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PERSONAL FOUL: THE EXPLOITATION OF NCAA STUDENT-ATHLETES' PUBLICITY RIGHTS

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INTRODUCTION

In 2017, Donald De La Haye, a Division I football player for the University of Central Florida of the National Collegiate Athletic Association ("NCAA"), was deemed ineligible for NCAA participation due to his successful YouTube channel, "Deestroying."[1] De La Haye was a kicker for the University of Central Florida's ("UCF") football team.[2] At the time, his YouTube channel had over 90,000 subscribers and almost 5,000,000 views.[3] The NCAA found De La Haye ineligible because he was compensated for videos that included aspects of his life as an NCAA athlete—a violation of the NCAA bylaws.[4]

The consequences of this decision were life changing for De La Haye and went well beyond losing football. As De La Haye explained, "no more college football[,] since I can't play college football[,] no more scholarship[,] I'm ineligible[,] I can't pay for school."[5] De La Haye had created content for his YouTube channel before he was UCF's kicker. However, as soon as he became a NCAA athlete, his compliance officer explained that he could no longer be compensated for the use of his own name, image, and

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[1] Dan Gartland, *UCF Kicker Ruled Ineligible After YouTube Channel Gets Him in Trouble with NCAA*, SPORTS ILLUSTRATED (July 31, 2017), https://www.si.com/college/2017/07/31/ucf-kicker-donald-de-la-haye-ineligible-ncaa-youtube-videos [https://perma.cc/FJ6J-6TCP].

[2] *Id.*

[3] *Id.*

[4] NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-2021 NCAA DIVISION I MANUAL, Const. art. 12.4.4 (2021), *available at* https://web3.ncaa.org/lsdbi/reports/getReport/90008 ("A student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation is [sic] not used to promote the business.").

[5] Deestroying, *I Lost My Full D1 Scholarship Because of My YouTube Channel*, YOUTUBE (July 31, 2017), https://www.youtube.com/watch?v=Fh69-X6X55w&feature=emb_logo [https://perma.cc/U53A-88CA].

likeness ("NIL").[6] De La Haye is a prime example of the NCAA's ability to control players' lives through the simultaneous exploitation and restriction of their publicity rights.[7]

The right of publicity is defined as "the right of a person to control the commercial use of [their] identity."[8] While this right developed in privacy law, the right of publicity soon diverged from the right of privacy.[9] The fracturing of the right of publicity from the right of privacy arose because, although the right of privacy was adequately protecting individuals, companies wanted more control over their economic interests in public personalities.[10] Most importantly, the right of publicity—unlike the right of privacy—is treated as a form of freely alienable property.[11]

This Note critiques the intent behind the development of a transferable right of publicity and argues that the present-day realities of an alienable right of publicity, particularly in relation to NCAA athletes, is problematic. Part I of this Note addresses the background of the right of publicity. Specifically, it explains how the right of publicity grew out of the right of privacy for the purpose of benefiting the publicity-holder, not protecting the identity-holder.[12] Part II examines how the NCAA, through its amateurism rules, requires student-athletes to do the equivalent of a transfer of their right of publicity. This Part demonstrates how the NCAA bylaws result in rampant abuse of young college athletes' publicity rights.[13] Part III demonstrates how the solutions that the courts, the NCAA, and state and federal legislatures have proposed up to this point have been insufficient. Finally, Part IV explores possible solutions to the issue of alienability of the right of publicity, including the creation of a federal right of publicity.

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[6] *Id.*

[7] *See infra* Section II.B.

[8] J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHT OF PUBLICITY AND PRIVACY § 1:7 (2d ed. 2020).

[9] *Id.*

[10] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 75 (2018).

[11] *See* MCCARTHY & SCHECHTER, *supra* note 8, § 1:7.

[12] ROTHMAN, *supra* note 10, at 75.

[13] *See* Cal. Educ. Code § 67456 (West 2021) (California Fair Pay to Play Act is operative January 1, 2023 with the purpose of allowing NCAA Athletes to exploit their publicity rights without losing their NCAA eligibility).

I. A FLAWED FOUNDATION: A BRIEF HISTORY OF THE RIGHT OF PUBLICITY

A. The Origins of the Right of Publicity

The modern right of publicity is commonly described as a right that was created in the 1950s, however the right of publicity can be seen in privacy cases as early as the 1800s.[14] For example, in 1895, the New York Court of Appeals was the first high court to consider whether a right of privacy existed.[15] Interestingly, the dispute arose from an objection to the unauthorized use of the name and likeness of Mary M. Hamilton Schuyler—a famous, deceased, society woman.[16] The court in *Schuyler v. Curtis* held that if Mrs. Hamilton did have a right to privacy, it would be personal to her and it would not survive her death.[17] In fact, many of the first cases to consider whether a right of privacy existed were cases involving the nonconsensual use of an individual's image and likeness for commercial gain.[18]

A few years later, in 1902, the same court analyzed the privacy right question in the context of a living objector.[19] In *Roberson v. Rochester Folding Box Co.*, the court held that Abigail Roberson, a teenager who had her portrait taken at a local photo studio, had no right of privacy when Franklin Mills Flour company utilized a portrait of her on a product advertisement without her permission.[20] Public uproar about the decision led to corrective legislation because less than one year after the *Roberson* decision, the governor of New York signed into law the "Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the Purposes of Trade."[21]

B. The Shift to a Separate Right of Publicity

Although the right of privacy was implicated in cases involving the nonconsensual use of images, there was a shift to a new concept, the right of publicity. About fifty years after *Roberson*, the Second Circuit Court of Appeals coined the term

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[14] MCCARTHY & SCHECHTER, *supra* note 8, § 1:4; ROTHMAN, *supra* note 10, at 11.
[15] Schuyler v. Curtis, 147 N.Y. 434, 442 (2d Cir. 1895).
[16] *Id.*
[17] *Id.* at 447.
[18] ROTHMAN, *supra* note 10, at 11.
[19] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 542 (2d Cir. 1902).
[20] *Id.* at 556.
[21] N.Y. Civ. Rights Law § 50 (McKinney 2021).

"right of publicity" in its 1953 opinion *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[22] The *Haelan* court considered two parties' competing claims that they owned exclusive rights to use baseball players' photographs to help sell gum.[23] The defendant contended that the baseball players only had a privacy interest in their pictures.[24] The Second Circuit in *Haelan* rejected the defendant's argument and held that "in addition to and independent of that right of privacy . . . , a man has a right in the publicity value of his photograph."[25] The opinion also stated that this "right to grant the exclusive privilege of publishing" a person's likeness may be validly done "in gross" without any related transfer of an underlying business.[26] In distinguishing the right of publicity from the traditional right of privacy, the court in *Haelan* reasoned that this right of publicity was crucial to protect public figures' ability to profit off their own identities.[27] The problem with this line of reasoning, however, is that in *Haelan*, the lawsuit primarily protected the commercial interests that both businesses had in the baseball players' identity but not the baseball players' interests directly.[28]

C. The Intent Behind the Right of Publicity

The court in *Haelan* claimed that individuals have a right of publicity separate from the right of privacy because public figures need a way to control and harness the profitability of their image, name, and likeness.[29] The perception that public figures lost their privacy rights by entering the public scene and needed another tool to protect themselves was incorrectly based on case law that seemed to suggest public figures waived their rights of privacy by virtue of being public figures.[30]

For example, in the earlier *O'Brien v. Pabst Sales Co.* case, the Fifth Circuit Court of Appeals did not hold that David O'Brien—a

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[22] 202 F.2d 866, 868 (2d Cir. 1953) (introducing the term).
[23] *Id.* at 867.
[24] *Id.*
[25] *Id.* at 868.
[26] *Id.*
[27] *Id.* (arguing that New York cases have recognized such a right).
[28] *Id.* at 867.
[29] *Id.* at 868.
[30] *See* ROTHMAN, *supra* note 10, at 30; *see also* Talor Bearman, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 92 (2012) (arguing that public figures need an avenue to protect their commercial rights in their image and name).

highly recognizable top collegiate football player—had lost his privacy rights because he was a well-known football player.[31] Instead, the court held that the specific photograph used by Pabst Sales Company, a popular beer distributor, was one that O'Brien had consented to be used for team publicity.[32] Regardless of the case's actual holding, Pabst's lawyer stated that the "football star [O'Brien's] likeness has become the possession of the public," and that quote was unfortunately and frequently cited to support the idea that public figures lose their privacy rights.[33]

This pervasive yet incorrect idea that *Haelan* created the right of publicity for the benefit of public figures who had lost their privacy rights is ironic upon a closer examination of the *Haelan* case. In *Haelan*, as mentioned above, two competing gum manufactures were fighting over the control of baseball players' names and pictures used in trading cards.[34] Neither the individual baseball players, nor their interests, were ever represented during the litigation.[35]

The history of the right of privacy demonstrates that it sufficiently protected public figures.[36] However, businesses utilizing public identities sought a way to ensure that they could exclusively exploit an identity-holder's name and likeness.[37] The right of privacy, which historically governed these disputes, was viewed as a personal right and therefore not alienable.[38] Thus, businesses had no way to prevent the individual from extending their name, image, and likeness to multiple companies.[39]

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[31] 124 F.2d 167, 170 (5th Cir. 1941).

[32] *Id.*

[33] ROTHMAN, *supra* note 10, at 43.

[34] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953); ROTHMAN, *supra* note 10, at 45.

[35] *Haelan Labs.*, 202 F.2d at 867; ROTHMAN, *supra* note 10, at 46; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 194 (2012).

[36] Rothman, *supra* note 35, at 194, 198 (arguing that an identity-holder could have endorsed a product or given permission for the use of their image and be compensated for doing so without assigning the right to his identity to another person or entity which demonstrates that the baseball players were adequately protected and compensated for the use of their image prior to the existence of an assignable right of publicity).

[37] *Haelan Labs.*, 202 F.2d at 867; Rothman, *supra* note 35, at 193, 198 (explaining that Haelan sued Topps specifically because they believed they were granted exclusive use of the baseball player's name and likeness and wanted to prevent Topps' continued use of it).

[38] Rothman, *supra* note 35, at 208.

[39] *Haelan Labs.*, 202 F.2d at 868 (explaining a public personality would earn no money for their name, image, or likeness unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures).

Hollywood reinforced the development of a separate right of publicity.[40] The movie industry relied on long-term contracts to lock actors into specific studios, which gave the studio ultimate control in cultivating and regulating the actors' public image, persona, career, and personal life choices.[41] However, in 1944 actress Olivia de Haviland officially ended these long-term employment contracts when she sued Warner Brothers to invalidate her contract as a violation of California's Labor Code.[42]

After the *De Haviland v. Warner Bros. Pictures Inc.* decision, Hollywood studios looked for new ways to manage the public image surrounding their actors.[43] Zealous advocates in the movie industry, like Paramount Pictures attorney Melville Nimmer, pushed for an independent and alienable right of publicity.[44] Nimmer stated that a new right was needed because the "concept of privacy" did not meet the needs of Broadway and Hollywood.[45] Nimmer designed this new right to provide the "entertainment and allied industries" with the ability to once again control their "employees' names and portraits."[46] However, nowhere did Nimmer express concern for the effect that this new right would have on the identity-holders themselves.[47] The creation of a separate transferable right of publicly was never about protecting the identity-holder.[48] Instead, it was about providing industries with a disturbing amount of control over another human's identity and life choices for commercial gain.[49]

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[40] *See* JANE M. GAINES, CONTESTED CULTURE 143–207 (1991) (discussing the historical developments and the chronology of events leading up to the adoption of the right of publicity, including the changes in Hollywood).

[41] David Denby, *Fallen Idols: Have Stars Lost Their Magic?*, THE NEW YORKER (Oct. 22, 2007), https://www.newyorker.com/magazine/2007/10/22/fallen-idols [https://perma.cc/F6CA-W3HM].

[42] De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 986–87 (Cal. Dist. Ct. App. 1944) (limiting an employment contract with a studio to seven years and striking down the longstanding practice that studios had used to extend seven-year contracts far beyond that term).

[43] ROTHMAN, *supra* note 10, at 69.

[44] Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 204, 212, 222 (1954) (arguing for the adoption of an independent and transferable right of publicity).

[45] *Id.* at 203–04.

[46] *Id.* at 204.

[47] *Id.* at 212; ROTHMAN, *supra* note 10, at 69.

[48] Rothman, *supra* note 35, at 187.

[49] *See* GAINES, *supra* note 40, at 143–207 (describing the chronology of events leading up to the adoption of the right of publicity).

D. The Current Right of Publicity

Today, the right of publicity is a state managed issue with no controlling federal legislation.[50] The lack of a federal right of publicity has created large discrepancies on how and when an individual's publicity rights will be protected.[51] For example, some states do not recognize the right of publicity at all.[52] Even in states that do recognize a right of publicity, the scope of protection varies widely.[53] Some states provide right of publicity protections to any individual, whereas other states limit the right only to individuals with valuable personalities, such as celebrities or other public figures.[54] Additionally, some states extend the right of publicity to deceased individuals, but others have limited the right only to the living.[55] The lack of uniformity across states is especially problematic for *national* organizations, like the NCAA, with members located in all fifty states.[56]

Crucially, because the right of publicity is treated as a property right, it is freely assignable.[57] Therefore, the publicity-holder—the person who owns the right of publicity—does not have to be the same person as the identity-holder—the individual whose identity is being used.[58] The ability to transfer an individual's interests and rights in their own identity is a powerful tool for

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[50] ROTHMAN, *supra* note 10, at 2; *see infra* Section III.E (explaining how the Lanham Act, the federal trademark statute, is inapplicable to cover the right of publicity).

[51] Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 500–02 (2010).

[52] MCCARTHY & SCHECHTER, *supra* note 8, § 6:2; *see also* Jennifer E. Rothman, *The Law*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com/law [https://perma.cc/F4GM-5FY9] (last visited Sept. 16, 2021) (listing and describing every state's right of publicity).

[53] *See* Bearman, *supra* note 30, at 96 ("The right of publicity [is] . . . a piecemeal compilation of state statutes and common law or is wholly unrecognized.").

[54] *See* Rothman, *supra* note 52.

[55] *See* S. S05959D, 2019-2020, Reg. Sess. (N.Y. 2019) (expanding the New York right of publicity to protect the right of publicity for the deceased, whose publicity rights have commercial value at the time of their death or because of their death); *see also* Rothman, *supra* note 52 (illustrating that Wyoming currently does not recognize a right of publicity that extends to the deceased).

[56] *What is the NCAA?*, NCAA, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa [https://perma.cc/3FJZ-GRFR] (last visited Sept. 16, 2021) (describing the NCAA as a national organization with members in all fifty states).

[57] MCCARTHY & SCHECHTER, *supra* note 8, § 10:13; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) ("The interest in the commercial value of a person's identity . . . is freely assignable to others.").

[58] Rothman, *supra* note 35, at 187.

publicity-holders, but it can be a dangerous liability for identity-holders.[59] It is particularly hazardous when the identity-holder's interests differ from the publicity-holder's interests. The public and, more troublingly, the courts have often assumed that the publicity-holder's and the identity-holder's interests, values, and goals are aligned, but unfortunately this is often not true.[60]

Courts have limited the alienability of publicity rights to only voluntary assignments to avoid significant loss of control over one's identity.[61] Unfortunately, this limitation does not prevent all of the abuses that arise when the right of publicity is freely alienable.[62] For example, oftentimes, the identity-holder has little bargaining power when deciding whether to transfer their right of publicity or not, raising the possibility that what appears to be a "voluntary" assignment may not be such.[63] A clear example of this arises in the relationship between the NCAA and student-athletes.

II. WHERE PUBLICITY RIGHTS FAIL – NCAA ATHLETE CASE STUDY

A. NCCA Amateurism Model

To fully grasp how the current right of publicity underserves NCAA athletes, a bit of context is necessary. The NCAA is a member-led organization where colleges, universities, and athletic conferences are the NCAA members.[64] They establish and enforce rules and regulations relating to college sporting activities for its member-universities.[65] The NCAA's core values are advertised as providing a quality educational experience and a competitive balance for their student-athletes and organization members.[66] Furthermore, the NCAA promotes a culture of amateurism where the athlete is a student first—thus the famous title "student-

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 189 (discussing how to facilitate the collection of an unpaid judgment, the estate of Ronald Goldman filed a motion seeking the assignment and transfer of O.J. Simpson's right of publicity).

[62] *Id.*

[63] *Id.* at 198.

[64] *Frequently Asked Questions About the NCAA*, NCAA, http://www.ncaa.org/about/frequently-asked-questions-about-ncaa [https://perma.cc/F8QK-9KPR] (last visited Sept. 16, 2021).

[65] *Id.*

[66] *See Mission Statement and Bylaws*, NCAA, https://www.ncaa.org/sites/default/files/M_WinonaState_SAACBylaws.pdf [https://perma.cc/D33B-TRMM] (last visited Sept. 16, 2021).

athlete."[67] To uphold these organizational initiatives, the NCAA uses extensive bylaws, policing, and punishment to maintain the idea of amateurism.[68] These regulations ensure that student-athletes do not use their athletic abilities nor their position as NCAA athletes to receive compensation.[69] Although the underlying purpose of these bylaws is to promote and maintain the NCAA's values, they amount to a broad transfer of the student-athletes' publicity rights.

B. The NCAA Bylaws are Equivalent to a Transfer of Publicity Rights

If a prospective student-athlete ("PSA") wants to participate in collegiate athletics, they must sign a contract granting the rights to use their name or picture to the NCAA, the specific university, and their university's conference.[70] This requirement allows the NCAA, the university, and the conference to use the student-athlete's name, image, and likeness in promotional materials, live streaming of games, and selling of merchandise.[71]

However, in addition to requiring that student-athletes waive their right of publicity, the NCAA bylaws also place suffocating restrictions on the student-athletes' ability to commercialize their own identities.[72] The bylaws make student-athletes ineligible if they commercialize their identity as a student-athlete in any way. For example, NCAA Bylaw 12.5.2.1, "Advertisements and Promotions After Becoming a Student-Athlete," states that a student-athlete becomes ineligible to remain a NCAA student-athlete if they:

> (a) [a]ccept[ ] any remuneration for or permit[ ] the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) [r]eceive[ ] remuneration for endorsing a commercial product

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[67] Kevin Given, *Walter Byers: The Man Who Built the NCAA, Then Tried to Tear It Down*, WBUR (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa [https://perma.cc/4BPN-SNTY].

[68] *Enforcement Process: Penalties*, NCAA, http://www.ncaa.org/enforcement/enforcement-process-penalties [https://perma.cc/J2SC-DB5P] (last visited Sept. 16, 2021).

[69] *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, Bylaw 12.11, at 93–94 (stating that student athletes become ineligible if they use their athletic skills or position as an NCAA athlete to gain compensation).

[70] NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, Bylaw 12.5.1.1, at 75.

[71] *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, Bylaw 12.5, at 74–78.

[72] NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, Bylaw 12.5.2, at 77–78.

> or service through the individual's use of such product or service.[73]

Therefore, the student-athlete technically does not transfer their right of publicity but, in fact, retains their right of publicity.[74] However, in reality, the NCAA, the university, and the conference all have the ability to exploit the student-athletes' name, image, and likeness for commercial gain while simultaneously restricting the student-athletes' use of their identity. Ultimately, the NCAA bylaws equate to a transfer of the student-athletes' publicity rights.

The NCAA amateurism model has been viewed as a mutually beneficial relationship.[75] The rationale behind this concept is rooted in an underlying contractual relationship where the student-athlete agrees that the NCAA and the university can use the student-athlete's image for their benefit in exchange for the university's pledge to provide a substantially discounted opportunity to attend college.[76] However, over time college athletics has expanded into a multi-billion dollar industry and, accordingly, student-athletes and the general public have begun to question if this is still a mutually beneficial relationship.[77]

C. NCAA Revenue Depends on the Exploitation of Student-Athlete Publicity Rights

The severe exploitation of NCAA student-athletes is reinforced by NCAA bylaws that allow the NCAA to freely utilize the student-athletes' publicity rights while at the same time completely restricting student-athletes from each using their own right of publicity. In 2019, NCAA schools across all three divisions and all athletic departments reported $18.9 billion in total

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[73] NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, Bylaw 12.5.2.1, at 77.

[74] *See* Bearman, *supra* note 30, at 105.

[75] Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS. L.J. 257, 272 (1996) (" '[Y]ou're putting stuff on the athletes and making money off of it, but they're getting an education here.' ") (quoting Mark Brantley, director of corporate relations at the University of Southern California).

[76] *See* Timothy Davis, *An Absence of Good Faith: Defining A University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 748 (1991) (asserting that universities owe a duty to educate student-athletes based on contract theory); John Keilman & Jared S. Hopkins, *College Athletes Routinely Sign Away Rights to Be Paid for Names, Images*, CHI. TRIB. (Mar. 26, 2015, 8:23 PM), http://www.chicagotribune.com/sports/college/ct-ncaa-waivers-met-20150326-story.html [https://perma.cc/FAH7-TUSZ].

[77] *See* Davis *supra* note 76, at 748–54.

revenue.[78] The largest source of revenue for the NCAA is the Division I Men's Basketball Championship television and marketing rights, earning $821.4 million.[79] This revenue is, in turn, dependent upon the exploitation of student-athletes' publicity rights.[80]

This revenue is distributed in more than a dozen ways, including many ways that support NCAA schools.[81] Approximately $3.6 billion dollars of the NCAA's annual revenues are allocated to providing 180,000 athletic scholarships.[82] Yet, the vast majority of the remaining revenue does not directly benefit student-athletes. Instead, the revenue upholds the institutions and organizations where the student-athletes play.[83] For example, the average compensation for head football coaches at NCAA public universities is more than $2 million annually, and the top NCAA basketball coaches' annual contracts now exceed $4 million per year.[84]

Some argue that this allocation of funds is justified.[85] The basic argument is that student-athletes are "getting paid" through free tuition, school assistance, and NCAA related benefits and, therefore, they are not entitled to any additional payment.[86] For example, NCAA student-athletes sometimes receive a full-tuition scholarship, room and board expenses, access to private, high-end athletic facilities, team gear, and the foundation for an extremely profitable professional career.[87] Furthermore, the argument goes, the NCAA is not exploiting or abusing the athletes, but rather

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[78] *Finances of Intercollegiate Athletics*, NCAA, http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics [https://perma.cc/Z8EY-UXK7] (last visited Sept. 16, 2021).

[79] *Where Does the Money Go?*, NCAA, https://www.ncaa.org/sites/default/files/Where%20Does%20the%20Money%20GoWEB.PDF [https://perma.cc/KHK2-6JU2] (last visited Sept. 16, 2021).

[80] *Id.*

[81] *Id.*

[82] *Scholarships*, NCAA, http://www.ncaa.org/student-athletes/future/scholarships#:~:text=NCAA%20Divisions%20I%20and%20II,scholarships%20to%20compete%20in%20college [https://perma.cc/X4N5-UASH] (last visited Sept. 16, 2021).

[83] *See Where Does the Money Go?*, *supra* note 79.

[84] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/345D-B8KY].

[85] Chrissy Clark, *NCAA Players Already Get Paid. It's Called Free Tuition*, THE FEDERALIST (Aug. 8, 2019), https://thefederalist.com/2019/08/08/ncaa-players-already-get-paid-its-called-free-tuition/ [https://perma.cc/V8GB-2E2R].

[86] *Id.*

[87] *Id.*

providing them with a nurturing atmosphere where they have the opportunity to pursue not only their athletic goals, but also academic and social opportunities.[88]

D. Tuition is No Longer Enough

Although the argument made above may be appealing on the surface, the argument fails to consider the reality and complexity of being a student-athlete. The first stark reality is that the majority of student-athletes do not receive full-tuition scholarships and their aid covers only a portion of college-related expenses.[89] Additionally, a majority of student-athletes will not have successful professional careers. There are more than 480,000 NCAA student-athletes and it is projected that less than two percent will advance to a professional career in their sport.[90] That means roughly ninety-eight percent of student-athletes will not have the opportunity to profit from their athletic ability past their collegiate careers.[91] This limited opportunity for student-athletes to profit from their athletic ability is even more pronounced in women's sports. Even after Title IX went into effect, women's college athletic programs continue to have lower rates of participation, staffing, financing, attendance, and support than the male parallel.[92] This trend is also apparent in women's professional sports.[93] The unfortunate reality is that if a female student-athlete does not have the ability to be compensated for her athletic talents during her collegiate career—from those limited opportunities that do present themselves—there is little to no chance that she will do so as a professional athlete.[94]

Another factor to consider when determining whether student-athletes are being fairly rewarded is whether the academic opportunities these students receive actually translate into a long-term educational benefit. First, there has been strong

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[88] *Id.*

[89] *See Scholarships*, *supra* note 82.

[90] *2020-21 Guide for the College-Bound Student-athlete*, NCAA, http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf [https://perma.cc/V3GP-85EE] (last visited Sept. 16, 2021).

[91] *Id.*

[92] Cecelia Townes, *Why California's Fair Pay to Play Act Could Be a Financial Win for Female Athletes*, FORBES (Sept. 16, 2019, 2:08 PM), https://www.forbes.com/sites/ceceliatownes/2019/09/16/why-the-california-fair-pay-to-play-act-could-be-a-financial-win-for-female-athletes/#664064f4c720 [https://perma.cc/9S7B-FY2H].

[93] *Id.*

[94] *Id.*

evidence of "academic clustering" of student-athletes into majors without clear career paths.[95] These studies have found that NCAA student-athletes tend to cluster into the following majors: "[G]eneral studies, interdisciplinary studies, social sciences such as sociology, and humanities such as communications and journalism."[96] Though the NCAA has advertised a considerable rise in student-athletes' graduation rates,[97] the clustering of student-athletes has serious, negative outcomes.[98] For example, student-athletes who have "little to no interest in their degree programs and no real career trajectory other than sports are being set up for failure once they leave college," regardless of whether they earn a college degree.[99]

Fath' Carter, a former safety for the Oklahoma State football team stated "[t]he philosophy, the main focus [of the program], was to keep [the best players] eligible through any means necessary . . . . The goal was not to educate but to get them the passing grades they needed to keep playing. That's the only thing it was about."[100] Further, Peter Finley, a professor at Nova Southeastern University who has conducted studies of clustering in major college athletic programs, stated that student-athletes "become a pawn . . . . They're there to play the sport and major in eligibility."[101] At the very least, these high performing—and profitable—student-athletes are being heavily encouraged to take an easier and more flexible academic path; at the worst, the vast majority of these students are being forced to choose an academic path that does not benefit them professionally, outside of a career in sports, but instead maintains their ability to perform.

Moreover, the institutions that are supposed to help these student-athletes thrive not only athletically, but also academically, are in fact doing worse than encouraging "easy

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[95] Matthew B. Rowland, Academic Clustering of Student-Athletes: A Case Study of Football and Basketball Programs (Aug. 2014) (M.A. thesis, University of Arkansas, Fayetteville) (ScholarWorks@UARK).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Special Report on Oklahoma State Football: Part 2—the Academics*, SPORTS ILLUSTRATED (Sept. 11, 2013), https://www.si.com/college/2013/09/11/oklahoma-state-part-2-academics [https://perma.cc/89Y5-SZKE].

[101] Shaun Hittle, *Athletes' Tendencies to 'Cluster' in Certain Academic Fields Problematic, Some Say*, LJWORLD.COM (June 15, 2012, 12:00 AM), https://www2.ljworld.com/news/2012/jun/15/athletes-tendencies-cluster-certain-academic-field/ [https://perma.cc/8YD5-KXCQ].

majors"—they are actually participating in academic fraud.[102] For eighteen years, advisors directed student-athletes to enroll in fake classes at the University of North Carolina ("UNC") to maintain their NCAA eligibility status.[103] Mary Willingham, the University's learning specialist, stated that the "paper classes were openly discussed as a way to keep athletes eligible to play."[104] Moreover, former UNC football player Michael McAdoo said "he was forced into majoring in African American studies, the department at the heart of the paper-classes scandal."[105] Crucially, the NCAA did not punish UNC or its athletic program for this fraud.[106] Unfortunately, "[t]he N.C.A.A.'s committee on infractions concluded it lacked the power to punish the university under the rules of the N.C.A.A."[107] Greg Sankey, who led the infraction panel meeting, stated "[t]he N.C.A.A. defers to its member schools to determine whether academic fraud occurred."[108] This kind of systematic academic fraud is not unique to UNC, as there have been countless instances of academic fraud perpetrated by NCAA member schools to maintain star collegiate athletes' eligibility.[109] The above mentioned examples tend to show that the NCAA's and its member institutions' motto of student first, athlete second is not a central pillar of their mission, but really a sham that allows them to avoid paying extremely talented individuals.

Yet another reason that the tuition and supplemental benefits awarded to student-athletes is insufficient compensation is that their scholarships are completely contingent on their athletic performance.[110] Student-athletes commonly sign a National

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[102] *See infra* notes 103–109 and accompanying text.

[103] Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Athletes Playing*, CNN, https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/Q642-2D9W] (last updated Oct. 23, 2014, 10:28 AM).

[104] *Id.*

[105] *Id.*; *see also* Hittle, *supra* note 101 (explaining how forced "clustering" affects student-athletes).

[106] Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, THE N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html [https://perma.cc/YU6N-MBCL].

[107] *Id.*

[108] *Id.*

[109] "In the 1980s, Jan Kemp, an English instructor at the University of Georgia, publicly alleged that university officials had demoted and then fired her because she refused to inflate [student-athletes'] grades." Branch, *supra* note 84.

[110] Ben, *Understanding Athletic College Scholarships*, PETERSON'S (Nov. 29, 2017), https://www.petersons.com/blog/understanding-athletic-college-scholarships/ [https://perma.cc/BGF8-QCYQ].

Letter of Intent ("NLI").[111] The NLI is a binding agreement between a PSA and the institution they will be attending.[112] This agreement guarantees the PSA tuition for one academic year in return for the student-athlete's full-time attendance and athletic performance at the institution for one academic year.[113] This is often referred to as the "one-year rule," and it is revisited annually by the parties, which effectively allows colleges to renew, reduce, or cancel student-athletes' scholarships each year.[114] This annual renewal system means that the academic experience of student-athletes is completely unsecured. Additionally, according to the National College Players Association, eighty-six percent of college athletes live below the poverty line.[115] Thus, the overwhelming majority of these students do not have the means to stay in school without their athletic scholarships.[116] As a result, student-athletes are caught in a double bind: student-athletes are unable to earn compensation if they participate in a NCAA program; however, they may not have the opportunity to earn a college degree if they do not participate in NCAA athletics.

E. Student-Athletes are a Vulnerable Population

In addition to the flawed argument that student-athletes are already being paid for their labor, there is another important point that should be raised: student-athletes are a vulnerable population. Student-athletes are a vulnerable population on account of their age, race, and lack of choice and, therefore, need more protection and support. The NCAA and member universities are taking advantage of susceptible student-athletes under the guise of their policy of cultivating amateurism.

Student-athletes are a vulnerable population because these students are often minors or newly legal adults.[117] A combination

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[111] *About the National Letter of Intent*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html [https://perma.cc/XL57-7UYU] (last visited Sept. 16, 2021).

[112] *Id.*

[113] *Id.*

[114] *See* Ben, *supra* note 110.

[115] Henry DeWitt, *NCAA Should Pay Its Athletes*, THE BUDGET ONLINE (Oct. 31, 2019), https://lhsbudget.com/opinion/2019/10/31/ncaa-should-pay-itsathletes/#:~:text=However%2C%20according%20to%20the%20National,water%20running%20in%20their%20homes [https://perma.cc/7FK3-7YN8].

[116] Branch, *supra* note 84 (discussing how most of the student athletes who lose their scholarships do not stay in school).

[117] *Delayed Enrollment*, NCAA, http://fs.ncaa.org/Docs/eligibility_center/ECMIP/

of the professional league age limits and NCAA bylaws result in most collegiate athletes being rather young. The NCAA's delayed enrollment rule states that a PSA has a grace period, up to one year, for the majority of Division I sports, after their high school graduation to enroll in a collegiate institution.[118] If the PSA does not enroll at the first opportunity after the grace period begins, and continues to participate in organized athletic competition, they will lose a season of eligibility if they later seek to enroll.[119]

It is commonly understood that the "damage of assignments of publicity rights is perhaps most apparent when children are involved."[120] While student-athletes are not necessarily children, they are young—often seventeen or eighteen years old—and generally lack the life experience and skills to make decisions as adults. Therefore, these student-athletes are not being protected as children but are being exploited in a similar way.

Aside from concerns about age and inexperience, there is also an undeniable nexus with race and poverty concerns. Recently, the conversation about whether student-athletes should be paid shifted to a conversation about race.[121] As Senator Chris Murphy observed, "a multi-billion dollar industry lines the pockets of predominately white executives all while majority-Black athletes can't profit from their labor."[122] The issue of race in the conversation surrounding the payment of college athletes gains a lot of traction because Division I men's basketball and football are the financial backbone of Division I college athletics, and fifty-six percent of Division I men's basketball players and forty-eight percent of Division I football players are African American.[123] Dr. Boyce Watkins, a finance professor at Syracuse University, has

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Amateurism_Certification/Delayed_Enrollment_Webpage.pdf [https://perma.cc/8GCU-MCWT] (last updated June 2020) (explaining there is no set age limit for any athletes, however, Division I athletes are required to enroll in school one calendar year after high school graduation and then have just five years to complete a typical four-year degree, making student-athletes a young population).

[118] *Id.*

[119] *Id.*

[120] Rothman, *supra* note 35, at 188.

[121] *See* Ross Dellenger, *Senators Announce Proposal for 'College Athletes Bill of Rights'*, SPORTS ILLUSTRATED (Aug. 13, 2020), https://www.si.com/college/2020/08/13/senators-announce-college-athletes-bill-of-rights-proposal [https://perma.cc/N5EP-UMKG].

[122] *Id.*

[123] Ellie Simpson & Lauren Chaingpradit, *NCAA Says Amateurism Is 'Education' While Making Millions off Student-Athletes*, GLOBAL SPORT MATTERS (Apr. 9, 2019), https://globalsportmatters.com/youth/2019/04/09/ncaa-says-amateurism-is-key-while-student-athletes-are-left-without-food/ [https://perma.cc/QF84-8RZU] (demonstrating the NCAA stresses amateurism and education while making millions off student-athletes).

remarked that the NCAA system disproportionately hurts low-income areas and the African-American community.[124] Dale Brown, former LSU basketball coach, put it starkly: "Look at the money we make off predominantly poor [B]lack kids . . . . We're the whoremasters."[125]

Finally, student-athletes are a vulnerable population because they have little to no choice due to the limited options they have upon graduating high school. The major American professional sports leagues, including the National Basketball Association ("NBA") and the National Football League ("NFL"), have age limits for participants.[126] Specifically, the NBA requires athletes to be at least nineteen years old to enter the draft, and the NFL requires athletes to be at least three years removed from high school—usually twenty or twenty-one years old.[127] These age restrictions leave prospective professional athletes with limited options including playing at the collegiate level, playing overseas,[128] or playing in an alternative professional league.[129] However, the alternatives to the NCAA do not have the same prestige[130] and are limited to the most elite players.[131]

Therefore, for those who have hopes of becoming professional athletes, the tried-and-true path requires NCAA participation and adherence to the NCAA bylaws, which require student-athletes to not utilize their publicity rights while contemporaneously allowing the NCAA to exploit their publicity rights. These aspiring student-athletes simply do not have the same "leverage to negotiate fair, or even favorable, contract terms related to the use of their

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[124] Trish LaMonte, *Syracuse University Professor: College Athletes Should Be Paid*, SYRACUSE.COM (July 30, 2009), https://www.syracuse.com/today/2009/07/syracuse_university_professor.html [https://perma.cc/28M9-YV26].

[125] Branch, *supra* note 84.

[126] TJ Mathewson, *How Young Is Too Young to Play Professional Sports?*, GLOBAL SPORT MATTERS (Apr. 25, 2019), https://globalsportmatters.com/culture/2019/04/25/how-young-is-too-young-to-play-professional-sports/ [https://perma.cc/C2QR-FVBC].

[127] *Id.*

[128] Gary Washburn, *Top High School Basketball Prospect Skipping College for G League a Problem for NCAA*, BOSTON GLOBE, https://www.bostonglobe.com/2020/04/16/sports/top-high-school-basketball-prospect-skipping-college-g-league-problem-ncaa/ [https://perma.cc/56U5-9PMK] (last updated Apr. 16, 2020, 8:22 PM).

[129] *NBA G League Introduces Professional Path for Elite Basketball Prospects*, NBA G LEAGUE (Oct. 18, 2018), https://gleague.nba.com/news/nba-g-league-introduces-professional-path-select-contracts-elite-basketball-prospects/ [https://perma.cc/L9JL-BPYA].

[130] Washburn, *supra* note 128.

[131] *See NBA G League Introduces Professional Path for Elite Basketball Prospects*, *supra* note 129.

identities" that successful professional athletes have at their disposal.[132] Thus, student-athletes "will continue to be burdened by oppressive, broad, long-term (even perpetual) assignments" unless more effective steps are taken to protect their rights.[133]

III. INSUFFICIENT SOLUTIONS UP UNTIL NOW

The exploitation of student-athletes' publicity rights is not a new conversation.[134] In fact, numerous courts have already addressed NCAA amateurism rules and the exploitation of student-athletes' publicity rights resulting in no positive change.[135] More recently, state legislatures have decided to address the problem by creating legislation that requires the NCAA and higher education institutions to allow student-athletes to receive compensation from third parties for the use of their NIL.[136] Although this was a positive step forward, I argue that it is incompatible, insufficient, and unfair when applied to a *national* organization like the NCAA. Additionally, due to the pressure that these state bills placed on the NCAA, it implemented bylaw changes. However, these bylaw changes are temporary and do not provide student-athletes the full benefit of their NILs. Finally, any federal legislation created will preempt all of the work these individual states have done to help student-athletes. Therefore, unless the federal legislation is crafted with these students in mind, the exploitation will persist.

A. Prior Case Law has Inadequately Protected Student-Athletes

In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court of the United States addressed the rules governing the broadcast of college football games.[137] The Court held that a per se rule against the NCAA's amateurism rules

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[132] Rothman, *supra* note 35, at 198.

[133] *Id.*

[134] *See generally* James S. Thompson, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT L. 143 (1994); Brian M. Rowland, *An Athlete's Right of Publicity*, 76 FLA. B.J. 45 (2002); Bearman, *supra* note 30 (demonstrating that this has been an active conversation for decades).

[135] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 88–89 (1984); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054 (9th Cir. 2015).

[136] S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019); H.B. 251, 2020 Leg., Reg. Sess. (Fla. 2020) (effective July 1, 2021).

[137] 468 U.S. 85, 88 (1984).

would be inappropriate because "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[138] The Court reasoned that the NCAA must be allowed to restrict member institutions because the national system's effectiveness would be destroyed if member institutions adopted decisions unilaterally.[139] In this way, the NCAA amateurism model was bolstered by approval from the Supreme Court of the United States.[140]

More recently, in *O'Bannon v. National Collegiate Athletic Association*, a group of current and former college football and basketball players brought an antitrust class action suit against the NCAA.[141] These former and current student-athletes alleged Sherman Act violations against the NCAA for restraining trade in relation to the use of players' names, images, and likenesses in an Electronic Arts ("EA") video game.[142] The Ninth Circuit decision in *O'Bannon* supports the notion that amateurism is a legitimate purpose for the NCAA to maintain competitiveness.[143] The court also found—absent the NCAA's anti-compensation rules—video game makers would likely have paid the plaintiffs for the right to use their NILs, and thus the plaintiffs had suffered an injury.[144] However, due to the NCAA amateurism rules EA did not pay the plaintiffs, but instead had a licensing agreement with the NCAA through the Collegiate Licensing Company.[145]

Unfortunately, the holding in this case was extremely narrow and once again did nothing to improve the position of student-athletes, stating "we reaffirm that NCAA regulations are subject to antitrust scrutiny . . . . The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."[146] Although *O'Bannon* shed light on an interesting problem, there were little

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[138] *Id.* at 102.
[139] *Id.* at 117.
[140] *Id.* at 120.
[141] 802 F.3d 1049, 1052 (9th Cir. 2015).
[142] *Id.* at 1055.
[143] *Id.* at 1061–62.
[144] *Id.* at 1067.
[145] *Id.* at 1069; Steve Berkowitz, *NCAA Ending Deal with Video Game Maker EA*, USA TODAY (July 17, 2013, 2:40 PM), https://www.usatoday.com/story/sports/ncaaf/2013/07/17/ncaa-ending-videogame-contract-with-ea-electronic-arts/2525843/ [https://perma.cc/9YBF-8KMY].
[146] *O'Bannon*, 802 F.3d at 1079.

to no real-life consequences for student-athletes because EA never produced another NCAA-inspired video game again.[147]

Even more recently, in *National College Athletic Association v. Alston*, a group of current and former collegiate football and basketball players brought an action alleging that the NCAA violated federal antitrust law by limiting the compensation they could receive in exchange for their athletic services.[148] Unlike the *O'Bannon* plaintiffs, the student-athletes in this case challenged, among other things, limits on non-cash, education-related benefits.[149] The Ninth Circuit found no "concrete procompetitive effect of limiting non-cash, education-related benefits."[150] Subsequently, the United States Supreme Court unanimously affirmed the Ninth Circuit's decision and found that the NCAA cannot prohibit its member schools from providing athletes with certain forms of education-related benefits.[151] This decision was a huge win in the fight to fairly compensate NCAA student-athletes. However, it was connected to education-related benefits and did not address the issue of compensation from third parties for the use of the student-athletes' NIL.

B. The Varying State Legislation is Inapplicable for a National Organization

Besides the numerous examples of unsatisfying litigation, state legislatures have also attempted to address this issue, but unfortunately these solutions will likely fall short of solving the problem. In recent years there has been a growing discomfort among the public with the NCAA and other organizations that make billions of dollars off of the labor of unpaid, mostly young, Black, male, athletes.[152] Therefore, in response to the public

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[147] Bryan Wiedey, *'NCAA Football': Why Video Game Series Hasn't Returned Five Years After Last Release*, SPORTS NEWS (July 10, 2018), https://www.sportingnews.com/us/ncaa-football/news/ncaa-football-video-game-series-return-ncaa-19-obannon-ea-sports-possible-resolution/1qpe2h09we8wl16w4qnm7t65ib [https://perma.cc/M8ZE-TZAG].

[148] 141 S. Ct. 2141, 2147 (2021).

[149] *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap. Antitruct Litig.*, 958 F.3d 1239, 1252 (9th Cir. 2020) (noting that post–NCAA appeal, the Fair Pay to Play Act ("FPP Act") was enacted by California).

[150] *Id.* at 1258.

[151] *Alston*, 141 S. Ct. at 2166.

[152] *See supra* Part II.E (explaining how the NCAA and its executives make billions of dollars off the unpaid labor of student-athletes, especially men's football and basketball which is overwhelming comprised of young Black men).

outcry, many state legislatures have proposed or are proposing bills to address this issue.[153]

On September 30, 2019, Governor Gavin Newsom of California signed the "Fair Pay to Play Act" into law.[154] This law prohibits California postsecondary educational institutions and every organization with authority over intercollegiate athletics from preventing a student-athlete from earning compensation as a result of the use of their name, image, or likeness or obtaining professional representation relating to their participation in intercollegiate athletics.[155]

The California law created a ripple effect causing other states to propose and even pass new legislation addressing the compensation of NCAA athletes for their publicity rights. For example, on June 12, 2020, Florida Governor Rick DeSantis signed into law the Intercollegiate Athlete Compensation and Rights Bill,[156] which is similar to California's law except that Florida's law is effective as of July 2021.[157] Therefore, as of the summer of 2021, Florida universities began playing by a different set of rules than all other NCAA member institutions residing in other states. To date, Florida and California are joined by approximately two dozen other states with similar bills in the legislative process, but much remains in flux.[158]

Although these state laws are moving in the right direction, they will likely be an insufficient solution because a state-by-state approach cannot be effectively implemented against a national organization such as the NCAA. As noted above, the NCAA is a

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[153] Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes Be Paid for Name, Image, Likeness* (Oct. 3, 2019, 5:43 PM), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/ [https://perma.cc/B7WR-7TN8] (discussing all the states who have passed and proposed state legislation).

[154] Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12 [https://perma.cc/3XK6-6L78].

[155] Cal. Educ. Code § 67456 (West 2019) (California Fair Pay to Play Act) [https://perma.cc/F7GN-LVGA].

[156] Rudy Hill & Jonathan D. Wohlwend, *Florida Law Will Allow College Athletes to Profit from Name, Image, and Likeness Starting Summer 2021*, BRADLEY (June 25, 2020), https://www.bradley.com/insights/publications/2020/06/florida-law-will-allow-college-athletes-to-profit-from-name-image-and-likeness-starting-summer-2021 [https://perma.cc/2DMN-KYF9].

[157] *Id.*

[158] *Id.*

national organization that spans across all fifty states.[159] Thus, the varying state laws treat student-athletes in similar positions differently due to their geographical location—an approach that is untenable for the NCAA.[160] Therefore, the NCAA is encouraging states not to create state level changes and attempting to back federal legislation to preempt the varying state laws.[161] As Ramogi Huma, the executive director of the National College Players Association, stated, "[t]hey're trying to tell the states to hold on and wait for us, meanwhile they're going to Congress trying to get legislation to preempt the states in the ways the NCAA would like."[162] Although state legislation is a possible solution, it is an inadequate and unstable solution, as it will not protect all student-athletes and it may well be preempted by federal legislation.[163]

C. NCAA's Bylaw Reforms are Insufficient

Due to the media attention surrounding the California Fair Pay to Play Act,[164] the NCAA was pressured to respond.[165] On June 30, 2021, the NCAA announced a uniform interim policy suspending NCAA name, image, and likeness rules for all incoming and current student-athletes in all sports.[166] NCAA President Mark Emmert stated that this policy was adopted due to the variety of state laws and that the NCAA intends to "continue to work with Congress to develop a solution that will provide clarity on a national level."[167] He goes on to explain that "[t]he current environment . . . prevents us from providing a more

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[159] *Directory*, NCAA, https://web3.ncaa.org/directory/memberList?type=1 [https://perma.cc/F879-4HCR] (last visited Sept. 1, 2021) (providing a list of every member institute and the corresponding state).

[160] Bearman, *supra* note 30, at 100.

[161] Brady McCollough, *NCAA President Mark Emmert Meets with Senators over Pay for College Athletes*, L.A. TIMES (Dec. 17, 2019, 6:19 PM), https://www.latimes.com/sports/story/2019-12-17/ncaa-president-mark-emmert-meets-with-senators [https://perma.cc/27N3-XMTL].

[162] *Id.*

[163] Ross Dellenger, *Congress Says NCAA Needs Change, But Mark Emmert Doesn't Have the Answers*, SPORTS ILLUSTRATED (Feb. 11, 2020), https://www.si.com/college/2020/02/12/ncaa-mark-emmert-senate-name-image-likeness [https://perma.cc/B8RX-ADVD].

[164] Cal. Educ. Code § 67456 (West 2021) (California Fair Pay to Play Act).

[165] *See* Berkowitz, *supra* note 145.

[166] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/WS8W-LGWY].

[167] *Id.*

permanent solution."[168] The interim policy allows student-athletes to participate in NIL activities without violating NCAA rules.[169]

While these recent developments are a huge win for student-athletes and may even suggest that the issue has been resolved, the struggle for student-athletes to use and be compensated for their NILs will likely persist. First, the NCAA's NIL rule modifications are only temporary.[170] For example, the current NCAA reforms allow schools and universities to restrict student-athletes from using their school's logos, facilities, and uniforms in any of their NIL deals, nor will they allow student-athletes to engage in business deals for certain prohibited products and services.[171] Additionally, student-athletes can be restricted from using content that represents the team or university and that occurs in "team-mandated activities."[172] This is a critical limitation on the bylaw changes because a student-athlete's position as a successful NCAA athlete is frequently how and why their NIL is commercially valuable.[173]

Second, all future state and federal laws, which are currently being proposed, will preempt the NCAA bylaw modifications. Although the state laws currently being proposed seem to be leaning in favor of protecting student-athletes,[174] they too will be preempted by any federal legislation.[175] To that end, NCAA President Mark Emmert and other NCAA officials are lobbying congressional "lawmakers to create federal NIL legislation to supersede mounting state laws that threaten the organization's long-standing amateurism model."[176] This action by the NCAA's President demonstrates that with one hand the NCAA is supporting the legal and social progress of student-athletes, but with the other hand the NCAA is attempting to uphold the system that has exploited them for decades.

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[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Clemson Sets Its First NIL Policy. Athletes Can't Use Tigers Logo 'At This Time'*, THE STATE (July 1, 2021, 8:01 AM), https://www.thestate.com/sports/college/acc/clemson-university/article252497068.html.

[172] *Id.*

[173] Stewart Mandel & Nicole Auerbach, *What Could College Athletes' Social Media Brands Be Worth?*, ATHLETIC (May 7, 2020), https://theathletic.com/1796999/2020/05/07/college-athlete-name-image-likeness-value/ [https://perma.cc/DMD2-RVF2].

[174] Norlander, *supra* note 153.

[175] U.S. CONST. art. VI, cl. 2.

[176] Dellenger, *supra* note 163.

D. Federal Legislation: Two Parties Two Different Goals

Finally, there has been a lot of discussion about creating a federal right of publicity. Senator Roger Wicker, Chairman of the Senate Commerce Committee, stated that he believes that a federal NIL bill is imperative to address the conflicting and varying compensation laws of the different states and that a bill will likely arrive on the floor of the U.S. Senate after the 2020 presidential election.[177] This issue has received media attention mostly due to its connection to, and implications for, the NCAA. In particular, on August 13, 2020, a group of senators announced a proposal for "a college athletes bill of rights."[178] If enacted, this legislation would allow college athletes to market their NIL and exploit their own publicity rights with minimal restrictions.[179]

Although the NCAA has advocated for a federal right of publicity, the NCAA's intent in creating a federal right is different than the student-athletes' goals.[180] The NCAA is urging Congress to create a federal bill since the new state bills conflict with their needs as a national organization.[181] The federal law the NCAA is lobbying Congress to pass "[e]nsures federal preemption over state NIL laws; [p]rotects the NCAA from federal and state antitrust lawsuits targeting the NIL rules; [s]afeguards the nonemployment status of student-athletes; [m]aintains the distinction between college athletes and professional athletes; and [u]pholds the NCAA's values."[182] In other words, the NCAA's intent in supporting a federal right of publicity law is to maintain the status quo, not to advance student-athletes' rights.

E. The Lanham Act is an Inadequate Substitute

Although there is no federal right of publicity at present, federal trademark law has been used in the past to protect

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[177] Ross Dellenger, *Next Steps for a Federal Name, Image, and Likeness Bill Coming into Focus*, SPORTS ILLUSTRATED (July 7, 2020), https://www.si.com/college/2020/07/07/ncaa-nil-athlete-compensation-senate [https://perma.cc/E4LL-TD2H].

[178] Ross Dellenger, *Senators Announce Proposal for 'College Athletes Bill of Rights'*, SPORTS ILLUSTRATED (Aug. 13, 2020), https://www.si.com/college/2020/08/13/senators-announce-college-athletes-bill-of-rights-proposal [https://perma.cc/75YK-N9QH].

[179] Chandelis Duster, *Lawmakers Announce Plans for a 'College Athlete Bill of Rights'*, CNN (Aug. 13, 2020, 1:31 PM), https://www.cnn.com/2020/08/13/politics/college-athletes-bill-of-rights/index.html#:~:text=The%20bill%20of%20rights%2C%20if,would%20also%20establish%20an%20oversight [https://perma.cc/4W4L-3MS9]; Hill & Wohlwend, *supra* note 156.

[180] Hill & Wohlwend, *supra* note 156.

[181] *Id.*

[182] *Id.*

individuals' publicity rights from unauthorized commercial use *constituting false endorsement*.[183] However, the federal trademark statute cannot adequately fill the void of a lack of a federal right of publicity. As Professor McCarthy explains, the "Lanham Act § 43(a) cannot provide a federal vehicle for the assertion of infringement of the state law right of publicity for the simple reason that § 43(a) is limited to some form of falsity, while infringement of the right of publicity involves no element of falsity."[184] Therefore, the elements of falsity or likelihood of confusion in trademark law are not required to prove infringement of the right of publicity.[185] Additionally, the protection offered under federal trademark law extends only to "famous mark[s]."[186] As such, the Lanham Act would only work to protect celebrities, and the right of publicity should not be a special right exclusively for the famous and should be available for everyone.[187] Since the federal trademark law cannot adequately fill this void, it is vital for Congress to finally pass a federal right of publicity statute.

IV. THE MOST EFFECTIVE SOLUTION: FEDERAL RIGHT OF PUBLICITY

A. A Federal Right of Publicity

The most appropriate and the only adequate form of protection for vulnerable and exploited populations, like NCAA student-athletes, is a federal right of publicity. A federal right of publicity must be created to provide individuals with uniformity, equal protection under the law, and to prevent the loss of control over one's fundamental rights. Most importantly, a new federal right of publicity, unlike the intent behind the original development of the right of publicity,[188] should put the protection of the person before the economic needs of businesses.

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[183] Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 247–48 (1999).

[184] Bearman, *supra* note 30, at 107.

[185] Goodman, *supra* note 183, at 241–42.

[186] 15 U.S.C. § 1125 (2012); *see, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1400 (9th Cir. 1992), *as amended* (Aug. 19, 1992) (describing that one of the factors in determining is the strength of the mark which refers to the level of recognition the celebrity enjoys).

[187] Goodman, *supra* note 183, at 254.

[188] *See supra* Section II.C (analyzing the history behind the development of the right of publicity and demonstrating that it was rooted in businesses wanting control over celebrities).

The new federal right of publicity statute must preempt statutory and common law state laws on the subject to ensure uniformity.[189] The current state-by-state approach provides individuals with inconsistent protections or no protection at all.[190] Therefore, the state-based system of the right of publicity has failed student-athletes who are a part of a *national* organization with member universities in all fifty states.[191] A foundational principle of American jurisprudence is predictability and certainty, and the current patchwork of publicity rights directly contradicts those values.[192]

A new federal right of publicity statute should also apply equally to every individual, regardless of whether or not they are a celebrity. A majority of states have already taken this position and, therefore, the federal statute should adopt this position as well.[193] The Ninth Circuit explained the majority's rational by holding that the right of publicity protects not only the celebrity's identity, but also the celebrity's non-famous birthname.[194] There does not need to be a particular number of people who actually identify the individual in a right of publicity infringement, instead that number is relevant only when determining the remedy.[195] As a majority of states have decreed, "fame should not be a prerequisite" to be able to recover for a right of publicity violation.[196] Incorporating this concept into the federal right of publicity will ensure the protection of both student-athletes who are known nationally and student-athletes who are not in the spotlight.

Additionally, the federal right of publicity statute should incorporate limitations on the alienation of the right. While most property is alienable, we as a society have recognized that in certain situations restrictions should be placed on the alienation

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[189] *See* Goodman, *supra* note 183, at 251; *see also* Bearman, *supra* note 30, at 108–09 (providing examples of the disparities between state protections).

[190] *See* Rothman, *supra* note 52.

[191] *See Directory*, *supra* note 159.

[192] *See* Goodman, *supra* note 183, at 243.

[193] Bearman, *supra* note 30, at 108.

[194] Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) (holding that the plaintiff had a right of publicity in his birth name regardless of his active use of it).

[195] MCCARTHY & SCHECHTER, *supra* note 8, § 4:14.

[196] Bearman, *supra* note 30, at 108.

of property.[197] For example, many have argued that the alienability of fundamental rights should be restrained.[198] However, there has been less contemplation of whether the right of publicity should be alienable and under what circumstances.

Professor Rothman argued that the right of publicity could be viewed as a fundamental right itself and thus inalienable.[199] Or, alternatively, that the right of publicity is so interwoven with other fundamental rights such as, liberty, free speech, and freedom of association, and thus should be inalienable.[200] The restriction on alienating fundamental rights can been justified as paternalistic, freedom-enhancing, and reducing societal harms.[201] As seen with the NCAA student-athletes, the NCAA has enormous control over the student-athletes' publicity rights even without a technical transfer.[202] Therefore, the new federal statute should handle the right of publicity like other fundamental rights and limit its alienability.

B. University NIL Programs

In addition to the creation of a federal right of publicity, universities can—and should—implement educational NIL programs to ensure that student-athletes are adequately prepared and protected from the exploitation of their own publicity rights. For example, St. John's University Department of Athletics has launched the Unlimited Program.[203] This program is a joint partnership with the Department of Athletics, The Peter J. Tobin College of Business, and The Lesley H. and William L. Collins College of Professional Studies, created with the goal of ensuring that student-athletes have the tools necessary to succeed in controlling their NIL rights.[204] All NCAA member institutions should implement similar NIL education programs to ensure

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[197] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 (2000) ("The greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation.").

[198] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 95 HARV. L. REV. 1089, 1111–114 (1972).

[199] Rothman, *supra* note 35, at 210.

[200] *Id.*

[201] *Id.* at 209–10.

[202] *Supra* Section II.B.

[203] *St. John's Athletics Unveils Unlimited Program*, ST. JOHN'S UNIV. ATHLETICS (Nov. 17, 2020, 2:30 PM) https://redstormsports.com/news/2020/11/17/general-st-johns-athletics-unveils-unlimited-program.aspx [https://perma.cc/2SXB-S7FS].

[204] *Id.*

student-athletes are prepared to handle the new opportunities coming their way.

CONCLUSION

The issue of alienability of the right of publicity is extremely troubling in the context of young NCAA athletes, like Donald De La Haye, but the problem extends even further. This issue also impacts professional athletes, aspiring musicians, models, reality television show contestants, and actors—all of whom are frequently required to sign away their publicity rights in gross, in perpetuity.[205]

In conclusion, a federal right of publicity is needed. The federal right of publicity should aim to provide uniformity, apply equally to all, and limit alienability in certain situations. In a modern, interconnected world where national organizations, campaigns, and advertisements are more common, a uniform approach is crucial. Most importantly, the federal statute must focus on the needs of the individual identity-holder instead of the commercial needs of the publicity-holder. Further, the dangers associated with the alienation of the right of publicity are clearly shown through the case study of the exploitation of young NCAA student-athletes. Therefore, the federal statute should allow for the alienation of the right of publicity to be restricted in certain situations similar to that of other fundamental rights.

[205] Rothman, *supra* note 35, at 196–98.