockery of amateur intercollegiate athletics, and collegiate tennis coaches would not want to tolerate such activity.

For tennis, however, allowing aspiring young tennis players who are already competing in tournaments and winning money to hire an agent will not cause the athlete from crossing some imaginary line making them an irrevocable professional. The NCAA should keep the current rules allowing for retention of amateur status if the player's tournament winnings do not exceed actual expenses<sup>219</sup>—this is the true mark of whether a player is engaged in the sport as a professional and would provide an adequately clear demarcation line for whether an aspiring young tennis player has crossed the line from amateur to professional.

Turning back to our case studies, Maria Genovese and Katarina Stewart, the amateur nature of college tennis would not have collapsed had they signed with their respective schools and played NCAA tennis.<sup>220</sup> At these universities, they would have been playing with and against other women just like them: those players that trained for tennis from a young age, played in junior tournaments, trained at an elite tennis academy, and flirted with the prospect of forgoing college to join the hard grind in the professional ranks. These two players were unable to play NCAA tennis because they had one thing different than their counterparts

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217. See *Oliver*, 920 N.E. 2d at 212.

218. See NCAA MANUAL, *supra* note 1, Const. art. 1.3.1, at 1.

219. See *id.* at 63, 66.

220. See NCAA MANUAL, *supra* note 1, at 63, 66, 71.

in college tennis: they had hired an agent or otherwise signed an endorsement deal. If, as recommended, the no-agent rule remained in place for their time at university, their schools would not have turned into a feeding frenzy for agents seeking to pluck them out of their college tennis environment and actively marketing their skills while still competing as an amateur.

What is even more telling about their stories is what they are doing now: Katerina Stewart is plodding away back in the tennis minor leagues<sup>221</sup> and Maria Genovese is competing in collegiate tennis for a school not governed by NCAA rules.<sup>222</sup> Katerina is back with her original crowd of prospective collegiate and professional tennis players<sup>223</sup> and Maria is competing with collegiate athletes.<sup>224</sup> Both would still be eligible for NCAA tennis at this point if were not for the no-agent rule.

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221. *Florida's Katerina Stewart Wins USTA Pro Circuit Naples Title*, USTA FLA. (May 21, 2019), [<https://perma.cc/D3JL-TWSP>] [hereinafter *Stewart Wins UTSA*].

222. *2019-20 Women's Tennis Roster*, *supra* note 66.

223. *See Stewart Wins UTSA*, *supra* note 220.

224. *2019-20 Women's Tennis Roster*, *supra* note 66.