NAME, IMAGE, AND LIKENESS RIGHTS IN COLLEGE SPORTS: EVALUATING YEAR ONE OF MUCH OVERDUE REFORMS

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The following is based on the keynote address that Professor Marc Edelman delivered on October 14, 2022, at the University of Oklahoma Law Review Symposium entitled "Name, Image, and Likeness in College Sports."

Twenty years ago, I was in about the exact same position as all of you. I was a 2L at a large public state university with a very good football team that was not having the best of seasons.[1] And like any 2L, I was told that one of my tasks was to write a student Note. I had one elective in my first year of law school. It was sports law. It was my favorite class, and I was presently taking antitrust law. So, using the knowledge I had built in these two courses, I decided to write a Note, entitled "Reevaluating Amateurism Standards in Men's College Basketball."[2]

In my Note, I argued that it violated antitrust law when the more than 1,200 National Collegiate Athletic Association (NCAA) member colleges came together and prevented college athletes at all schools from endorsing products.[3] I also explained that the NCAA's rules prohibiting college athletes from endorsing products had a disproportionately harmful effect on low-income and African-American college athletes: both groups of college athletes likely to forgo earning their degree based on the need to earn incomes for their families.[4]

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1. *See Big Ten Conference Schedule 2002*, SPORTS REFERENCE, https://www.sports-reference.com/cfb/conferences/big-ten/2002-schedule.html (last visited Oct. 7, 2023) (showing that the University of Michigan finished the 2002 Big Ten season with a conference record of six wins and two losses, having lost critical games that year to University of Iowa and Ohio State University).

2. *See* Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861 (2002).

3. *Id.* at 864 ("This Note argues that courts should interpret NCAA conduct under the Principle of Amateurism as a violation of § 1 of the Sherman Antitrust Act . . . .").

4. *See id.* at 877–80.

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To be fair, I do not want to overstate my own importance. I was probably not the first person to make the argument that the NCAA's restraints on college athlete endorsement deals violated antitrust law, and I was absolutely not the last. Over the past twenty years, we have seen strong criticism of the NCAA restraints on college athletes coming from many others as well, from throughout the political spectrum. Taylor Branch, the civil rights scholar, described the NCAA system as having the "unmistakable whiff of the plantation" because you have overwhelmingly Black and low-income athletes doing the work and not sharing in any of the revenues.[5] Economists Andy Schwarz and Daniel Rascher have criticized the NCAA's restraints on athlete endorsement deals based on their anticompetitive economic effects.[6] And, University of Nebraska law professor Jo Potuto, herself a long-time Faculty Athletics Representative who has worked closely with NCAA compliance, had published an article somewhat critical of the NCAA system in *Oregon Law Review*.[7]

In late-2017, NCAA leadership decided they were going to conduct an "independent" investigation to determine if there was indeed a need to reform certain economic aspects of college sports.[8] I use the term "independent" loosely because they brought in Condoleezza Rice, who was the director of an institute at Stanford University (an NCAA member school) to draft the report, and she in turn interviewed primarily NCAA insiders and their lawyers.[9] But, tellingly, even Condoleezza Rice came back with the recommendation in her sixty-page report that it is time for the NCAA to liberalize its rules that prevent college athletes from endorsing products.[10] The NCAA claimed that it still needed to wait until "legal

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5. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

6. *See, e.g.*, Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: "Amateurism" in Big-Time College Sports*, ANTITRUST, Spring 2000, at 51, 14-SPG Antitrust 51 (Westlaw).

7. *See* Josephine (Jo) R. Potuto et al., *What's in a Name? The College Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 975 (2014) ("An amateurism model based on a 1906 campus and college athletics world is ill suited to the modern realities of universities and athletic competition.").

8. *See* COMM'N ON COLL. BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL 1 (2018), https://ncaaorg.s3.amazonaws.com/compliance/cbreform/2018CCB_ReportFinal.pdf.

9. *See id.* at 15–18.

10. *See id.* at 8; *see also Condoleezza Rice: NCAA Rules 'Incomprehensible'*, REUTERS (May 10, 2018, 7:58 AM), https://www.reuters.com/article/us-basketball-ncaa-condoleezza-rice/condoleezza-rice-ncaa-rules-incomprehensible-idUSKBN1IB1TZ.

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parameters relevant to this issue are clearer."[11] I still do not think anybody understands what that means.

Thereafter, the NCAA members had a very long period of time in which they, on their own, could still have come up with a proposal to liberalize their restraints on college athlete endorsement deals. But they did not do so. Thus, what we saw happen (effective June 30, 2021, just over fifteen months ago)[12] is that, when the NCAA would not act, many others acted for them. The U.S. Supreme Court, in *NCAA v. Alston*, called into doubt the legality of 1,200 member colleges maintaining a wide variety of restraints on athletes earning income, implicitly questioning the NCAA's no-endorsement rule.[13] Also, a number of state legislatures, led by California, passed bills to ensure that the athletes in their state could legally and safely endorse products.[14] Perhaps even these reforms have not been enough, but still they have led to the system that we see today.

So, what I would like to do in my talk today is first speak briefly about the financial status of college sports in America. I will then explain exactly the process by which various states, beginning with California, passed their bills, which in essence overturned aspects of the economic cartel of college sports and led to college athletes endorsing products. I am also going to talk about the positives that have emanated from name, image, and likeness (NIL) reform. Finally, because I am a realist, I am going to conclude by expressing certain concerns—some that were foreseeable, and some that may not have been—about the current system and make some generalized proposals about moving forward.

I. The Financial Status of College Sports in America

When we talk about college sports in America, it means so many different things. Football at the University of Oklahoma means something very different than fencing at a Division III college. So, just to understand what we are working with from a financial perspective, to use the NCAA's own numbers, according to a 2019 NCAA budget report, Division I college

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11. COMM'N ON COLL. BASKETBALL, *supra* note 8, at 8; *see also Condoleezza Rice: NCAA Rules 'Incomprehensible'*, *supra* note 10.

12. Fifteen months from the date of the speech, given in October 2022.

13. *See* 141 S. Ct. 2141, 2147, 2169 (2021).

14. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state (last updated July 28, 2023).

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sports brought in $15.8 billion in revenue, with $10.2 billion of that revenue coming from the activities themselves, as opposed to student fees.[15]

Now, the reality is that, of this $10.2 billion, almost all of this money comes from a very small sub-segment of schools: somewhere between, we could say sixty-four and about 128 schools to throw two Fibonacci numbers out at people. To throw a few more numbers out here to make the point, the University of Texas athletic program brought in over $200 million last year, with $160 million of that coming from the football program alone.[16] Now to illustrate this point—and I mean no disrespect for hockey fans here—there are many National Hockey League teams that do not bring in $200 million, much less $160 million, in annual revenue.[17]

Again, sixty-four colleges in this country have football programs that bring in $25 million per year or more, ranging from the $25 million dollar range to over $200 million at the University of Texas.[18] All of these colleges I referenced are technically non-profits, which means they operate subject to a non-distribution restraint.[19] What that means is, if you think about a for-profit entity, the goal is to keep costs down to maximize revenue for shareholders. At the end of the day, you will see the shareholders get the economic benefit from doing so.

In college sports, through the non-distribution restraint, all of the money that comes in is supposed to stay in the system itself. Some of it might be allocated from one sport to another, but the system itself also includes employees. Thus, the more money that is generated from big time college sports, the more that goes to those individuals that are classified as

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15. NCAA RSCH., 2004-19 NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS REPORT: 15-YEAR TRENDS IN DIVISION I ATHLETICS FINANCES file page 18 (2019), https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf.

16. Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 178 (2020).

17. *See The Business of Hockey*, FORBES, https://www.forbes.com/nhl-valuations/list/#header:revenue_sortreverse:true (last visited Oct. 8, 2023) (noting that only seven out of thirty-two NHL teams have annual revenue over $200 million per year, with the lowest revenue team as the Arizona Coyotes with $127 million).

18. *See* Brad Crawford, *Ranking College Football's Richest, Poorest Programs*, 247 SPORTS (Dec. 29, 2020), https://247sports.com/LongFormArticle/College-football-richest-poorest-programs-Alabama-Crimson-Tide-Texas-Longhorns-Ohio-State-Buckeyes-157982941/#157982941_1.

19. *See* Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137, 1142 (2017) (explaining the non-distribution restraint and its implications on college athletics).

employees. We get some absurdities as a result: with uncompensated, unpaid, and historically not-allowed-to-endorse-products college athletes, we end up with college presidents, athletic directors, administrators, and coaches that, while not technically shareholders, enjoy the proceeds or the profits as if they are.

To illustrate that point further, in the National Football League—arguably the most profitable sports league in the country—there are just three coaches that make salaries of $10 million or more per year.[20] In college sports, there are at least four football coaches who bring home more than $10 million per year (as of October 2022).[21] Where does this money go? Nick Saban at the University of Alabama is paid $11.7 million.[22] Dabo Swinney at Clemson University, $10.5 million.[23] That is not money returned to the education system; it is a windfall for the individuals who control the NCAA's economic cartel.

Meanwhile, as far as the athletes' financial status, according to a 2013 study that was jointly commissioned by the College Athletes Players Association and Drexel University, 85% of college athletes were living below the poverty line.[24]

II. Legislative Efforts To Secure Endorsement Rights in College Sports

There have been some drastic proposals to change the economic opportunities of college athletes, ranging from completely free economic markets for college athletes to sell their services to colleges to the absolute unionizing of college athletes. The name, image, and likeness movement is neither of these things. The name, image, and likeness movement is aimed at one tiny little sliver of the inequity in the system. It is aimed at allowing college athletes to enjoy a right that is frankly afforded to all other college

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20. *See* Logan Reardon, *Who Are the Highest Paid Coaches in the NFL in 2022 Season?*, NBC SPORTS (July 31, 2022, 6:12 PM), https://www.nbcwashington.com/news/sports/nbcsports/who-are-the-highest-paid-coaches-in-the-nfl-in-2021-season/2830508/ (reflecting 2022 salary numbers).

21. *See* Julia Elbaba, *Looking at the Top College Football Coach Salaries in 2022*, NBC SPORTS CHI. (Sept. 8, 2022, 11:25 AM), https://www.nbcsportschicago.com/ncaa/looking-at-the-top-college-football-head-coach-salaries-in-2022/328860/.

22. *Id.*

23. *Id.*

24. *See* NAT'L COLL. PLAYERS ASS'N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4 (2011), http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf ("The percentage of FBS schools whose 'full' athletic scholarships leave their players in poverty is 85% for those athletes who live on campus; 86% for athletes who live off campus.").

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students and to all other human beings: the right to grant permission for third parties to use their name, image, or likeness in exchange for the payment of a sum of money.[25]

So how did this happen? If the NCAA member schools refused to drop their restraint against college athletes endorsing products, how did we move to a period where the NCAA was in essence forced to do so? The story here, for a large part, goes back to California, and the person who probably deserves the most credit for the forced change is a state senator from California, Nancy Skinner.[26]

Now, there are many different ways that one could attack the concerted restraint of a private association to prevent their workers, here the college athletes, from endorsing products for money. The way I had suggested twenty years ago in my law review Note was straightforward. File an antitrust lawsuit under section 1 of the Sherman Act.[27] Allege that the 1,200 colleges were colluding in restraint of trade. Get a court to lift the restraint.

But Nancy Skinner decided to tackle this same cartel problem in a very different way. She proposed a bill called the Fair Pay to Play Act.[28] Now, the name might be a little bit misleading. This was not about direct pay. The proposed bill, which she coauthored with Stephen Bradford, stated that in the State of California it would be a violation of state law for any college, public or private, to prevent the athletes at that college from endorsing products for money or participating in any trade association that mandated that result. In essence, we had a cartel in the NCAA that no school was willing to break away from because they feared being banned from competing in organizing sporting championships. What Nancy Skinner's

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25. *See* Ryan Kartje, *Bill Allowing Collegiate Athletes to Profit Off Name, Likeness Clears Another Step in California Legislature*, ORANGE CNTY. REG. (July 9, 2019, 6:02 PM), https://www.ocregister.com/2019/07/09/bill-allowing-collegiate-athletes-to-profit-off-name-likeness-clears-another-step-in-california-legislature (quoting Nancy Skinner as explaining that, prior to NIL reform, everybody but college athletes were allowed to license the rights to their name, image, and likeness for money).

26. *See* J. Brady. McCullough, *How California Paved the Way for College Athletes to Cash in Big*, L.A. TIMES (July 1, 2021, 6:02 AM PT), https://www.latimes.com/sports/story/2021-07-01/how-southern-california-helped-launch-ncaa-nil-revolution (explaining the substantial role that California state senator Nancy Skinner, as early as 2015, played in speaking to improve the financial opportunity set for college athletes).

27. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or *commerce* among the several *States,* or with foreign nations, is declared to be illegal.").

28. Ron Kroichick, *Sen. Skinner, Architect of NIL Legislation, Wants Colleges to Pay Athletes*, S.F. CHRON. (Mar. 10, 2023), https://www.sfchronicle.com/sports/college/article/nil-nancy-skinner-pay-ncaa-athletes-17809435.php.

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bill proposed was to make it a violation of California's law to go along with that seemingly illegal cartel.

Now, I cannot tell you what Nancy Skinner thought, even though I have come to know her pretty well. But she had worked with an economist, Andy Schwarz, at the time.[29] I think the notion was that this was not only going to help the athletes in California, but reasonably, if you know anything about cartel theory, it would also help athletes more broadly because once one substantial member or several members of a cartel walk away, then the cartel will fall apart. Because in a free market, while it might be the Pareto optimal outcome[30] for the colluding parties to all engage in the same consciously parallel behavior of denying their athletes the opportunity to endorse products for money, if one school allows endorsement deals, they will all want to do it. Or, stated in plain English for those who I just got too 'economics-y' for; if one school is going to allow athletes to endorse products, every other school is going to want the same edge.

Well, Nancy Skinner proposed this bill in California, and the NCAA chose to respond. They did not have to respond. They *chose* to respond. Now, this would have been a wonderful opportunity for leadership of the NCAA to independently lift certain restraints on college athlete endorsement deals, at least on the fringes. The NCAA even could have asked for a short period of time to make additional reforms. Instead, the NCAA asked for a very extended period of time. Rather than listening to the public's demand or Nancy Skinner's proposed bill, the NCAA issued a statement, which was probably the worst statement the association ever could have issued. The NCAA came back and said that if this bill passes, they would ban from post-season play every single California member school that complies with new California state law.[31]

The NCAA's leadership did this with the goal of trying to make Nancy Skinner's Fair Pay to Play Act go away. The threat was, at least initially, persuasive. There were athletic directors at some of the large California

29. McCullough, *supra* note 26 (explaining the substantial role that California state senator Nancy Skinner, as early as 2015, played in speaking to improve the financial opportunity set for college athletes).

30. *See generally Pareto Efficiency Examples and Production Possibility Frontier*, INVESTOPEDIA, https://www.investopedia.com/terms/p/pareto-efficiency.asp (last updated Aug. 3, 2023).

31. *See* Matt Norlander, *NCAA Considers Postseason Ban for California Schools If State Proceeds with Amateurism Reform*, CBS SPORTS (June 24, 2019, 11:10 AM ET), https://www.cbssports.com/college-basketball/news/ncaa-considers-postseason-ban-for-california-schools-if-state-proceeds-with-amateurism-reform/.

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schools, both public and private, that feared that with Nancy Skinner and others messing with the NCAA—I use that term ironically—that they would find themselves unable to compete in the dominant college sports trade association anymore. They started encouraging their local legislative people to vote against the bill.[32]

On July 9, 2019, there was a hearing before the California Assembly's Higher Education Committee on the bill.[33] The NCAA had witnesses that spoke very strongly against the bill, talking about the parade of horribles that they believed would happen if athletes were ever able to endorse products.[34] Their star witness talked repeatedly about how we need to stop college athletes from endorsing marijuana and sports gambling, something he purported that athletes were all going to want to do the minute the bill went through.[35]

Nancy Skinner, meanwhile, had three witnesses, and I like to think these three witnesses did a little bit better. The first person who came to speak was Russell Okung, a Black former first-round draft pick in the NFL from a low-income family.[36] Mr. Okung talked about what it was like playing college sports while being poor, the desire to be able to engage in business practices, to endorse products, to learn from doing so, and to make some money.[37] He also discussed how college athletes were denied the same opportunity that any other student in the student body would have, and how he and many other college athletes were harmed by not even being given the opportunity to bring themselves out of poverty by endorsing products while they were in school.[38]

The second speaker was Hayley Hodson. At the time, Ms. Hodson was a law student at UCLA. She has since graduated and is practicing law in New York. Hayley Hodson went to Stanford University as a volleyball player.

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32. *See* Kartje, *supra* note 25 ("Several members expressed concern that universities in the state could be excluded from NCAA member events, after Emmert implied as much in his letter to the Assembly's Arts, Entertainment, Sports, Tourism and Internet Media Committee.").

33. *Id.*

34. *See id.* (reporting Long Beach State athletic director Andry Fee's comments that allowing college athletes to endorse products would have "unintended consequences" such as college athletes "partnering with a gambling entity or marijuana dispensary").

35. *Id.*

36. *See* Gilbert Manzano, *Chargers' Russell Okung Testifies in Support of 'Fair Pay to Play Act'*, ORANGE CNTY. REG. (July 9, 2019, 5:18 PM), https://www.ocregister.com/2019/07/09/chargers-russell-okung-testifies-in-support-of-fair-pay-to-play-act/.

37. *Id.*

38. *Id.*

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The NCAA had claimed that, if it dropped its restraints on college athlete endorsement deals, that only the male athletes would benefit. Ms. Hodson, however, refuted this point. In testifying, she talked about various opportunities that were afforded to her to endorse products that she had to turn down to comply with NCAA rules. These were not huge million-dollar opportunities. One proposed deal she talked about was the chance to endorse a line of sunglasses in exchange for a supply of sunglasses. Nonetheless, she explained how these small benefits would have been very helpful and desirable to some athletes.

Those were the first two. The final witness was the technical witness, which meant that that person was not speaking about personal experience but instead was talking about special knowledge of a particular area of law. I was the final witness on that day. Several of the California state legislators were very supportive of the bill but were inclined to vote against it, not because they thought it was the wrong thing—they valued additional economic freedoms for athletes—but because they were genuinely fearful that if they passed the bill, their local colleges would no longer be able to compete in college sports.[39] My role was to explain in about three minutes to the California state legislators why, if the NCAA banned colleges that complied with California's proposed bill, the NCAA member schools themselves would be in violation of section 1 of the Sherman Act.[40]

Believe it or not, a good part of my three minutes harkened back to that law review Note I wrote twenty years earlier.[41] In addition, I talked about what was then an upcoming U.S. Supreme Court case, *NCAA v. Alston*,[42] and how I believed the NCAA was going to lose the case 9-0 and be found fully subject to federal antitrust law.[43] After I spoke, the legislators went around and cast their vote, along with personal commentary on the issue. One of the legislators, in particular, said my three-minute talk changed his vote because the only reason why he was initially opposed to the California bill was fear of the NCAA threat to ban California colleges. After hearing

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39. Kartje, *supra* note 25.

40. *Id.* ("[A]ttorney and sports law expert Marc Edelman noted for the committee Tuesday that [the NCAA's threat to ban California member schools that allowed athletes to endorse products] would presumably violate antitrust law under the Sherman Act.").

41. Edelman, *supra* note 2, at 861.

42. 141 S. Ct. 2141 (2021).

43. *See* Marc Edelman (@MarcEdelman), TWITTER (Mar. 31, 2021, 9:12 AM), https://twitter.com/MarcEdelman/status/1377262513822269440 (referencing this prediction of a 9-0 outcome in *NCAA v. Alston*).

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from someone talk about the antitrust perspective, his concerns were relieved.

Once California passed its bill, it was then a short period of time before other states began passing similar bills. Florida moved next.[44] If California was seen as a state that was liberalizing things for college athletes based upon a progressive view, Florida's legislative action was a lot more in terms of the more conservative interest in preserving the freedom of college athletes to transact business.[45] Yet, much the same, Florida Representative Chip LaMarca was able to shepherd a bill through the Florida legislature relatively quickly to allow college athletes in that state to endorse products as well.[46]

Then, the chips kept falling. Few state legislators wanted their state to be a state where colleges could not as effectively recruit athletes because college athletes still could not endorse products. Thus, by the end of June 2021, more than twenty states had passed bills to ensure college athletes the rights to endorse products.[47]

On June 30, 2021, the NCAA came out and said that, in the purported interest of reform, we are now going to allow college athletes to endorse products.[48] The humor cannot be minimized. The NCAA did not do anything. They just folded. NCAA leadership knew that it realistically was not going to ban California member schools, and Florida member schools, and South Carolina members schools, and Pennsylvania members schools, and the schools of every other state that passed a bill to ensure that college athletes could endorse products.[49] So the NCAA capitulated, using the best public relations spin they could fathom. They said we are no longer going to regulate third party endorsements of college athletes.[50] Individual colleges could disallow it. That is not an antitrust issue. There is no collusion. Conferences collectively could choose to disallow it. That might

44. *See* Ross Dellenger, *New Florida Bill Will Allow Schools to Facilitate NIL Deals*, SI (Dec. 15, 2021), https://www.si.com/.amp/college/2021/12/16/new-florida-nil-bill-schools-power (noting that in June 2020 Florida became the second state, after California, to pass a college athlete name, image, and likeness bill).

45. *Id.*

46. *Id.*

47. *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 14.

48. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

49. *See Tracker: Name, Image and Likeness Legislation by State*, *supra* note 14.

50. *See* Hosick, *supra* note 48.

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not be a violation of antitrust law, presuming the conference members lacked market power. But the NCAA said it was going to step away.[51]

I do not give the NCAA any credit for this move. I give people like Nancy Skinner credit for cornering the NCAA into this, and, fifteen months later, that is the world in which we now live.

III. Assessing College Sports in the NIL Era

So, what does this new world of college sports look like? On the positive side, we have college athletes now who are endorsing products, some of whom are making real money. There is way too much being written in the media about who has the biggest endorsement deal. The reality is many of these deals are for $3,000 or less.[52] But, we have a wide range of college athletes who are now enjoying the opportunity to endorse products.[53]

NIL reform has also led to opportunities for both male and female athletes. While football players are dominating the name, image, and likeness endorsement opportunities, if you remove football players from the denominator of college athletes, 52.8% of all remaining endorsements are with female athletes.[54] So indeed, Nancy Skinner seems to be correct that NIL would create opportunities for women who play college sports.

In addition, we are also beginning to see a little bit of what I suggested in my law review note from twenty years ago—that there would be at least some college athletes who, now that they could earn small amounts of money, choose to stay in school. And I think the best example is the University of North Carolina basketball team that made it to the NCAA finals this past year. All four of their players with college eligibility remaining returned to school this season, including Leaky Black, who asked for a fifth year of eligibility, and Armando Bacot, who is a traditional senior this year.[55] Both players presently have name, image, and likeness deals. Indeed, it is a step in the right direction, a step towards fairness.[56]

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51. *See id.*

52. *See* Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made*, ASSOCIATED PRESS (July 6, 2022), https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb.

53. *See id*.

54. *Id.*

55. *See* Mark DeMott, *UNC Basketball: Tar Heels Fan Drops Song Honoring Leaky Black's Return*, FANSIDED (Aug. 5, 2022), https://keepingitheel.com/2022/08/05/unc-basketball-tar-heel-fan-drops-song-honoring-leaky-blacks-return.

56. *See UNC's Armando Bacot Raising Money to Help Others Through NIL*, WRAL SPORTS FAN (Sept. 29, 2022, 9:59 AM), https://www.wralsportsfan.com/unc-s-armando-

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There are also some reasonable criticisms of what has happened in college sports since NIL reform took place; however, I do not believe the criticisms outweigh the benefits of reform. One criticism, with which I personally agree, is that NIL reform does not necessarily go far enough.[57] While allowing college athletes to endorse products is an important reform, we still have 100-0 revenue sharing between schools and athletes in college sports.[58] And, for the about 100 or so schools that are bringing in very real revenue and paying their coaches many millions of dollars per year, perhaps more free market reforms are needed to allow the athletes to share in direct revenues as well.[59]

Another criticism raised by the NCAA before NIL reform even began was that there would be some individuals out there that would exploit college athletes, rather than truly help them to market themselves. While the NCAA has often cried wolf to avoid reform, I have always thought that this particular concern was a fair concern. And these particular concerns proved right.

In the weeks after the name, image, and likeness reform, hundreds of people, most non-lawyers, most with no knowledge in the space—none of whom ever advocated for this change but now wanted to profit from it—decided they were now name, image, and likeness experts.[60] College

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bacot-raising-money-to-help-others-through-nil/20497407/ ("Since helping lead North Carolina to the national championship game, Armando Bacot has landed several high profile name, image and likeness deals."); *Leaky Black Joins Armando Bacot with New NIL Deal*, TAR HEEL TIMES (Aug. 30, 2022), https://www.tarheeltimes.com/article136445.aspx (reporting on the players signing an NIL partnership with a local Chapel Hill restaurant).

57. *See, e.g.*, Kevin B. Blackistone, *The NCAA and Supreme Court Took a Small Step to Fix College Sports. It's Not Nearly Enough*, WASH. POST (June 30, 2021, 6:00 AM EDT), http://www.washingtonpost.com/sports/2021/06/30/blackistone-ncaa-nil/ ("NIL doesn't come close to approaching a fair market value for major college football and men's basketball players.").

58. *Id.*

59. *See generally* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 64 (2013) ("[T]he need to reform the college athletics industry extends far beyond [a limited range of issues]. . . . It is not just the outer fringes of the NCAA rules that violate antitrust law: *it is the whole shebang.*").

60. *See* Kit Ramgopal et al., *'There's No Rules. It's Crazy.' New Money in NCAA Recruiting Leaves Elite Athletes Ripe for Exploitation*, NBC NEWS (Nov. 27, 2022, 7:00 AM CST), https://www.nbcnews.com/news/us-news/star-high-school-athletes-can-now-profit-nil-deals-rcna51075 (describing marketing contracts in the form of commissions, false promises, and other unsavory behavior by some of the less reputable people to enter the NIL marketplace).

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athletes are now being bombarded by these folks trying to help them endorse products when many of these so-called experts do not have any knowledge about the field itself.[61] Big companies have jumped in. Small companies have jumped in. Random individuals jumped in. And there is no way in many cases to know who is legitimate and who is running a ruse.

Now again, I blame the NCAA a little bit for this outcome, too. We need in this country sports agent law that actually protects college athletes instead of protecting the colleges themselves. Most of sports agency law in this country, however, comes out of the Uniform Athlete Agents Act, which was promoted by the NCAA.[62] While in name this sounds like a bill that should be protecting athletes against unscrupulous agents, in reality the bill protects NCAA member schools' cartel-related interests by requiring agents to disclose certain payments to college athletes. Now that we are in a period of time where college athletes finally have the opportunity to endorse products, we need to update and modernize sports agency law. We do not want a system where we have reduced the ability of NCAA member schools to exploit college athletes, but have aided athlete exploitation by a different group of so-called "agents" or "NIL experts."

IV. Closing Thoughts

Overall, as I think all of our other panelists today will agree, the reforms in college sports have been a wonderful thing. Athletes for the first time have the opportunity to endorse products just like everybody else in society. For some of them, it is even increasing their opportunity to stay in school.

In closing, I leave you with two final thoughts. First, while NIL reforms are wonderful, do they go far enough? Do we need further legislative efforts and federal antitrust lawsuits to ensure that athlete labor at about one hundred or so schools who compete in revenue-generating sports are able to share in the fruits of their labor? As John Locke once said, every man—and I am going to add in woman—deserves the right to share in the fruits of their own labor. In this vein, I believe NIL reform is just the beginning, and there is a *bona fide* need to continue pursuing social justice and free markets in the commercial college sports industry. Second, how do we

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61. *Id.*

62. *See* Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 167–70 (2013) (discussing the role that Florida State University president Sandy D'Almberte, Florida State University representative to the NCAA Charles Ehrhardt, and former member of the NCAA Board of Directors Harvey S. Perlman played in proposing and drafting the Uniform Athlete Agent Act).

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actually protect the college athletes against people who are jumping into the name, image, and likeness space as quasi-agents who might not have the ability or desire to provide reputable advice? I think that could be covered by updating sports agent law.

So, on that note, I would like to thank you for joining me on this half-hour journey, in which we discussed how college sports moved from where it stood in 2002 to where it stands today. I am hopeful for those of you in the room who are thinking about a student Note that if you are passionate about this issue, you jump on it. I remain amazed that something I wrote twenty years ago, at a point in my life when I think I knew a lot less than I do today, continues to have relevance. Whether it be college sports or anything else, if you are a law student here and you passionately believe there is a need for something to change: think it, study it, and write it. You will be amazed. What might sound outlandish to some today might be the new reality in twenty years.

I look forward to hearing from the rest of the panelists and thank you very much.

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