ARIZONA STATE SPORTS AND ENTERTAINMENT LAW JOURNAL

VOLUME 13 FALL 2023 ISSUE 1

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
111 EAST TAYLOR STREET
PHOENIX, ARIZONA 85004

ABOUT THE JOURNAL

The *Arizona State Sports and Entertainment Law Journal* is edited by law students of the Sandra Day O'Connor College of Law at Arizona State University. As one of the leading sports and entertainment law journals in the United States, the Journal infuses legal scholarship and practice with new ideas to address today's most complex sports and entertainment legal challenges. The Journal is dedicated to providing the academic community, the sports and entertainment industries, and the legal profession with scholarly analysis, research, and debate concerning the developing fields of sports and entertainment law. The Journal also seeks to strengthen the legal writing skills and expertise of its members. The Journal is supported by the Sandra Day O'Connor College of Law.

WEBSITE: www.asuselj.org.

SUBSCRIPTIONS: To order print copies of the current issue or previous issues, please visit Amazon.com.

SUBMISSIONS: Please visit the Journal's website for submissions guidance.

SPONSORSHIP: Individuals and organizations interested in sponsoring the *Arizona State Sports and Entertainment Law Journal* should contact the current Editor-in-Chief at the Journal's website.

CITATION: ARIZ. ST. SPORTS & ENT. L.J.

“If you make the most of the resources you have, use your strengths to make your mark and play the long game in your interactions with others, you will not only survive you will thrive—and not only now at the start of your career but for the rest of your professional lives.”

-Justice Ketanji Brown Jackson

Justice Jackson centered her Commencement Address at American University Washington College of Law on May 20, 2023, around life lessons, derived from the reality TV show *Survivor*, she finds important to surviving a legal career.

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY

VOLUME 13 FALL 2023 ISSUE 1

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 13 FALL 2023 ISSUE 1

INDEX

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 13 FALL 2023 ISSUE 1

A PROPOSAL TO SAVE COLLEGE ATHLETICS FROM SELF-DESTRUCTION: HOW TO USE ANTITRUST LAW AND MARKET FORCES TO RATIONALIZE COLLEGE ATHLETICS AND PROTECT STUDENT-ATHLETES

MICHAEL S. STRAUBEL*

CONTENTS

*Michael S. Straubel taught as a Professor of Law at Valparaiso University School of Law for thirty-seven years. He served as Head Cross Country Coach and Assistant Track Coach at Valparaiso University for thirty-five years. He was the Director of the Valparaiso University Sports Law Clinic for fifteen years. He taught Sports Law, Intercollegiate Sports Law, and International Sports Law during his time at Valparaiso University School of Law, and he has argued before the Court of Arbitration for Sport.

I. AN UNHEALTHY INDUSTRY IN NEED OF A FIX

Once upon a time, long, long ago, college sports were organized for the good of college students. They participated for the health benefits, for the benefits it brought to their studies, and for the pure joy it brought.[1] Initially, the students organized the teams and contests by themselves;[2] however, as time progressed college administrators began organizing the teams and contests.[3] Unfortunately, not long after college competition began, college administrators and outside business interests saw that tickets could be sold, alumni could be attracted, and attention could be had from those competitions.[4] In other words, they saw that they could make money from college athletics. Since that storybook beginning, the revenues, and sources of revenue, from college athletics have continued to grow. In 2019, the Department of Education reported that college sports programs made a total of $14 billion in revenue.[5]

But the history of college athletics is about more than just making money. That view is too cynical and not fair. Schools and

---

[1] *See* JOHN J. RATEY & ERIC HAGERMAN, SPARK: THE REVOLUTIONARY NEW SCIENCE OF EXERCISE AND THE BRAIN 10, 38 (1st ed. 2008). Dr. John Ratey explains the connection between exercise, particularly aerobic exercise, and better academic performance. Fundamentally, exercise improves brain cell circuitry and the connection between brain cells (synapses) by stimulating the production of neurotransmitters and brain-derived neurotrophic factor.

[2] Guy Lewis, *The Beginning of Organized College Sports*, 22 AM. Q. 222, 223–24 (1970).

[3] ERIANNE WEIGHT & ROBERT ZULLO, ADMINISTRATION OF INTERCOLLEGIATE ATHLETICS 5–8 (1st ed. 2015).

[4] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148–49 (2021).

[5] U.S. DEP'T OF EDUC., Equity in Athletics Data Analysis (2019); *see* Andrew Zimbalist, *Analysis: Who is Winning in the High-revenue World of College Sports?*, PBS NEWSHOUR (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/ [https://perma.cc/8U63-W6VR].

the National Collegiate Athletic Association (NCAA) organize many sports that do not make money. They organize these teams solely for the benefits the teams bring to students. To date, the NCAA, as a condition of membership, requires all schools to sponsor a minimum number of sports—mostly non-revenue sports.[6] At most schools, only one or two sports earn significant revenue, and the majority of teams do not earn nearly enough money to cover their costs of operation.[7]

But now, at the Division I level, gone are the athletic department administrators who were just as concerned about providing athletic opportunities to students as they were about profiting off athletics. Those administrators have been replaced by administrators who are driven primarily, often at the insistence of the school's central administration, to earn a profit or at least make athletics a source of revenue opportunities for the school. This approach is called the business model of college athletics.[8]

The business model of college athletics has spread over the years to the point that business is the paradigm now driving college athletics.[9] The business model has turned football and basketball players into professional athletes at the expense of their education and well-being.[10] The business model is seeking new and additional

---

[6] *See* NCAA, 2023-24 NCAA DIVISION I MANUAL § 20.10.6, § 20.10.9.1, § 20.10.10.1, (2022). Under these Bylaws, BCS schools must sponsor a minimum of sixteen total sports, and FCS and non-football schools must sponsor a minimum of fourteen sports.

[7] Mark J. Drozdowski, *Do Colleges Make Money From Athletics?*, BEST COLLEGES (May 3, 2023), https://www.bestcolleges.com/ [https://perma.cc/7NJZ-7NBH].

[8] *See* NCAA, DIVISION II FACTS AND FIGURES 1–2 (2023). Division II and III have, to some extent, escaped being driven by the business model of college athletics. But this is not to say that they are driven solely by the good of college athletics. Their athletic departments too are often seen as a way to draw attention and to create revenue opportunities for the school. At the very least, they are seen as a way to recruit students who otherwise would not attend the school.

[9] For an interesting discussion of the business model of college athletics growth and affect, see MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 23–52 (1st ed. 2000). In chapters two through four, Professor Sperber speaks to the corrupting influence of big-time college athletics on coaches, athletic directors, university presidents, athletes, and the quality of the education at schools with big time college athletics.

[10] *See* Mathew Rowland, Academic Clustering of Student-Athletes: A Case Study of Football and Basketball Programs, Graduate Theses and

sources of revenue that could further threaten the well-being of student-athletes and the schools these student-athletes represent. Connections to sports gambling is one example. For a long time, the business model has used athletes in the revenue sports of football and basketball as labor to produce massive profits without fairly compensating them.

The business model is also widening the gulf between the Power Five Conferences and the rest of the Division I schools, creating the threat of breaking up the NCAA (at least Division I) to create a new super association of the highest earning schools.[11] In 2019, the sixty-five schools of the Power Five Conferences brought in more than $7.6 billion in revenue: an average of $116,932,070 per school.[12] In 2019 the 283 non-Power Five Division I schools brought in a total of $7.3 billion, for an average of $25,789,257 per school. On average, each Power Five school made over four times the revenue than each non-Power Five school did in 2019.[13] None of the non-Power Five schools' athletic departments earned enough money to fund their departments, let alone, in some cases, their football and basketball teams, thus forcing them to rely on student fees and subsidies from their central administrations to keep up with the big earning schools and chase the dream of being the next Gonzaga or Villanova.[14] Many schools are finding this financial burden a threat to their institutional well-being.

Dissertation (Apr. 2014) (M.A. thesis, University of Arkansas) (on file with ScholarWorks@UARK); *see* Kevin Trahan, *Athletes Are Getting Degrees, But Does That Actually Mean Anything?*, SB NATION (July 9, 2014, 7:03 PM), https://www.sbnation.com/ [https://perma.cc/W825-MKXE]. When a team becomes a source of profits for a school, its team members are expected to perform at a very high level to win and earn money. This expectation forces them to professionalize their approach to their sport. Actual compensation for athletic performance comes later for these athletes.

[11] *See* Dennis Dodd, *Why We May Be Reaching A Tipping Point For The Power Five To Break Away From The FBS*, CBS SPORTS (May 28, 2020 3:27 PM), https://www.cbssports.com/ [https://perma.cc/3Q2Q-MS4Y]; *see* Ross Dellenger, *The Fight Over the Future of College Sports is Here: It Needs to Implode*, SPORTS ILLUSTRATED (Jan. 20, 2022), https://www.si.com/ [https://perma.cc/VNF8-4PUN].

[12] CHRIS MURPHY & MADNESS, INC., HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS - EXCEPT THE PLAYERS 5 (2019).

[13] Non-Power Five schools' total revenue and average for each school calculated using 2019 report of total revenue submitted to the Department of Education. *See* Equity in Athletics Data Analysis, *supra* note 5.

[14] *See* Merrit Enright et al., *Hidden Figures: College Students May be Paying Thousands in Athletic Fees and Not Know It*, NBC NEWS (Mar. 9,

To chase the possibility of making it big with a Cinderella season or jumping to a bigger conference with increased revenue distribution, athletic departments are pouring more and more money into their basketball and football teams.[15] Because budgets are already tight at most of the non-Power Five schools (and even a few Power Five schools), this extra money for the basketball team has to come from elsewhere in the department: the budgets of the non-revenue sports. Some schools are even cutting non-revenue sports to better fund their football team.[16] This results in non-revenue sports' student-athletes going with less: no new uniforms, fewer competitions, run-down training and competition facilities or no facilities, second class travel, less support from the training room (sports medicine), poorly paid coaches, and old or nonexistent equipment.[17]

The business model of college athletics has introduced the reality of the business world to college athletics. Labor disputes and antitrust litigation are now part of college athletics. Antitrust attacks on the paradigm created by the business model have brought us to a critical juncture in college athletics. College athletics must choose what it wants to be. It must decide what its priorities are. Will it decide that profits are all that matters, or will it decide that there is another, better way? Perhaps it can decide to be the unique, better

---

2020, 10:01 AM), https://www.nbcnews.com/ [https://perma.cc/NZ55-LURT]; *see also* David Ridpath, *Who Actually Funds Intercollegiate Athletic Programs*, THE CONVERSATION (Dec. 12, 2014, 6:35 AM), https://theconversation.com/ [https://perma.cc/T39Z-RXDR].

[15] *See* David Sirota, *College Football: Public Universities Spend Millions On Stadiums, Despite Slim Chance For Payoff*, INT'L BUS. TIMES (Jan. 11, 2016, 10:11 AM), https://www.ibtimes.com/ [https://perma.cc/ZKQ6-AQZ7]. According to Sirota, citing the Knight Commission, between 2009 and 2013, public universities increased their spending on football by 21%. Much of this spending was to build or upgrade stadiums to improve their football team's visibility. Money for these projects often came from increasing student fees. Also, according to Sirota, nearly three-quarters of all Division I football programs run deficits.

[16] *See* Dennis Dodd, *Power 5 Proposals Change Financial Face of College Sports*, CBS SPORTS (Jan. 20, 2015, 8:38 AM), https://www.cbssports.com/ [https://perma.cc/UJ5U-BC46].

[17] My experience at Valparaiso University was that the non-revenue sports had their budgets cut first or disproportionately during hard times to keep the basketball team well-funded. Coaches for other Horizon League Cross Country and Track teams shared similar experiences.

principles venture that Justice White spoke of in his dissent in *NCAA v. Board of Regents* in 1984.[18]

The business model of college athletics has most endangered the well-being and the better interest of student-athletes. The business model has also put the entire health of college athletics at risk. The oligopoly of the now Power Four (or maybe the Super Two) conferences and the big earning schools in those conferences is creating a tragedy of the common scenario that is fracturing college sports.[19] At this juncture in the life of college athletics, we must accept the reality that exploiting college athletics is here to stay, and consequently we must find a way to protect both revenue and non-revenue sports athletes. But while we must accept that schools will earn money off college athletes' labor, we must separate the revenue and the non-revenue sports and reign in the oligopoly practices and power of the Power Four to rationalize college athletic finances, to preserve what is good about college athletics and ensure the financial health of all of college athletics. What follows is a proposal on how to do that. The proposal explores how to use antitrust law and market forces to control the monopolistic tendencies of the Power Four. The proposal also shows how antitrust law can be interpreted to protect student-athletes from the business model of college athletics. Finally, the proposal sets out a plan for restructuring the NCAA and the management of college athletics to better adapt to the new reality of college athletics.

II. THE HISTORY OF COLLEGE ATHLETICS AND THE PROFIT MOTIVE: WHY FOOTBALL AND BASKETBALL ARE DIFFERENT

To remedy the profit motive's detrimental effect on college athletics, we need to examine why and how colleges came to sponsor athletics. We then need to examine why and how it turned

[18] Justice White was very concerned that uncontrolled competition would harm the student-athlete and the student-athlete's integration into the student body. He feared that profit-making objectives would overshadow educational objectives. He also feared that economically successful programs would use their profits to expand their programs and increase their revenues, all leading to a professionalization of the program at the expense of the student-athlete. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1983).

[19] Dennis Dodd, *Stanford, Cal, SMU Catch Last Train into Power Four, but It's Hardly the End of Conference Realignment*, CBS SPORTS (Sept. 1, 2023, 5:11 pm), https://www.cbssports.com/ [https://perma.cc/STW6-VZ4G].

to making money off athletics. Along the way, we will learn how profiting off athletics has affected the sport and players involved.

Athletics on college campuses started in the mid-1800s as intramurals organized by students, run by students, for students.[20] College life in the early and mid-1800s was regimented, tedious, and by some accounts unpleasant.[21] Sports were a popular way to escape and cope with that unpleasantness, thus improving the educational experience.

Sports and physical activity on campuses also received a push from outside social commentators and critics such as Thomas Higginson and Oliver W. Holmes, who thought American college students were physically wanting and inferior to their British counterparts.[22] It was argued that British students were better scholars because they were better athletes.[23] These critiques were bolstered by the notion of "Muscular Christianity," championed by Thomas Hughes, who believed healthier students, made healthy by sports and exercise, were better students and citizens.[24] Sports clubs began to pop up on campuses around the country. The members of these clubs talked to one another, and the idea of inter-school competition grew. The first such intercollegiate competition on record is the famous regatta between Harvard and Yale in 1852, which was organized and run by the students.[25] Although commercial interests sponsored later regattas, students and their clubs continued to organize them.[26] From there, student clubs would organize intercollegiate competitions in other sports and create organizations to manage these intercollegiate competitions.[27]

A. ENTER FOOTBALL

As intercollegiate competitions grew, the events drew increasingly more press coverage. The press wrote about students playing for the glory of their alma maters in sports like baseball, rowing, and track and field.[28] However, the college sports landscape

---

[20] Lewis, *supra* note 2, at 223–24.

[21] ERIANNE WEIGHT & ROBERT ZULLO, ADMINISTRATION OF INTERCOLLEGIATE ATHLETICS 5 (1st ed. 2015).

[22] Lewis, *supra* note 2, at 225–26.

[23] *Id.* at 225.

[24] *Id.* at 226.

[25] *Id.* at 224.

[26] *Id.* at 228–29.

[27] *Id.* at 224.

[28] *Id.* at 229.

would soon change. In 1869, the first college football game was played, forever altering college sports.[29]

In the later quarter of the nineteenth century, the rapid creation of land grant universities in states without the population base to fill these new schools led to greater competition for students.[30] To attract students, schools looked for ways to connect to the broader culture rather than rely on the image of the high culture of university life. College administrators found that connection in intercollegiate sports, particularly football. Football had a flare for spectacle and the image of masculine superiority and valor that appealed to the broader population.[31] It created commercial opportunities. Soon, stadiums were built for the purpose of generating gate receipts, drawing large numbers of people to campus, developing relationships with sponsors and boosters, and, most importantly, drawing media attention.[32] Schools then replaced student leadership with professional coaches, as successful teams drew more attention, along with the rewards of that attention.[33]

By the end of the nineteenth century, something that began as a means of improving college students' welfare had been transformed into a revenue generator for schools, with football leading the charge. As early as 1880, a football game between Princeton and Yale drew 40,000 fans and produced $25,000 in revenue.[34] College football was on its way to becoming a commercial enterprise. And, as a commercial enterprise, competition for the labor used to produce this new entertainment product heated up. Colleges began to lure skilled athletes with various inducements, including free tuition, meals, jobs, and even direct payments.[35] "Tramp athletes" began to roam the country, playing for the highest bidder.[36] By the 1920s the commercial enterprise of college football had become incredibly lucrative. In one year, Harvard's football revenue was $429,000, and the payments made to team members were as much as $200,000 a year.[37]

Despite its increasing commerciality, college football was a violent sport that caused many concerns. For example, in 1905 alone, eighteen deaths occurred in college games.[38] Though this

---

[29] *Id.* at 228–29.
[30] WEIGHT & ZULLO, *supra* note 3, at 5–8.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148 (2021).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 2149.
[38] *Id.* at 2148.

violence may have contributed to its popularity, it was of concern to faculty and even President Theodore Roosevelt. In 1905, President Roosevelt called a meeting of the presidents of Harvard, Princeton, and Yale to review the rules of football.[39] Consequently, the newly minted NCAA normalized the football rules. Furthermore, the NCAA championed the virtue of amateurism, thus opposing any method of financially compensating college athletes. Perhaps the NCAA was following the lead of the newly reborn Olympic Movement with its patrician notion of amateurism; however, the inexperienced NCAA was unable to prevent colleges from paying their football players.[40]

In 1948, the NCAA membership experimented with a compromise between the principle of amateurism and paid professional football players when it promulgated the Sanity Code.[41] The Sanity Code was the NCAA's attempt to stop under-the-table payments to athletes in exchange for tuition scholarships.[42] To give teeth to this deal, the Sanity Code created an enforcement mechanism. [43] This commenced what some have called "shamateurism," a practice of paying athletes with scholarships and other perks. The Sanity Code marked a truce in direct payment competition for football players between NCAA members. Going forward, football players' direct compensation was limited to a "full ride," and the competition between schools for these players was thus limited, additionally threatened with sanctions for impermissible compensation.[44] With direct compensation fixed for NCAA members, the competition for the best football players would move to other areas: facilities, travel, and housing, for example.[45]

---

[39] *Id.*

[40] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148 (2021).

[41] *Id.* at 2149.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* Jordan Zim, *17 Insanely Expensive College Athletic Training Facilities*, STACK (June 2, 2014), http://www.stack.com/ [https://perma.cc/J9WB-E4G3]; *see also* Will Hobson & Steven Rich, *Colleges Spend Fortunes On Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015, 6:40 AM), https://www.chicagotribune.com/ [https://perma.cc/F2SK-SS8V].

B. ENTER BASKETBALL

Football is the undisputed king of the college athletics business model.[46] Football began generating money for schools in the 1880s and 1890s and continues to grow during the twenty-first century. Football money and the exposure it brings are now driving conference realignment, the emergence of the Power Five Conferences, and talk of dismantling the NCAA. However, basketball has grown to occupy a unique place in the college business world. The NCAA is financed by the revenue from the men's Division I basketball tournament, and many "mid-major" Division I conferences survive off basketball money, mainly in the form of NCAA basketball distribution shares.[47]

The first intercollegiate basketball game occurred in 1894 between Drexel and Temple and, starting in the 1920s, basketball began to take off as a revenue sport.[48] Beginning on the East Coast, particularly New York City and in Madison Square Garden, basketball games began to draw big audiences. A game between City College of New York and New York University drew 10,000 spectators to Madison Square Garden. Seeing the potential of college basketball to draw big numbers, promoters, including the mayor of New York and the New York World-Telegram, began to organize marque games, doubleheaders, and tripleheaders at Madison Square Garden.[49] At the height of these promotions, a game between NYU and Notre Dame drew 16,188 spectators to the Garden.[50]

Other cities observed this success and started assembling their own big games. After World War II, colleges began building their own field houses to draw big crowds to campus for basketball games.[51] Because fielding a competitive basketball team was relatively inexpensive compared to fielding a competitive football team (all that was needed to field a good basketball team was recruiting one or two outstanding players), smaller schools played a significant role in the early growth of college basketball, and later dropped football to fund big-time basketball.[52]

---

[46] Murphy, *supra* note 12, at 4.

[47] Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/ [https://perma.cc/GBL7-GNN8].

[48] *College Basketball*, POPULAR TIMELINES, https://populartimelines.com/ [https://perma.cc/M98D-DCR6].

[49] Albert J. Figone, *Gambling and College Basketball: The Scandal of 1951*, 16 J. SPORTS HIST. 44, 45 (Spring 1989).

[50] *Id.*

[51] *Id.* at 48.

[52] *Id.*

By the 1940s, the National Invitational Tournament (NIT) and the NCAA Championship were well established and on their way to being significant revenue sources for participating schools and the NCAA. The NIT, which started in 1922, and the NCAA Championship, which started in 1939, battled for the prominent teams. Although schools were initially permitted to participate in both tournaments, the NCAA introduced a by-law in 1951 prohibiting its members from competing in both events. The NCAA Championship became the dominant tournament in the 1960s and 1970s.[53]

This significant growth of college basketball was also met with difficulties, namely that of an increase in gambling on college teams. As early as 1931, the New York Herald Tribune reported as much as $50,000 bet on a game between Temple and NYU played in the Garden.[54] As gambling on games increased, so did gamblers' efforts to fix the games. Major scandals involving bribes to players to fix point spreads and even throw games occurred throughout World War II and through the rest of the 1940s.[55] One of the biggest scandals came to a head in 1951, after the NCAA attempted to reduce player corruption by passing the Sanity Code in 1948.[56] Another big scandal would follow in 1961.[57]

Basketball games, compared to football games, were much easier to fix. Whereas only a few players had to be paid to change the outcome of a basketball game, changing the outcome of a football game required paying off many players. In basketball, just one or two players could play easier on defense or miss a couple of key shots or passes near the end of a game to close the point spread or lose a game.

Football betting scandals have been rare compared to basketball. Most football betting scandals involve players betting on their own games.[58] One famous football betting scandal involved four Northwestern players accused of doing so, with one of the four players even fumbling on the one yard line.[59] A second famous scandal involved three University of Toledo players accused of

---

[53] Popular Timelines, *supra* note 48.

[54] Figone, *supra* note 49, at 45.

[55] *Id.* at 47–49.

[56] *Id.* at 50–59.

[57] *Id.* at 61.

[58] Bill Dedman, *COLLEGE FOOTBALL; 4 Are Indicted in Northwestern Football Scandal*, N.Y. TIMES (Dec. 4, 1998), https://www.nytimes.com/ [https://perma.cc/T422-YTYP].

[59] *Id.*

taking payments from gamblers to play poorly. One of those players was accused of taking $2000 to fumble at a key time.[60]

Looking at the history of college football and basketball, we see that schools are eager to use sports to make money when the opportunity arises. As a result, the sports grow in ways that are not always good. Corruption, be it gambling and game fixing or recruiting, follow the money in the sport. Only recently have the players, the workforce responsible for generating this money, begun to receive their fair share.

III. WHAT IS THE REALITY OF DIVISION I ATHLETICS?

Now, let's look at what the history of college athletics at the Division I level has created. Athletics on college campuses were started to improve the lives and education of college students. Participation spread because it accomplished just that. However, the desire to profit from college athletics began influencing colleges' motivations to sponsor teams. Colleges sold tickets to popular contests, built stadiums, and professionalized team organization and coaching. Organizations to normalize rules and schedule competitions were created. As college athletics grew, competition increased—including competition for profits. This increased competition brought corruption and increased danger to athletes. Enter the NCAA to control this corruption and danger.

While many stayed true to the origin of college athletics, the business model of college athletics began to increase its presence and influence. Football and basketball drove the growth of college athletics. The NCAA grew in importance as it oversaw the growth of football and basketball with a conflicted agenda. The NCAA sought to protect student-athletes, protect the education of those student-athletes, and fight the corruption of big-time athletics while simultaneously enabling schools to earn big profits and withhold those profits from student-athletes.

For better or worse, college athletics at the Division I level has identified two objectives for itself: (1) protect the welfare and education of student-athletes, and (2) make money. To plan a future for college athletics, we must assess how successful the schools and the NCAA have been at achieving these two goals. To evaluate the success of earning money, we should look at whether schools have been able to cover the expenses of their athletic departments, the expenses of individual teams, and ultimately the cost of the entire industry. To evaluate the success of protecting student-athletes we

[60] Associated Press, *Quinton Broussard pleads guilty*, ESPN (Aug. 25, 2011, 4:00 PM) https://www.espn.com/ [https://perma.cc/5KAX-2LNB].

should look at whether they are receiving, or have the opportunity to receive, a valuable quality education, whether their health and welfare is being protected, and whether they are receiving a robust athletic experience.

A. ARE SCHOOLS EARNING MONEY FROM ATHLETICS?

There is no question that all Division I athletic departments bring in revenue. All Division I schools play men's basketball and therefore receive, in some way, a share of the revenue from the Division I basketball tournament. A cut of the basketball tournament revenue is the driving reason many schools are Division I to begin with. But the important question to ask (for the purpose of answering questions such as should college athletes be paid, does antitrust law apply to and provide a remedy for claims against the NCAA and member schools, and are college athletes employees) is this: Are athletic departments and individual teams earning a profit (or at least enough money to cover their reasonable expenses)? Often in the popular debate, the answer to this question is assumed to be that Division I schools make a lot of money,[61] but the real answer is not simple and is importantly nuanced.

Determining how much schools earn through their athletic departments and individual teams is difficult, largely because schools have reasons to keep that information private and the publicly available information can be inconsistent and cloudy. Athletic departments want to show a balanced or close to balanced budget to avoid discouraging alumni from donating, to keep other campus interests from coming after athletic department revenue, and to prevent cutting athletic department subsidies from the central campus. Further, athletic departments at state schools do not want to suggest to state legislatures that they can cut public funds going to the school.[62] On the other hand, athletic departments and central administrations do not want to give the impression that the athletic department is losing money because that could cause other constituencies on campus to question sponsoring athletics and how much money is going to support the athletic department. The athletic department, and particularly the revenue teams, do not want

---

[61] *See* Associated Press, *NCAA earns $1.15 billion in 2021 as revenue returns to normal*, ESPN (Feb. 2, 2022, 3:53 PM), https://www.espn.com/ [https://perma.cc/3NBG-WQF9].

[62] *See* SPERBER, *supra* note 9 (discussing the role of state funding for high education and funding cuts that lead public schools to turn to athletics to make up that lost funding); *see also* JOSHUA HUNT, THE NIKE EFFECT: ONE COMPANY'S WAR ON HIGHER EDUCATION, ORGANIZED LABOR, AND CLEAN COMPETITION 13–14 (2020).

to appear the be losing money, as that could hurt recruiting and suggest that the department is doing a poor job. Those who question the reliability of the accounting behind the reports schools submit to the Department of Education and the NCAA cite as evidence of manipulation: problems with scholarship valuation, how the revenue from selling merchandize is attributed, the years in which the expense of large projects is posted to the budget, and the true value of student fees and other subsidies. As a coach in a Division I athletic department, I found the budget and budgeting process to be an enigma and never transparent.

So, with possibly unreliable and conflicting reports of college sports' finances, how should we proceed? We have no choice but to accept the reports as a close representation of reality because we have no other figures to work with, and the reporting schools have chosen to create a reality with these figures that they are presumably comfortable living with. However, we must always be careful and suspicious of their complete accuracy. Nevertheless, we can look to general agreement between the figures and anecdotal reports to identify some indicia for evaluating the reliability of the reported finances. Three such indicia of reliability are:

> 1. Both the Department of Education and the NCAA reports agree that the majority of Division I schools report either losing money or balanced budgets.
> 2. Investigations have revealed that four-fifths of all Division I schools collect sports fees and that some schools rely on these fees to make up the majority of their athletic department budgets.[63]
> 3. The vast majority of non-revenue sports have minimal to no visible sources of revenue other than donations from alumni and small gate receipts.

In 2019 (the most recent information not affected by the COVID pandemic available), the information reported to the Department of Education indicates that of the 347 reporting schools, no school lost money, ninety-five schools made a profit, and 252 ended the year with balanced budgets.[64] But, according to the figures submitted by those same schools to the NCAA for 2019, only twenty-five schools reported a profit and all of the remaining Division I schools lost money.[65] NCAA statistics report that of all colleges sponsoring

[63] Enright et al., *supra* note 14.
[64] U.S. DEP'T OF EDUC., *supra* note 5.
[65] Drozdowski, *supra* note 7.

athletics, Divisions I, II, and III, only twenty-five turned a profit and the rest saw no revenue exceed expenses.[66]

As to whether athletic departments are losing money, making money, or breaking even, what should we believe? Considering anecdotal reports of individual schools' finances, and the report that four-fifth of schools rely on student sport fees, along with reports that schools are reluctant to report loses, the reasonable conclusion is that a few schools earn massive profits, but that the large majority of athletic departments do not support themselves with revenue earned from outside the school. Schools reporting a balanced budget, trusting that they are not falsifying figures, are likely not underreporting their expenses (though shifting costs elsewhere is possible), but are making up losses with subsidies and fees. While it may be fair to say that some schools are spending revenue on extravagant and arguably unnecessary perks like miniature golf courses for their football teams, such spending is not likely done by most of the bottom-tier Division I schools. That is not to say, though, that at most schools the football and basketball teams are being treated rather well and are the beneficiaries of unnecessary spending. All in all, it is fair to say that the large majority of Division I schools do not earn enough sports-generated revenue to cover the expenses of their athletic departments.

Now we need to do the (perhaps more important) analysis of whether the traditional revenue sports of football and basketball produce a profit. Whether these teams, individually and across the industry, produce a profit is important to knowing if they can handle paying student-athletes, how much, and how they might need to be managed going forward.

1. *FOOTBALL*

According to the Department of Education's statistics for 2019, of the 237 Division I schools that sponsor football, eighty-five made a profit, twenty-five lost money, and 139 had a balanced budget.[67] Individual football programs' revenues ranged from a low of $221,136 to a high of $144,426,105.[68] The average for each of the 123 Football Bowl Subdivision (FBS) schools was $31,924,154 (more than the next thirty-five sports' revenues combined, at those FBS schools).[69] The average for each of the 122 Football Championship Subdivision (FCS) schools was $4,169,759 in

---

[66] *Id.*
[67] U.S. DEP'T OF EDUC., s*upra* note 5.
[68] *Id.*
[69] Murphy, *supra* note 12, at 4–5.

2019.[70] Revenue at the top of the college football world is massive compared to the rest of the NCAA and is significantly higher among the Power Five conferences. At the top are the University of Texas with $144,426,105, the University of Georgia with $134,463,859, and the University of Michigan with $125,773.306. At the bottom of the revenue ladder were the University of Dayton with $221,136, Drake University with $246,158, and Austin Peay State University with $667,704.[71]

The FBS football teams' average expenses in 2019 was $23,702,118. When matched with the average revenue for FBS football teams of $31,924,154, the result is an average yearly profit of $18,222,036.[72] The FCS football teams' average expenses in 2019 was $4,234,790. When matched with the average revenue for FCS football teams of $4,169,759, the result is an average loss of $65,031.[73] While these averages of profits and losses are informative, they do not show the entire picture. The range above and below these averages for FBS and FCS schools can be broad. The profits in 2019 for the three biggest earning FBS schools were: the University of Texas with $104,923,029, the University of Georgia with $85,962,66, and the University of Michigan with $81,088,721.[74] The losses for the three lowest earners in FCS football were: Austin Peay State University at $3,923,902, the University of Dayton at $1,080,145, and Drake University at $797,622.[75] Not all FBS football teams earn a profit and not all FCS teams lose money. But overall, there are two different worlds within Division I college football: schools that bring in a handsome profit from football and those that cannot afford football. As we saw earlier, the schools that lose money (or at best break even) significantly outnumber the schools that make money.

2. *BASKETBALL*

In 2019, 347 Division I men's basketball teams and 345 women's basketball teams reported their finances to the Department of Education. For the men, ninety-seven made a profit, forty-four lost money, and 206 reported a balanced budget.[76] For the women, twenty-six made a profit, ninety-seven lost money, and 222 reported a balanced budget.[77] For the men, the revenue ranged from

---

[70] U.S. DEP'T OF EDUC., s*upra* note 5.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

$40,684,042 at the top end to $364,684 at the bottom end. The average for FBS schools was $8,193,344, and the average revenue for non-FBS schools (FCS and non-football schools) was $2,817,645.[78] For the men, the biggest earning schools were Louisville at $40,684,042, Duke at $33,382,946, and Kentucky at $29,307,070.[79] The lowest revenue schools were Kent State University with $364,684, Howard University with $410,169, and Austin Peay State University with $525,037.[80]

After considering expenses, the average profit for FBS schools was $1,230,568 and the average for non-FBS schools was $200,656.[81] For the top three basketball earning schools, the profits were: Louisville at $20,836,695, Duke at $13,433,700, and Kentucky at $10,959,123. For the lowest earning Division I teams, the losses were: Kent State at $1,669,342, Howard at $862,666, and Austin Peay at $1,164,416.[82]

For women's basketball teams, the revenues ranged from $8,323,428 at the top end to $55,934 at the bottom end.[83] The average revenue for FBS schools was $1,965,362, and the average revenue for non-FBS schools was $1,499,708. The three highest earners for women's basketball were Baylor at $8,323,428, the University of Connecticut at $7,336,001, and Purdue University at $6,513,061. The three lowest earners were Austin Peay State University with $55,934, Kent State University with $66,954, and the University of Kansas with $67,954.[84]

When team expenses are factored in, all FBS women's basketball teams lost an average of $1,561,393 (expenses average of $3,526,755 compared to a revenue average of $1,965,362), and the non-FBS schools, on the average, lost an average of $42,263 (expenses average of $1,541,971 and a revenue average of $1,499,708). The net profit or loss for the top three revenue schools was zero (balanced budget) for Baylor, a loss of $650,675 for Connecticut, and a profit of $2,086,906 for Purdue. The net for the three lowest revenue schools was a loss of $981,657 for Austin Peay, a loss of $1,325,756 for Kent State, and a loss of $3,299,053 for Kansas.[85]

---

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

The preceding figures illustrate that only a tiny percentage of Division I athletic departments earn a profit (seven percent). Further, only at a similarly small percentage of schools do the revenue sports earn enough money to pay for the non-revenue sports (contrary to the popular myth). The reality of athletic department finances is a large wealth gap, with a small percentage of big earning programs and a large number of programs finishing each year in the red. The vast majority of athletic departments do not earn enough money to support themselves and rely on subsidies to cover their expenses.

Similarly, only a small number of the traditional revenue sports earn a profit. Only thirty-five percent of football teams, twenty-eight percent of men's basketball teams, and eight percent of women's basketball teams finish in the black at the end of the year. And, as would be expected, there is a massive wealth gap between the few big earners and the rest. The majority of football and basketball teams do not earn a profit and don't even cover their own expenses.

Considering the financial state of Division I athletics, what will happen as the expenses of the revenue sports, and maybe even the non-revenue sports, are driven up by antitrust rulings against the NCAA and member schools? The *O'Bannon* and *Alston* decisions have already started to raise the pressures to spend more on football and basketball. A few athletic departments, the richest of the Power Five schools, will be able to cover the expenses of the non-revenue sports while also paying student-athletes from the revenue they earn. A few more Power Five schools might be able to sufficiently reorganize their overall spending to do the same. But the majority of athletic departments do not earn enough revenue to afford both. Most athletic departments do not earn enough revenue to cover the cost of non-revenue teams, let alone pay student-athletes. Those schools will be forced to make difficult decisions.

Athletic departments that cannot afford to cover the increasing cost of antitrust decisions against revenue sports will be forced to choose one of, or a combination of, the following paths:

> 1. Increase student fees or receive more direct subsidies from the University's general budget.
> 2. Cut the budget of non-revenue sports or cut non-revenue sports altogether.
> 3. Cut all sports.
> 4. Move to Division II or III.

The *O'Bannon* and *Alston* decisions have already made sponsoring football and basketball more expensive, and perhaps started the culling of Division I schools. The cost of attendance,

added by the *O'Bannon* decision, can range from $2000 to $6000 a year for each athlete.[86] Depending on the school, giving each full ride football player the cost of attendance adds between $170,000 to $510,000 to the football team expenses, between $24,000 and $72,000 for a men's basketball team, and $30,000 and $90,000 for a women's basketball team. The cost of additional education benefits, authorized by the *Alston* decision, can cover up to $6000 per year, per athlete,[87] which can be $510,000 for a football team, $72,000 for a men's basketball team, and $90,000 for a women's basketball team. Additionally, the authorization of NIL benefits, brought about by the *O'Bannon* decision, will cost schools the salary of an in-house NIL coordinator (and additional administrative costs)[88] while diverting donations to cooperatives funded by alumni that otherwise would have been given directly to the athletic department. Each of these benefits alone can equal the cost of an entire non-revenue team. Many schools are struggling to pay these additional benefits for their football and basketball teams. Non-revenue athletes are lucky to get any of these benefits and did not get them at Valparaiso University.

The business model of running college athletics is not working. It is not earning enough revenue to support the majority of athletic departments. It has also failed to earn enough revenue to support the majority of Division I football and basketball teams. What it has done very well is create a small group of very wealthy athletic departments.

B. WHAT IS THE ROLE OF CONFERENCES AND THE COLLEGE FOOTBALL PLAYOFFS?

No picture of the financial health of college sports would be complete without looking at the role played by conference membership and the College Football Playoffs (CFP). Conference membership and the CFP are now more important than ever because of the media rights (TV) money they earn and distribute to individual schools. The financial success of an athletic department

---

[86] *See* Christopher Smith, *Full Cost of Attendance: What Will It Mean For Power Five Players*, SATURDAY DOWN SOUTH (2015), https://www.saturdaydownsouth.com/ [https://perma.cc/LAZ7-LKTX].

[87] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2165–66 (2021).

[88] *See Marquette Adding In-House ASP Personnel to Manage Athlete-Driven NIL Operations*, MARQ. UNIV. (Dec. 12, 2022, 11:03 AM), https://gomarquette.com/ [https://perma.cc/38JB-XJ4K].

is now almost entirely decided by how much TV money it can bring in.

The entire operational structure of the NCAA is largely built on conferences. Qualification for NCAA championships, with the notable exception of football, begins with winning conference championships, and many NCAA rules and sanctions are administered by conferences.[89] But the most important role conferences now play is scheduling and marketing the media rights to football and basketball games. Conferences are now like the producers and agents of the college sports entertainment industry.

Currently, there are thirty-two Division I basketball conferences, ten Bowl Championship Series (BCS) conferences (which can be broken into the Autonomous (Power) Five (perhaps now four) and the Group of Five), and fourteen FCS conferences. In most cases, but not all, a basketball conference is also a football conference, and even a conference for the non-revenue (Olympic) sports. An example of a basketball conference that is not a football conference is the Horizon League. Historically, conference affiliation, a voluntary decision, was based on school similarities like size, commitment of resources to athletics, and geographic proximity. Conference operations were funded by membership dues and distributions from the NCAA.

Before the 1984 decision in *NCAA v. Board of Regents*, schools could not market broadcast rights for their home games. The NCAA stopped schools from marketing their broadcast rights by threatening punitive sanctions, and it sold those rights as a package deal managed only by the NCAA.[90] However, after *Board of Regents*, schools and conferences marketed their broadcast rights and soon began to see their revenues skyrocket. Schools soon found they could command better, bigger deals from broadcasters if they packaged conference games together. Games between highly ranked and successful teams brought better money.

Conferences soon began competing for the best media deals from broadcasters. Member schools started to see a correlation between conference identification and financial success, which was tied to their success on the field. More TV exposure led to better recruiting classes. It wasn't long before conferences realized that big name members made for better media deal. They began to court big name schools, and schools sought more successful conference membership. This brings us to the conference reorganization of late.

---

[89] *See* NCAA, Division I Manual 338–39 (2022–2023).

[90] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 85–86 (1984).

Below are the media deals now in place for the current nine BCS conferences (organized by total revenue):

1. Big-10
*Contract through 2030 with Fox, CBS, and NBC
*Valued at between $7B and $10B, depending on market developments
2. SEC
*Contract for 10 years with Disney (ESPN)
*Valued at $3B
3. ACC
*Contract with ESPN for 20 years
*Valued at $4.8B
4. Big-12
*Contract through 2025 with ESPN and Fox
*Valued at $200M per year to the conference
5. Mountain West
*Contract through 2026 with CBS and Fox
*Valued at $4M per school per year
6. MAC
*Contract through 2023 with ESPN and CBS
*Valued at $8M per year to the conference
7. Sun Belt
*Contract through 2031 with ESPN
*Valued at $7M per year to the conference
8. Conference USA
*Contract through 2024 with ESPN, CBS, and NFL
*Valued at $5.5M per year to the conference
9. AAC
*Contract for 12 years with ESPN
*Valued at $1M per year to the conference[91]

Missing from this list is the Pac-12. It has a deal with ESPN through 2023 for $250 million per year to the conference. However, four member schools joined the Big-10, four members joined the Big-12, and two members joined the ACC due to the conference's inability to negotiate a high valued replacement deal.[92] The

[91] George Malone, *College Football Conferences With The Best TV Deals – And How They Might Make Even More*, YAHOO! (Jan. 1, 2023), https://finance.yahoo.com/ [https://perma.cc/8V6H-P3AY].

[92] Maggie Hicks, *Conference Realignment Is Sweeping College Sports. Here's Why It Matters.,* THE CHRON. OF HIGHER EDUC. (Aug. 9, 2023), https://www.chronicle.com/ [https://perma.cc/T4MP-ZRPE].

remaining two schools, Washington State and Oregon State, are searching for a home.[93]

An assessment of the current conference and media deal landscape shows a consolidation of wealth and power at the top. After the most recent round of media deals and conference jumping, we may no longer have the Power Five conferences but instead two super conferences with enough wealth to secure dominance of the college sports world for some time to come. The Big-10 now has eighteen member schools and a truly nationwide footprint. The Big-10 currently has schools in nine of the top twenty-five media markets in the country, and notably in the first, second and third largest ranked markets in the country.[94] It truly is and will be the richest conference for some time to come. The SEC now has sixteen conference members. It has a near stranglehold on the traditional south and has the biggest earning football team in the BCS: Texas. The SEC has schools in four of the top twenty-five media markets.[95] As of the time of writing, the SEC has eight of the top twenty-five ranked football teams in the country, as does the Big-10. Only the ACC can make a case for being the Big-10 and SEC's equal, but its case is weak. While it has seventeen conference members and six of the top twenty-five media markets in its footprint, its football success is much less than that of the Big-10 and SEC, with only four of the top twenty-five ranked teams and no history of national champions and CFP appearances, as the Big-10 and SEC schools have.

Being at the top in media revenue and TV appearances brings a massive competitive advantage over competing conferences and schools. Football is an expensive sport to sponsor, with bigger revenue and better NIL deals for team members (and recruits). More TV exposure also improves rankings and CFP placement and bowl appearances. All of these benefits result in more money, so the cycle continues.

After media deals, the second biggest source of income for Division I schools is national championship payments. For non-Power Five schools, and definitely for non-BCS schools, national championship payments are the biggest source of income. All Division I championships (except for BCS football) are administered by the NCAA, which markets the championships. The NCAA has a media rights deal with CBS for the men's basketball

---

[93] *Id.*

[94] *See* Rebecca McSwain, *Top 200 Nielsen DMA Rankings (2023)*, METHOD SHOP (Jan. 1, 2023), https://methodshop.com/ [https://perma.cc/MQ9V-SXQG].

[95] *Id.*

championship that is worth about $873 million per year. In total, the NCAA nets about $1.14 billion from the men's championship. The NCAA has a media deal with ESPN for $34 million per year to broadcast all of the remaining NCAA championships, including the Division I women's basketball championship.[96] It is estimated that the women's basketball championship altogether lost $2.8 million dollars in 2019. However, some estimates say that by 2025, the women's tournament could be worth between $81 and $112 million.[97] All thirty-two Division I basketball conferences receive a share of the men's basketball tournament revenue.

Under the current four-team College Football Playoff system, the BCS national football championship and post-season bowl appearances are divided into two groupings: the first involves almost exclusively Power Five conference teams, and the second involves mostly Group of Five conference teams. The first grouping includes the six New Year's Day bowl games and the four-team national championship playoffs. The six New Year's Day bowls, the Rose, Sugar, Orange, Fiesta, Peach, and Cotton bowls, either host semi-final playoff games or games between the Power Five conference teams (by virtue of existing contracts with those conferences). In the 2018-2019 season, this group of bowl games paid out $549 million to the competing schools and conferences.[98] The conference for each of the four teams selected for the CFP national championship receives six million dollars and $2.74 million in expenses for each game. Also, due to the New Year's Day bowl game contracts they have for their conference champions, the Power Five conferences receive $74 million each. The Group of Five conferences get to divide $95 million amongst themselves. Finally, the fourteen FCS conferences are given $2.95 million to divide.[99] The second grouping of bowl games, thirty-three in all, paid out $99 million in total. The games between Group of Five teams received an average of $967,163. Games between Power Five teams received an average of $5,420,556.[100]

---

[96] Kristi Dosh, *NCAA Bullish on Change for Women's Basketball Tournament Revenue and Distribution*, FORBES (Mar. 31, 2022), https://www.forbes.com/ [https://perma.cc/CD43-BL38].

[97] *Id.*

[98] Brent Schrotenboer, *College Football Playoff Business is Booming at Halfway Point, But Expansion Looms*, USA TODAY (Jan. 9, 2020, 9:55 AM) https://www.usatoday.com/ [https://perma.cc/SX4N-KC4D].

[99] *College Football Playoff Payouts 2022-2023*, BUS. OF COLL. SPORTS (Nov. 23, 2023), https://www.businessofcollegesports.com/ [https://perma.cc/679A-DP6T].

[100] *See* Schrotenboer, *supra* note 98.

As early as 2024, the CFP national championship will expand to twelve teams. The twelve teams chosen will be the six highest-ranked BCS conference champions and six at-large teams. The CFP ranking committee will rank the teams, and the revenue allocation system is yet to be decided. The selection system will guarantee one team from the group of Five makes the playoffs.[101]

C. WHAT IS THE STATE OF STUDENT-ATHLETE WELL-BEING?

The NCAA appears to be doing its very best to protect athletes' opportunities to receive an education while still devoting substantial time to their sports. For example, the NCAA requires that freshmen meet minimum academic requirements. To be eligible,[102] athletes must earn a minimum GPA and accumulate minimum credits as they move through school. These requirements have contributed to improving overall graduation rates among athletes. Nevertheless, the quest to earn money from football and basketball has stunted the academic success of those sports' athletes. According to NCAA statistics for the 2019-2020 academic year, the overall graduation rate within six years for all Division I athletes was 90%.[103] Female athletes graduated at a rate of 94% and male athletes at a rate of 85%.[104] The rate for FBS football players was 81%.[105] But some question the reliability of the NCAA's statistics, largely because the NCAA includes any athlete who leaves school in good standing (including transfers) among those who graduated from that school, thus over-estimating those who graduated. The critics also point out that the student athlete graduation numbers are not given context when comparing those numbers to the numbers of the general student population of their schools.[106]

The College Sports Research Institute at the University of South Carolina produces what it calls the Adjusted Graduation Gap (AGG) statistics for Division I football and basketball teams. It does this by comparing the Department of Educations' Federal Graduation Rate (FGR) numbers for a particular sport at a school

---

[101] *College Football Playoff Board of Managers Votes to Expand Playoff to 12 Teams*, COLL. FOOTBALL PLAYOFF (Sept. 2, 2022, 3:15 PM) https://collegefootballplayoff.com/ [https://perma.cc/LQB5-UPDN].

[102] *See* NCAA, NCAA Division I Manual at 141 (2022-2023).

[103] *See* Maria Carrasco, *NCAA Division I Athletes Maintain High Graduation Rate*, INSIDE HIGHER ED (Dec. 2, 2021), www.insidehighered.com [https://perma.cc/5LJV-UAD3].

[104] *Id.*

[105] *Id.*

[106] *See* Ethan Bauer, *Does high-level NCAA football have a graduation problem?*, DESERT NEWS (Jan. 12, 2020, 8:55 PM) www.desert.com [https://perma.cc/XAQ3-AWS6].

with the FGR number for the general student population (same gender) at that school.[107] The resulting statistics show the graduation rate differences between the general student population and a particular sports team at that school.[108] For the 2021-2022 academic year the AGG for FBS football teams was -15.6%.[109] In other words, on average, the graduation rate for FBS football players was 15.6% lower than the graduation rate for the male student population at FBS schools. Interestingly, the AGG for the Power Five schools was -19.1% while the AGG for the Group-of-Five schools was -12.1%.[110] The AGG for Division I men's basketball teams was -24.9% in 2021-2022.[111] For women's basketball teams the AAG was -17.0% (women's basketball players compared to the general women's student body).[112] Like the football AGGs, there was a significant difference between the larger and smaller schools. The mean AGG for the men's major conferences was -35.0%, while the mean AGG for the mid-major conferences was -20.0%.[113] For women's basketball, the mean AGG for the major conferences was -22.4% while the mean for the mid-majors was -14.5%.[114]

Like graduation rates, grade point statistics do not paint a good picture for football and basketball players, in comparison to other sports' athletes. According to statistics from NCAA Research, of the seventeen men's sports, basketball and football were at the bottom of GPAs with 2.77 and 2.75, respectively.[115] Women's basketball was last of nineteen women's sports with a GPA of 3.09.[116] Perhaps the GPA problems are in part due to the large

---

[107] COLLEGE SPORT RESEARCH INSTITUTE, UNIV. OF S. CAL. COLL. OF HOSP., RETAIL & SPORT MGMT., 2021–2022 ACADEMIC YEAR: ADJUSTED GRADUATION GAP REPORTS (2022), https://www.sc.edu/ [https://perma.cc/6V9H-GX4X].

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*; CHRIS CARR, E. WOODROW ECKARD, RICHARD M SOUTHALL & MARK S. NAGEL, COLLEGE SPORT RESEARCH INSTITUTE, 2021–2022 ADJUSTED GRADUATION GAP REPORT: NCAA DIVISION I BASKETBALL (Feb. 10, 2022), https://static1.squarespace.com/ [https://perma.cc/6SUL-ZZDX].

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] NCAA Research (@NCAAResearch), TWITTER (Jul. 26, 2017, 8:33 AM), www.twitter.com [https://perma.cc/2UFZ-PJ84].

[116] *Id.*; *Why Do College Athletes Get Worse Grades?*, COMPENDENT (Oct. 23, 2020), https://compendent.com/ [https://perma.cc/C7EQ-4ZLE].

amount of time spent practicing and playing games. Despite an NCAA rule that limits weekly practice and playing time to twenty hours per week, surveys of football players have reported that they spend an average of forty-four hours per week practicing and playing.[117]

Finally, as mentioned earlier, football and basketball players are often steered away from demanding majors because of worries about class conflicts with practice times or eligibility problems because of the difficulty keeping up with class demands in the face of high practice and playing demands.[118] The restrictions on the choice of majors, along with lower graduation rates and bottom of the ladder grade point averages, demonstrate that revenue chasing harms academic performance. In this regard, the business model of college athletics is at odds with the mission and promise of educating football and basketball student-athletes. It might be said that this is evidence of schools taking advantage of football and basketball players to earn money. One has to wonder what the effect of NIL obligations and now easier transfers will have on football and basketball student-athletes' academic performances.

IV. WHAT THE BUSINESS MODEL IS DOING TO COLLEGE ATHLETICS AND HOW TO SAVE DIVISION I WITH ANTITRUST LAW

The business model of managing college athletics, namely turning football and basketball into money-making enterprises, is failing. It is making a small number of athletic departments very rich, while at the same time threatening the financial health and very existence of the majority of Division I athletic departments. Schools are jumping conferences in the quest for bigger profits, the Power Five conferences, now down to four, are threatening to leave the NCAA if not allowed to spend and make money as they wish (without sharing that money with non-Power Five schools), and the mid-majors are spending themselves into bankruptcy to keep up. Keeping Division I together, or something resembling Division I, could mean jettisoning robust athletic programs (cutting non-revenue sports), as they pivot toward revenue sports. College

---

[117] Peter Jacobs, *Here's The Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 9:44 AM), https://www.businessinsider.com/ [https://perma.cc/78SN-FVQS]; Brad Wolverton, *College Football Players Spend 44.8 Hours a Week on Their Sport, NCAA Survey Finds*, THE CHRON. OF HIGHER EDUC. (Jan. 14, 2008), www.chronical.com/articcle/college-football [https://perma.cc/SLZ2-RKF6].

[118] Rowland, *supra* note 10.

athletics is a cooperative venture, both the revenue and non-revenue sports, depending on a sustainable and shared use of its "commons" for survival. An unchecked business model of college athletics is devouring that commons.

The only thing keeping Division I together is March Madness and the revenue it brings to all of Division I. Maybe it is all well and good that money tears up Division I, with schools that cannot compete moving to Division II and III or forming a new Division. But much could be lost. March Madness will change—likely not for the better. Women's sports could be devalued, and non-revenue sports could be significantly diminished. High quality non-revenue sports, the place where the world's best come to train, could be lost as Division I schools look for ways to pay football and basketball players and chase elusive big paydays.

We need to look for a way to accept the evolution of football and basketball into professional sports, while saving non-revenue sports at a robust level. We also need to rationalize the income and spending of college athletics by applying antitrust principles to the oligopoly now at the top of the industry, and let market forces go to work. The path to saving Division I may be a divorce of revenue and non-revenue sports and using the Clayton Act to break up an oligopolistic system of super conferences. Just as antitrust law is being used to bring equity to the revenue sports, antitrust law can be used to separate the revenue sports from the non-revenue sports and rebuild the foundation of Division I.

A. A DIVORCE BASED ON ANTITRUST LAW

To protect all college student-athletes and to bring equity to the athletes of the revenue sports of football and basketball, football and basketball must be separated from and governed differently than the non-revenue sports. Football and men's and women's basketball should be treated and governed like professional sports, with their players paid and the sport and teams funded solely by the revenue the sport and teams produce.[119] The non-revenue sports should be

[119] Women's basketball must be treated like men's basketball both for Title IX and gender equity reasons, and because it appears to be arching toward producing substantial revenue. Within a department of professional sports at each college, the revenue from football and men's basketball should be shared with and used to support the women's basketball team. Treating women's basketball teams like men's basketball teams is only fair considering that this for-profit enterprise is taking place at an institution of higher education. This equal treatment will also allow women's basketball teams to receive the special treatment. This treatment is special because

treated like all other academic pursuits of higher education and regulated by the NCAA to ensure their continued existence. Antitrust law permits and protects this different treatment.

As explained later, antitrust law governs revenue-generating sports and their players because those sports intend to, and do, earn revenue: they are commercial activity. Non-revenue sports are not subject to antitrust law because they are not intended to and do not earn revenue: they do not earn enough to make them commercial activity.[120] Because non-revenue sports are not subject to the reach of antitrust law, they can continue to be organized and managed by the NCAA differently than the revenue sports. To explain and analyze how this different treatment under antitrust law is possible, we will look at how a plaintiff's initial proof elements are satisfied in a revenue sport, but not satisfied in a non-revenue sport case. The first proof element is a showing of an activity that affects interstate commerce (basically subject matter jurisdiction).[121] The second element is proof of the relevant market at issue.[122] The third element is proof that the relevant market has or is being harmed.[123]

B. ELEMENT ONE: AN EFFECT ON INTERSTATE COMMERCE

The cases that have looked closely at what amounts to activity that affects interstate commerce break the inquiry into two parts:

---

they are professionals, the same special treatment that is needed for the other professional teams of football and men's basketball.

As will be discussed in more detail, the revenue sports of football and basketball will need to behave like the NFL and other professional leagues do, sharing revenue because not all teams earn enough to support themselves or to be competitive. This revenue sharing could be done on a large scale, such as between all FBS schools and FCS schools (the FBS separately from the FCS schools), if not between all Division I football schools. The rich schools will likely resist sharing revenue produced by the sport collectively, such as from TV deals and bowl games, but they may come to see that some revenue sharing is necessary for the health of the industry as a whole, as the NFL has realized. The negotiations of such a deal will be brutal and could result in some schools' football programs folding.

[120] At some schools, other sports like baseball and hockey do earn a profit. However, Department of Education figures show that overall, no traditionally non-revenue sport earns enough revenue to consistently support themselves while making a profit. U.S. DEP'T OF EDUC., *supra* note 5.

[121] McLain v. Real Est. Bd. of New Orleans, 444 U.S. 232, 242 (1980).

[122] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015).

[123] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154 (2021).

first, whether the activity crosses state lines, and second, whether the activity is "commerce."[124] There is no doubt that non-revenue college sports cross state lines. The critical inquiry is whether non-revenue college sports constitute "commerce." As seen in the recent relevant cases examining whether athletes' claims involve or affect commerce, the courts' analyses and the NCAA's arguments have focused on the relevant market that might affect commerce and a defense of no intent to harm commerce. Both the *O'Bannon* court and the *Alston* court defined the relevant market as a labor market for amateur student-athletes, and the NCAA argued the breadth of that market.[125] The NCAA also argued that the activity was not commerce because the NCAA's objective was to maintain the amateurism of its labor force—a subjective, intent-based argument.[126] As a result, there was no real analysis of whether the activity involved actually constituted commerce.

By labeling the relevant market in the *O'Bannon* and *Alston* cases as a labor market of amateur athletes, the courts have assumed or skipped the question of whether the activity at issue is "commerce." This assumption or conclusion is likely because the plaintiffs have easily pointed out the massive revenue produced by Division I college football and basketball.[127] When the activity at issue produces significant revenue, it seems useless to analyze whether the activity is commerce or commercial. In the *Alston* opinion, the Supreme Court called college sports a "massive business," noting that March Madness earns $1.1 billion annually and that the FBS College Football playoffs are worth $470 million

---

[124] *McLain*, 444 U.S. at 233. In *McLain*, the Supreme Court pointed out that these cases, as well as Congress's statutory definition, have preserved the distinction between activity "in" interstate commerce and activity which "affects" interstate commerce in antitrust and related laws by limiting some provisions to activity "in commerce." Nevertheless, the jurisdictional requirement of the Sherman Act can be satisfied by either a showing that the activity is "in" interstate commerce, or that it "affects" interstate commerce. Importantly, the Court noted that a showing of activity in or affecting interstate commerce is necessary to establish subject matter jurisdiction under the Sherman Act.

[125] *Alston*, 141 S. Ct. at 2154–55.

[126] *Id.* at 2152.

[127] Plaintiffs made a wise tactical decision to name as plaintiffs only Division I basketball players and BCS football players. These are the only sports and teams that clearly generate significant revenue. Including student-athletes from other sports would have opened the plaintiffs up to an argument that they do not earn revenue and therefore have no standing.

per year.[128] But what if college sports made little or no revenue, like the non-revenue sports do? How would an analysis of whether this activity is commerce come out? How would they define the relevant market, or would there even be a market without revenue? Would there be any harm to the relevant market by an agreement to cap scholarships when no one is earning money? Basically stated, is there antitrust subject matter jurisdiction when the product does not earn profit and the activity is done without the expectation of producing a profit?

Fundamental and necessary to antitrust jurisdiction is an economic harm to the plaintiff.[129] The practical reason the plaintiff class in *O'Bannon* and *Alston* was limited to Division I FBS football players and Division I basketball players was that the product of FBS football and Division I basketball clearly earns substantial revenue, and the student-athletes play a prominent role in producing that revenue. Other college sports athletes (non-revenue sports) would have trouble proving an economic injury. The *Alston* Ninth Circuit court pointedly noted that the compensation of a full-ride scholarship was not reflective of the competitive value of the services provided by football and basketball student-athletes.[130]

Several courts have addressed the mixed nature of the activity, objectives, and purposes of higher education by stating that only the clearly commercial activity of higher education should be subject to the Sherman Act. The *Brown* court, citing *Marjorie Webster Junior College*, stated that the Sherman Act does not extend to "the noncommercial aspects of the liberal arts."[131] Additionally, the dissent in *Brown* pointed out that the Sherman Act's legislative history showed that Senator Sherman did not intend the Act to cover educational associations.[132] Add to this observation about higher education the role that intent plays in deciding antitrust application. The *Agnew* court pointed out that the Sherman Act applies to transactions in which the "actor anticipates economic gain" and went on to say that in recruiting football players, "these are all part of a competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic

---

[128] *Alston*, 141 S. Ct. at 2150.

[129] *See* St. Louis Convention & Visitors Comm'n v. NFL, 154 F.3d 851, 856 (8th Cir. 1998).

[130] The District Court found, and the Ninth Circuit Court accepted, the fact that the NCAA artificially capped compensation for student-athlete labor below its value. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1256–57 (9th Cir. 2020).

[131] United States v. Brown Univ., 5 F.3d 658, 667 (3d Cir. 1993).

[132] *Id.* at 679.

gain."[133] Pulling all of these points together: to be commerce for antitrust purposes, the activity in question must be intended to produce (or be part of producing) significant revenue, with a result of causing economic harm to the plaintiff, and not be a non-commercial aspect of higher education.

Non-revenue sports do not earn the NCAA and their colleges millions of dollars. Few, if any, non-revenue sports earn money, let alone earn enough to cover their expenses. They do not produce an entertainment product that many customers pay to enjoy. The revenue that these sports produce is incidental and not the reason colleges sponsor the sports. Additionally, recruiters do not recruit non-revenue athletes anticipating their labor will produce economic gain for the school. The scholarships, full or partial, are not given to attract revenue producing input labor for an entertainment product that earns substantial money. The scholarships are given for other reasons. Non-revenue sport athletes fall into the category of pay to play, not the category of pay for play.[134]

Furthermore, a necessary element of any anti-trust case is economic injury. Non-revenue sport athletes cannot show an injury because the value of their services (as an input) is not equal to or greater than the value received by the school or NCAA. To constitute "labor" within the intent of the Sherman Act, the services rendered must play a part in the production of wealth. Non-revenue athletes do not produce wealth for their schools (not enough to overcome the value of the scholarships they receive). Therefore, applying the indicia of commercial activity, particularly in an academic setting, it is reasonable to conclude that non-revenue sports do not constitute commerce and do not fall under the jurisdiction of the Sherman Act.

---

[133] Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 340, 347 (7th Cir. 2012).

[134] Evidence that football and basketball are intended to be revenue sports and that the athletes recruited for those teams are understood to help produce that revenue is the fact that NCAA rules provide for more full-ride scholarships than are the starting positions for that sport. The NCAA allows eighty-five full rides in football, thirteen in men's basketball, and fifteen in women's basketball. The majority of non-revenue sports are not allowed enough scholarships to cover their starting positions. For example, men's track and field and cross country is allowed only 12.6 full-rides, while there are nineteen events in a full track meet. Women's track and field and cross country is allowed eighteen full rides. Further, men's tennis is allowed 4.5 full rides while it takes six players for a tennis match. *See* NCAA Bylaws § 15.5.3.1.1, 15.5.3.1.2, 15.5.5, 15.5.6.1 (2022-2023).

C. ELEMENT TWO: THE RELEVANT MARKET

The second element in an antitrust prima facie case is proof of a relevant market.[135] While examination of the relevant market is also involved in proof of the first element, a focused examination of the proposed relevant market can be more nuanced and, thereby, be informative. A non-revenue plaintiff bringing an antitrust claim would likely define the relevant market as the market for student-athlete labor and leave the definition there. However, the proper definition of the relevant market must include the product this labor produces. Under this comprehensive definition, the market would be student-athlete labor to produce the product of non-revenue sport entertainment. So, could a plaintiff prove a market for non-revenue sport athletes? Or, looking at this question more broadly, could a Division III student-athlete prove such a market when all Division III schools have agreed not to award athletic scholarships?

Few courts have been asked to truly dig deep into the question of whether a relevant market exists. Instead, they have focused on the question of the market's scope or breadth to determine whether the defendant exercises monopolistic control over that market. In recent notable athletic compensation cases brought against the NCAA, there has been little or no argument over the relevant market at issue.[136] Both sides have come to define the relevant market as one for student-athlete labor. The NCAA has accepted that this is an input market to produce a product that generates a profit.[137]

To properly analyze whether a non-revenue sport athlete could prove the existence of a relevant market, we must look at a case in which the challenged activity did not produce a profit. In *Dedication and Everlasting Love to Animals (DELTA) v. Humane Society*,[138] the Ninth Circuit determined whether the solicitation of contributions by nonprofit entities amounted to a market covered by the Sherman Act.[139] To begin its analysis, the Court dug into the Sherman Act's history and intent. The Court found it especially important that Congress used the phrase "restraint of trade" because it intended to adopt the prior common law meaning of "trade and

---

[135] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015).

[136] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151–52 (2021) (quoting *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1067, 1070 (N.D. Cal. 2019)).

[137] *Id.* at 2152.

[138] Dedication & Everlasting Love to Animals v. Humane Soc'y of the U.S., 50 F.3d 710, 711 (9th Cir. 1995).

[139] *Id.* at 712.

commerce."[140] The common law meaning of that phrase was "the purchase, sale and exchange of commodities," a "practical conception drawn from the course of business," and particularly the suppression of competition in the market place or taking from consumers the advantages "which accrue to them from free competition in the market."[141] Relying on this history, the Court found the absence of a profit significant and determined that Congress had not intended for the Sherman Act to cover benevolent organizations like the Humane Society.[142]

Like the Humane Society in *DELTA*, non-revenue and Division III teams do not earn a profit. One might argue that the NCAA and its member schools are not benevolent organizations like the Humane Society; however, when sponsoring non-revenue sports, the schools' intentions are educational and benevolent. Non-revenue sports opportunities enure benefits to the athletes, their education, maturation, and health. Just like the Humane Society does not profit from the service it provides, schools do not profit from the non-revenue sports they sponsor. It is, therefore, reasonable to conclude legislators did not intend for the Sherman Act to apply to schools engaging in non-profit educational activity. And further, a relevant market of student-athlete labor does not exist for non-revenue sports in an antitrust context.

D. ELEMENT THREE: AN UNREASONABLE HARM TO COMPETITION

The third element in a plaintiff's prima facie case is proof of an anti-competitive effect or harm to the plaintiff.[143] In *O'Bannon* and *Alston*, the plaintiffs were able to prove that the NCAA's scholarship limitations (the compensation for their services), were below what open-market bidding for their services would otherwise bring.[144] In *O'Bannon*, the harm was that plaintiffs were being paid nothing for their NIL rights and that their scholarship packages did not include the total cost of attendance.[145] In *Alston*, the harm was that the scholarship package did not include the cost of additional

---

[140] *Id.*

[141] *Id.* at 712–13.

[142] *Id.* at 714.

[143] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154 (2021) (recounting the District Court's finding that without the alleged restraint, student-athletes' compensation would be higher and that the NCAA's rule imposed a significant restraint on the relevant market).

[144] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015); *Alston*, 141 S. Ct. at 2165–66.

[145] *O'Bannon*, 802 F.3d at 1074.

education expenses.[146] But fundamental to both of these findings of harm was the conclusion that the NCAA's scholarship limits were not reflective of the true value of the student-athletes' services, particularly in light of the revenue earned by the defendants. Therefore, for non-revenue student-athletes to show an antitrust harm, they must prove that the current scholarship package does not reflect the true value of their services: that they would earn more in an open market.

Placed in the context of cases brought by Division I basketball players and FBS football players, without the end market of big gate receipts and TV money, could non-revenue student-athletes show that they could command compensation above a full-ride scholarship? Because non-revenue student-athletes are now allowed to monetize their NIL rights, there appears to be little harm they could prove. Outside of fielding the most competitive team possible, there is little reason for a school to pay non-revenue athletes more than the value of a full-ride scholarship. There would be no commercial market for their services without an end product market. Without a profit to be had, schools have no additional money to pay non-revenue athletes, and the athletes have created no value or wealth for their putative employers. Non-revenue sports' coaches may have motive to offer star athletes more compensation, but schools have an economic reason not to offer more compensation.

After a plaintiff has established a prima facie case, a court can conduct either a per se, quick look, or rule of reason analysis, during which it analyzes whether any justification for the restraint of trade offered by the defendant is acceptable.[147] A rule of reason analysis is almost always used in sports industry and non-profit entity cases because a certain level of co-operation (agreed restraint) is needed in sports industries to produce its product, and in non-profit cases because non-economic reasons can justify restraints.[148] Because college sports involves both a sports industry and non-profit entities, a look at a rule of reason analysis is helpful.

In a rule of reason analysis, after a prima facie case is established, the defendant's burden is to come forward with a reason the restraint is justified.[149] In sports industry cases, a restraint can be justified, or is reasonable, if that restraint is necessary to produce

---

[146] *Alston*, 141 S. Ct. at 2165.

[147] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016–17 (10th Cir. 1998).

[148] *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99 (1984)).

[149] *Law*, 134 F.3d at 1019.

the product (namely the entertainment product) of a sports contest.[150] In non-profit entity cases, the economic harm of the restraint can be countervailed by a significant benefit to society.[151]

While it is unlikely that a non-revenue sport student-athlete could prove a prima facie case, during the rule of reason analysis, a court would have to consider the benefits of cost controls on non-revenue sports (such as scholarship limits). The primary benefit of NCAA controls would be the continued existence of broad-based, non-revenue sports. Schools will not offer non-revenue sports if the cost of such sports becomes prohibitive. Coupled with the continued existence of non-revenue sports, the benefits would include the health and education benefits that sports participation creates. Therefore, if a non-revenue sport athlete suffers economic harm, a countervailing benefit to that harm might exist.

In summation, antitrust claims against Division I college football and basketball have forced us to recognize that making money off football and basketball has turned college football and basketball into professional sports. The same antitrust law, which pushed football and basketball over the threshold to become entirely professional, can also allow a separation of professional sports from non-professional sports. Such a separation can rationalize the treatment of professional sports and non-professional sports.

E. DOWNSIZING SUPER CONFERENCES

Division I college football and basketball are now clearly entertainment businesses. They compete by, and their success as entertainment businesses are measured by, selling tickets to their games and attracting TV viewers. From a macro view, they collectively compete against all other forms of entertainment. But more realistically, they collectively compete against other sport entertainment products (like professional football, hockey, and baseball). Individually, each Division I team is competing against every other Division I team. It is the nature of sports entertainment that they compete collectively against other forms of entertainment while competing against one another. This is the duality of the industry.

To ensure that schools have opponents (partners in the sense of co-producing games) for the home games they market, schools join

---

[150] *Bd. of Regents*, 468 U.S. at 99.

[151] *See* Dedication & Everlasting Love to Animals v. Humane Soc'y of the U.S., 50 F.3d 710, 713 (9th Cir. 1995); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); *Bd. of Regents*, 468 U.S. at 134–35 (White, J., dissenting).

into conferences. Having formed conferences, the conferences now both cooperate to create games as an entertainment product, and they compete among themselves to attract viewers. As the competition for viewers grows between conferences, eliminating a competing conference or stealing its best members become ways to increase conference success.

The biggest earning football and basketball teams in college sports are the biggest earners both because they are successful on the field and court, and because they have the biggest media rights deals. Big media deals are now creating a small group of immensely wealthy football and basketball programs, leaving more and more schools behind. To save the whole of college sports, we must find a way to slow (and maybe reverse) the massive enrichment of a few schools at the expense of the majority.

The Clayton Act's purpose is to prevent economic concentration that harms competition and the health of an industry by keeping a large number of smaller competitors in business.[152] Its aim is to arrest anticompetitive activity in its incipiency. [153] Therefore, it does not require proof of certain anticompetitive effect, but that an act's effect "may be substantially to lessen competition, or to tend to create a monopoly."[154] Additionally, there is no need to show an intent to lessen competition or create a monopoly[155] because the Clayton Act is intended to prevent damage to competition.[156]

Proof of a Clayton Act Violation begins with identifying the relevant market. [157] In the college sports industry, the important market is the sale and purchase of media (broadcast) rights to Division I football games. In that market, the conferences package and sell the media rights. At its broadest, the market could be described as Division I football, but a strong argument can be made that the market is better described as BCS football, or even as Power Five football. Applying the principle of the cross elasticity of demand to the sale of media rights, we see virtually no competition (shift in demand) between Power Five conferences like the Big-10 and FCS conferences like Ohio Valley. When the Big-10 raises its price, no one offers to buy the Ohio Valley's media rights. So, the relevant market might only consist of BCS conferences. BCS

---

[152] Ass'n of Taxicab Operators, U.S. v. Yellow Checker Cab Co. of Dallas/Fort Worth, Inc., 910 F. Supp. 2d 971, 976 (N.D. Tex. 2012).

[153] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 186 (1974).

[154] F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 569 (1967).

[155] United States v. Phila. Nat. Bank, 374 U.S. 321, 364 (1963).

[156] United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 865 (S.D. W. Va. 2008).

[157] Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 324 (1962).

schools and BCS conference members are the only schools eligible for the College Football Playoffs and post-season bowl games. All BCS conferences have media rights contracts for their football games, but there is a difference in kind between the value of media rights deals for the Power Five conferences and the Group of Five conferences. Arguably, the Power Five could be a market of its own, but for analysis purposes and to be conservative, the relevant market here is best described as BCS conference media rights.

A violation of the Clayton Act, section seven, occurs when an entity engaged in commerce acquires an asset of another entity engaged in commerce such that it threatens to substantially lessen competition or create a concentration of economic power that will lessen competition.[158] When the relevant market is already concentrated, even a small increase in that concentration is problematic.[159] When the Big-10 acquired USC and UCLA, and later the University of Oregon and the University of Washington, it created a threat to substantially lessen the competition for media rights deals. The Big-10 acquisition of USC and UCLA also lead to the demise of a competing conference: the PAC-12. After the demise of the PAC-12, there are only four of the former Power Five conferences and only nine of the former ten BCS conferences competing for media deals. After adding USC and UCLA in June of 2022, the Big-10, in August of 2022, signed the largest media contract in college sports history, reported to be worth between seven and ten billion dollars over a seven-year period.[160] That media deal dwarfed the second-best deal, the SEC's, valued at three billion over an approximate ten-year period. One has to wonder if the deal would have been as large if USC and UCLA had not been added to the Big-10.

As a result of the Big-10 acquiring USC and UCLA, the Big-12 acquired four schools: Arizona, Arizona State, Colorado, and Utah.

---

[158] *Daily Gazette Co.*, 567 F. Supp. 2d at 865; *see also* Gerlinger v. Amazon.com, Inc., 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004). Also, for an acquisition to violate the Clayton Act six elements must be met: (1) both parties must be subject to the jurisdiction of the F.T.C.; (2) both must be engaged in interstate commerce; (3) the challenged transaction must constitute an acquisition within the meaning of the Act; (4) the acquisition must be of an "asset"; (5) the acquisition may be indirect or direct; and (6) the acquisition may be of all or part of the asset.

[159] F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109, 128 (D.D.C. 2004), *dismissed*, 2004 WL 2066879 (D.C. Cir. 2004).

[160] Adam Rittenberg, *Big Ten Completes 7–year, $7 Billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022, 9:30 AM), https://www.espn.com/ [https://perma.cc/M2N8-QSKR].

The ACC then acquired formed PAC-12 members Stanford and the University of California. With the demise of the PAC-12, either as a conference altogether or as a Power Five conference, what was already an oligopoly of Power Five conferences atop the BCS media world became an oligopoly of four larger and wealthier conferences, further concentrating economic power. But it can be seriously argued that the oligopoly has been reduced from five down to two: the Big-10 and the SEC. These two conferences now command media deals and a media presence that stands head and shoulders above every other conference.

Conference realignment and the growth of super conferences has accelerated the concentration of wealth and power at the top of Division I, threatening the health of the division and college athletics as a whole. Because the Clayton Act is intended to remedy the competitive harm caused by violations of the Act, district courts are clothed with the discretion to tailor a decree in judgment to the special needs of an individual case.[161] Here, the Clayton Act's power should be used to reintroduce more competition into the revenue chase of college athletics, and thereby spread revenue more equitably within college athletics. The super conferences need to be downsized to increase competition. Conferences with nationwide media footprints, presences in numerous major media markets, and membership above ten schools have concentrations of power that lessen competition. The Clayton Act's authority should also be used to increase the number of schools that qualify for the CFP championships, and thereby disperse the revenue produced by the CFP more widely. A system similar to the FCS playoffs with twenty-four participants, including all conference champions, would spread revenue widely and encourage more, smaller conferences.

The creation of super conferences has led to a tragedy of the commons for college athletics. The super conferences now monopolize the media landscape and thus, revenues needed for a healthy industry. Unchecked, the super conferences will continue to grow and thrive. But what about the rest of college athletics?

V. RESTRUCTURING COLLEGE SPORTS TO SAVE IT AND TREAT ATHLETES FAIRLY

Now that we have explored the antitrust path to separating revenue and non-revenue sports at the management level (NCAA level), we can discuss how to restructure college sports. Overall,

[161] Steves and Sons, Inc. v. JELD-WEN, Inc., 345 F. Supp. 3d 614, 648 (E.D. Va. 2018).

Division I football and basketball must be governed and managed as professional sports, and the remaining sports must be governed and managed as intercollegiate sports.

A. THE REVENUE SPORTS HAVE TO BE TREATED DIFFERENTLY

The time has come to accept the reality of Division I sports and to do what is best for the athletes who play Division I sports and, in the process, do what is right for the schools that sponsor Division I sports. Doing what is best requires a divorce between the revenue and non-revenue sports with a separation agreement. The separation agreement will recognize that the revenue sports have become professional sports and accommodate that reality while ensuring the players remain student-athletes, although in a professional setting. The separation agreement will also preserve the existence of non-revenue sports and recognize that these athletes are not professional athletes.

The starting point of the divorce is the separation of the management of revenue and non-revenue sports. Because revenue sports live in a different reality, a reality driven by business and profit considerations, they must be governed in a manner different from non-revenue sports. At the macro level, the NCAA should be divided into two divisions: one responsible for the revenue sports and the other for the non-revenue sports. The administration of the FBS and College Football Playoffs, currently not handled by the NCAA, would be rolled into the revenue division. Rolling the FBS and CFP into the revenue sports division of the NCAA would unify the college football world and facilitate the stability of college football.[162] The revenue sports division would be administered by people experienced and skilled in dealing with the business end of sports, areas such as CBA negotiations and marketing. The non-

[162] Bringing the FBS and CFP within the NCAA would create an opportunity to address some of college football's problems and face the new challenges of being a professional sport. First, it will bring the administration of all college sports championships under the umbrella of the NCAA. Currently the FBS CFP is independently administered, and the only championship not administered by the NCAA. Second, it will legitimize counting FBS football teams for purposes of the distribution of NCAA basketball revenue. Third, it will unify the college football world and allow sport wide discussion of solutions to the sports problems. Fourth, while the revenue from the CFP, approximately $470 million in 2019, will continue to be divided among the FBS schools only, it would facilitate spreading the revenue more evenly among FBS schools as part of an effort to keep all FBS schools financially healthy and competitive.

revenue sports division could be more experienced in "Olympic Movement" sports and operations. Finally, separating the revenue sports from the non-revenue sports will eliminate the need for the autonomy voting power of the Power Five conferences. The revenue sports athletes will be treated as professionals, which has been the primary objective of the autonomy voting power.

At the individual school level, the management of revenue sports would remain in the "athletic department," which is becoming more experienced in sports business matters like NIL cooperatives, marketing campaigns, and agent regulations. The management of non-revenue sports could be moved to the sports management department, physical education department, or even a new college of sports. A new college of sports could not only manage non-revenue sports, but it could offer degrees in the coaching, management, or science of a particular sport—perhaps the sport a student-athlete is playing in college.

The second step in the divorce would be to separate the finances of revenue sports from non-revenue sports. Revenue sports should keep only the revenue they produce, which will lead to many significant changes. It will rationalize the revenue sports' spending and stop them from living off subsidies from the rest of the university. The schools with big football and basketball revenues will find this simple and perhaps even liberating. The rest of the Division I schools would have to face the reality that they do not make a profit off their revenue sports, which could induce them to improve their football and basketball programs. They would no longer be able to survive off student fees and subsidies from the general fund.

Living off the revenue they earn means that football and basketball programs will have to pay for the services they receive from their main campuses. As an independent professional team, they should pay the main campus for their players' educations. A cut of their revenue should also go to cover facilities and services provided by the main campus. Finally, part of the revenue should go towards using the school's trademark and reputation. Each school could negotiate a percentage of the team's revenue or a set amount. Requiring teams to pay for all the benefits and support that they receive from the main campus would stop the unseen subsidies the revenue sports receive.

Revenue attributed to football and basketball should include everything reasonably attributable to the revenue sport. This would

include NCAA basketball revenue distribution,[163] targeted alumni donations, merchandise sales, TV money, and advertising and sponsorship revenue. A broad definition of revenue will be necessary so that the teams can fairly cover all their current expenses, plus the cost of paying athletes directly.

The non-revenue sports would be financed, as most of them are now, by money from the general fund. Indeed, at some schools, money earned by the revenue sports covers some or all of the costs of non-revenue sports. At those schools, some of that money will still go to support the non-revenue sports in the form of the licensing fees paid by the revenue sports to use the school's trademark and reputation. But it is also true that the non-revenue sports help pay their own expenses in the same way the College of Arts and Sciences helps pay for its expenses: by bringing in tuition-paying students who would otherwise not be on campus if not for the sport they play. Most, if not all, non-revenue sports rosters include many non- or partial-scholarship players who are paying a tuition bill. Their tuition money goes into the general fund and helps fund their team's expenses.

The third step in the divorce will be paying revenue sports athletes. As explained earlier, the current antitrust cases will lead to paying athletes, but that conclusion will result in messy consequences. Paying revenue sports' athletes will lead to employee status, with features such as workers' compensation, health insurance, retirement, and sick pay. Solving these issues while keeping the players classified as students will be complicated and expensive. On top of that, the athletes will unionize, making things even messier. But these problems are the price of earning money off college athletics and explain why separation is needed.

Despite being paid and even unionizing, one thing that cannot change or be negotiated away in this brave new world is the players' statuses as students. While the NCAA will soon lose the argument that the popularity of college sports is partly due to the players' amateur status, the players must still be students for the product to be distinctive and popular. Therefore, academic requirements cannot, or may only minimally, be a subject of collective bargaining. Congress may have to impose necessary limits on collective bargaining subjects, as other areas of the employer-employee relationship may also need to be regulated.

---

[163] The distribution would not include the portion of the distribution given for sponsoring other sports. That share of the distribution would go to those sports.

The recruiting process and rules will need to be updated if student-athletes are paid. High school athletes will need agents and maybe lawyers. If athletes are not all paid similar salaries but negotiate separate contracts, the recruiting process will become complicated and thus require agents. How much will a third-string tackle on a roster of eighty-five players be worth? Will some recruits not even be worth the current full ride?

The fourth step in the divorce process will be modifying the academic requirements of professional student-athletes to fairly recognize the demands of being professional. Added years of eligibility and reduced semester class loads will likely be necessary. The academic requirements must be as robust as is required of every other student to make the athlete a student and keep fans believing that these are not pure professionals. The academic requirements must be implemented at a different pace. Specifically, what might work is five years of eligibility with a minimum of nine credits per semester. Of course, as professionals and employees, athletes will have to work year-round (as most of them already do). Therefore, they can attend classes over the summer to catch up on credits they miss during the season, which will help them accumulate the typical 120 credits needed to finish a degree.

For revenue athletes to receive a comprehensive education (a fair exchange for their services), they should be allowed semesters off from being athletes to study abroad or do internships. The semester of not playing should not count against their eligibility. However, what they receive above the traditional scholarship benefits in pay during their semester off might be a matter of collective bargaining negotiations. How much an employee-student-athlete can be involved in other extracurricular activities, such as Greek organizations and student government, might also be subject to collective bargaining but could be hard to accommodate. However, these are the consequences of schools using sports as a source of revenue and student-athletes wishing to be compensated.

The fifth step in the divorce process will be reorganizing conference structures and responsibilities. Currently conferences, particularly the Power Five, are organized primarily to make money from the revenue sports. Conferences court schools in major media markets and according to their history of winning. Basketball-driven conferences want to maximize the number of conference members that get at-large bids to the NCAA tournament, and football conferences wish to maximize the teams they get into the FBS playoffs and bowl games. Conferences built this way tend to ignore problems such as travel (long road trips) and the competitiveness of non-revenue sports within the conference. To create conferences that make business sense for revenue and non-

revenue sports (considerations such as reduced travel, similar competition levels, and sport sponsorship), separate conferences should be allowed for revenue and non-revenue sports. Non-revenue sports are often ignored and neglected in revenue sport-driven conferences. This would allow revenue sports conferences to be purely business driven.

B. A PLAN TO PROTECT NON-REVENUE SPORTS

The revenue and non-revenue sports are growing apart. They live in different worlds. Revenue sports are now, for all practical purposes, professional. Non-revenue sports must be managed and governed differently. The non-revenue sports are currently managed by athletic directors who owe their primary allegiance to the revenue sports. Their jobs often hinge on how well the revenue sports do and how much money they make. Non-revenue sports are too often treated as a drag on the revenue sports. Therefore, the management of non-revenue sports should be vested in a separate organization within the NCAA and a separate organization within each school.

Within each school, non-revenue sports should be moved to a new college within the university, perhaps a new college of athletics, or tucked into the sports management department, physical education department, or kinesiology department. A combination of non-revenue sports and faculty with experience in sports management, kinesiology, and exercise science would create valuable collaborations. Coaches could be given faculty status and teach classes relevant to their sport. Teaching would give coaches an opportunity (and impetus) to dive even deeper into the science of their sport and give their students lessons from the front lines. Faculty status, or a hybrid status, could improve coaches' salaries and give them more job security. However, their teaching load, if any, would have to be very limited to avoid shortchanging their teams. Also, a college of athletics, or sports science college, could offer team members minors in the sports they are playing. The classes in such a minor could range from coaching and training theory to being an agent and business manager in that sport. Such a minor might make them better athletes and prepare them for a career in that sport when their playing days have concluded.

Non-revenue sports should continue to be funded by the same sources but with more stability. At schools where revenue sports earn enough to cover all or most of the costs of the non-revenue sports, the money paid by the revenue sports for licensing of the school's name and trademark would still cover much of those non-revenue sports costs. However, systems where student fees and

budget subsidies cover the budgets of non-revenue sports would continue. All-in-all, non-revenue sports would be treated the same as any other college within the university.

It would also be beneficial to allow schools to belong to two separate conferences, one for their football and basketball teams and one for their non-revenue sports. The current super conferences are driven by chasing revenue for football and basketball. These super-conferences are large and geographically far apart. Travel costs and time demands are challenging, causing academic problems. A different conference, one more local or at a more appropriate competition level, may be better for the non-conference sports.

Non-revenue sports should continue to award athletic scholarships even when under new management. The NCAA should keep its commitment to a robust athletic menu by continuing to require a minimum number of team sponsorships by Division I schools. Moving non-revenue sports out of athletic departments that want to cut non-revenue sports to better fund football and basketball is necessary to save the non-revenue sports. There is talk about reducing sponsorship requirements to pump more money into football and basketball.[164] Schools and the NCAA cannot give into the dark side of the college sports business model by doing so.

Because some non-revenue sports teams at some schools can earn money, like volleyball and baseball teams, revenue will flow into the college of sports to help fund it. In some cases, that revenue could approach covering team costs. When revenue exceeds costs, a profit-sharing plan should be implemented to split the profits with team members at those schools. Such a plan would recognize the rights given to revenue sports athletes as also belonging to non-revenue sports athletes.

A plan should also exist within the NCAA for dealing with sports that move toward and ultimately become revenue sports. Such a plan should include a threshold, sport-wide benchmark, for declaring the sport a revenue sport and moving that sport into the revenue sports category and management world. Such a plan may need to be ready for men's hockey, baseball, and soccer because those sports have some of the attributes of football and basketball that enable them to be revenue generators.[165] They are team sports

---

[164] A recent example of this is Clemson's attempt to cut men's cross country and track. *See* Eben Novy-Williams, *Clemson Track Cuts Reveal Differences in NCAA Budgets and Accounting*, SPORTICO (Nov. 11, 2020, 10:12 AM), https://www.sportico.com/ [https://perma.cc/UC6Z-JDJX].

[165] The non-revenue teams that may object the loudest to being moved into a college of sports governing structure are those from the wealthiest

with professional leagues and a college draft. But they have a long way to go in popular fan attraction and TV revenue at the college level to match what has happened to football and basketball. The larger entertainment market for college sports may have a natural limit that cannot accommodate more sports.

The separation of revenue and non-revenue sports will not only work to protect student-athletes, it will also allow the NCAA and schools to comply with antitrust principles and rulings. Student-athletes in revenue sports can be paid and treated as professional athletes who are still yet students. Student-athletes in non-revenue sports can still receive scholarships and be treated as students first and athletes second. But how will this be done in practice: particularly in the tiered world of Division I football?

Division I is the for-profit, business division. It is held together by basketball and the money of the men's basketball tournament. Schools join Division I with the hope of making money, so decisions on Division I status unfortunately need to be based on money. But considerations of fairness and gender equity need to be included in how teams are categorized. For purposes of separating revenue from non-revenue teams, even though most women's basketball teams lose money, the men's and women's basketball teams at a single school should be considered one economic unit, pooling their revenue and resources and paying each team's expenses from those pooled revenues and resources. Being treated as one economic unit will ensure that women's basketball teams are treated as well as the men's team and ensure that the NCAA tournaments for both genders are fully supported. All Division I basketball teams will then be considered revenue sports and treated as such.

However, all Division I football teams do not make a profit and do not receive revenue distribution from the NCAA. Therefore, the football teams that do make a profit, an average of $18,222,036 for FBS schools, should be considered revenue teams; the teams that do not earn a profit, an average loss of $65,031 for FCS schools, should be initially treated as non-revenue teams. But because FCS teams can and do produce substantial revenues ($4,169,759 on average) and lose on average $65,031, a relatively small amount, they should be closely monitored. Should any FCS team turn a profit, those

---

FBS schools, who are big and successful enough that they earn substantial revenue on their own. But elevation of a sport to a "revenue" status must be done when the sport as a whole earns a profit and can stand on its own feet financially.

profits should be split 50-50% with the players, or as negotiated by any future players union.

Going forward, because Division I is the business division and antitrust liability depends on making a profit, teams that do not consistently make a profit and must, so to speak, declare bankruptcy should be relegated or demoted. FBS football teams that go bankrupt should become FCS teams. FCS teams that earn a profit consistently might become FBS teams. Basketball teams that go bankrupt must become Division II teams, perhaps along with the rest of the school, unless the football team makes money and wants to subsidize the basketball team. While relegation, and even demotion, to Division II (or III) may seem harsh, it is the reality of the business world these schools choose to join.

VI. PROTECTING WOMEN'S SPORTS AND COMPLYING WITH TITLE IX

Paying football and basketball players (both men's and women's teams) and funding those teams with the revenue they earn could raise fairness and Title IX issues. Does Title XI require that an equal number of female athletes be paid when football players are paid? If the football team uses its revenue to build top-of-the-line training facilities, must they also be built for the women's volleyball team? Is it fundamentally fair to allow football and basketball players to be professional and paid while not treating non-revenue sports athletes the same?

Title IX requires that no person, "on the basis of sex, shall be excluded from participation, denied the benefits of, or subject to discrimination under any educational program receiving Federal financial assistance."[166] Because all NCAA member schools receive Federal financial assistance, Title IX applies to them. Further, Title IX has been interpreted to be remedial and intended to remedy past discrimination.[167] Compliance with Title IX falls into two general categories: (1) equal participation opportunities for each gender proportional to the undergrad enrollment for the underrepresented gender, and (2) equivalent support for each genders teams.[168] When applying these principles to paying revenue team athletes, a threshold question is whether Title IX speaks to paying college

[166] 20 U.S.C. § 1681(a).

[167] *See* Cohen v. Brown Univ., 101 F.3d 155, 181 (1st Cir. 1996).

[168] *See* Major Changes to Proposed Policy Interpretation, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86); 34 C.F.R. § 106.41 (2023).

athletes because it, and its implementing regulations, were enacted when paying college athletes was not contemplated.

There seems to be little doubt that the first requirement of Title IX, equal or proportional participation opportunity, would continue to apply even when paying some athletes. Counting participation opportunities does not appear to be contingent upon whether the athletes are paid or receive a scholarship.[169] How the athlete is treated is a second, separate evaluation under the regulations and policy statement. Schools will still be required to provide equal or proportional participation opportunities. So, the conundrum of how to balance participation opportunities for women against the football team will continue. One approach to this problem may be for the NCAA to require that every football school sponsor two more women's teams than men's teams and require that the teams be of substantial numbers.[170]

The more vexing question is whether schools must pay an equal number of women to match the football players they pay. Title IX does not speak to paying athletes for their services; it only speaks to providing scholarships and financial aid.[171] To determine if the proportionality requirement for athletic scholarships applies to paying athletes, and thus the requirement that female athletes be paid alongside male athletes, one must interpret the definitions of scholarships and financial assistance. The Title IX regulation regarding scholarships and financial assistance, 34 C.F.R. Sec. 106.37, contains neither. The only definition for either scholarship or financial assistance that can be found in the Title IX regulation is in the "Definitions" section for the entirety of the regulation, 34 C.F.R. Sec. 106.2(g). The relevant language of that definition reads, "Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

---

[169] *See* Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 90 (D. Conn. 2010).

[170] The practice of relying on surveys of the student body to conclude that there is no unmet interest among the underrepresented gender must stop, and schools should be required to balance numbers proportionally. Interest is driven by opportunity and exposure. High schools are doing a poor job of introducing females to a broad range of sports that can develop an interest that carries on to college.

[171] 34 C.F.R. § 106.37 (2023). Title IX and its regulations were enacted well before there was any serious discussion of paying college athletes. 34 C.F.R. § 106.37 speaks to "Financial assistance" in general and subsection (c) of § 106.37 speaks to "Athletic scholarship" in particular. Neither regulation includes a definition of financial assistance or athletic scholarship.

(5) Any other contract, agreement, or arrangement which has as its purpose the provision of assistance to any education program or activity . . . ."[172] This definition looks to limit any financial assistance, which includes scholarships, to that given in support of educational programs. On the other hand, pay given to football players is given as a quid pro quo for athletic services. The pay is part of a commercial transaction; it is not given to the athlete to pay for educational expenses and is, therefore, not a scholarship. Thus, pay is not currently covered by the requirement of proportionality in Subpart D and does not have to be given to both genders.[173]

Determining that paying football players does not qualify as awarding scholarships and, therefore, does not require spreading the pay proportionally to female athletes does not end the Title IX analysis. Paying football and basketball players likely makes them employees of the university, and because they are employees of an

---

[172] 34 C.F.R. § 106.2(g) (2023).

"As used in this part, the term

……..

(g) Federal Financial assistance means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) the acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein of nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any educational program or activity, expect a contract of insurance or guaranty."

[173] Women's basketball players would be paid under this proposal, as basketball should be seen as a package, men's and women's basketball together. Women's basketball is growing toward a self-supporting revenue sport and should be given the chance to so grow. Further, treating women's basketball as men's basketball is treated is consistent with the Title IX requirement of equivalent support for each gender team. *See* § 106.2(g).

educational institution governed by Title IX, Subpart E of Title IX regulations controls. Subpart E, unlike Subpart D, which requires "equal athletic opportunity," only requires that employment decisions be made in a "nondiscriminatory manner" and that sex does not adversely affect employment opportunities.[174] Further, as the Office of Civil Rights has explained, Subpart E was modeled after Title VII and the Equal Pay Act (EPA).[175] Therefore, courts have analyzed challenges to pay decisions brought under Title IX according to the case law of Title VII and the EPA. In the seminal case of *Stanley v. University of Southern California*,[176] where the female coach of the USC women's basketball team claimed a violation of Title IX when she was paid substantially less than the male coach of the USC men's basketball team, the Ninth Circuit Court of Appeals ruled that equal pay was not required when jobs were not equal and important factors justified the greater pay.[177] The critical factor in *Stanley* was the significantly larger revenue generated by the men's basketball team, and the men's coach's role in producing that revenue.[178]

Given that male football and basketball players contribute to producing revenue and, in most cases, much more revenue than non-revenue sports, under sub-Regulation E, schools will not have to pay non-revenue sport athletes or female athletes to balance out the football players' pay. Further, the fact that schools put much more money into promoting football will not tip the scale toward paying non-football athletes. The *Stanley* court held that such a spending decision was a reasonable business decision based upon the revenue-earning potential of a particular team.[179] Therefore, because paying athletes makes them employees, pay is not the equivalent of scholarships. Therefore, non-revenue athletes will not have to be paid until they earn substantial revenue in the same manner that revenue athletes do.

---

[174] 34 C.F.R. § 106.51(a)(2) (2023). § 106.51(a)(2) reads: "A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in anyway which could adversely affect any applicant's or employee's employment opportunities or status because of sex."

[175] VALERIE M. BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 165 (1990).

[176] Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1323 (9th Cir. 1994).

[177] *Id*. at 1321–23.

[178] *Id.* at 1321.

[179] *Id.* at 1323.

Finally, allowing football and basketball teams to spend revenue on top-of-the-line facilities, equipment, and support should not result in the same being done for non-revenue sports. Just as the *Stanley* court found greater spending on publicizing the men's basketball team to be a rational business decision, a court will find spending more to support and attract top-level recruits to the football and basketball teams is a reasonable business decision. It will not require equal spending on the non-revenue sports. Such a decision would be consistent with the principle that those who produce the revenue should benefit from that revenue.

The obvious conclusion is Title IX does not require paying women when male revenue athletes are paid. The only time college athletes have a right to pay seems to be when their team earns sufficient revenue. If male athletes were paid when their team did not earn sufficient revenue, that might be another question.[180] Title IX was drafted at a different time under different circumstances than exists today. At that time, college athletics finances were different and antitrust law had not gained influence in collegiate sports. For Title IX to be updated to take these new developments into account, some important policy decisions must be made.

One important decision could focus on a stated objective of Title IX, namely remedying past discrimination. Football and basketball arguably generate substantial revenue now because they were treated differently and favorably in the past. That previous treatment could be seen as past discrimination against women's teams. Remedying this past discrimination could mean paying female athletes equal to the pay given to male athletes. But a requirement to pay athletes in sports that do not earn substantial revenue will run into problems: only a few schools make enough to pay the members of their football and basketball teams, let alone members of teams that do not earn sufficient revenue. Paying non-revenue team athletes could require using school general funds. Unfortunately, until Title IX is updated, the best way to protect women's teams and all non-revenue teams is to shield them from the pressures to fund football and basketball teams at the expense of non-revenue teams.

---

[180] Schools that do not earn enough revenue to cover the costs of their football or basketball teams could face this problem. To recruit good players they will have to pay them, but they will not be paying them with revenue earned by the football team, they will be paying them with money from student fees and the general budget.

VII. CONCLUSION: NOT AMATEURS BUT STUDENTS AND THE NEED TO RATIONALIZE COLLEGE ATHLETICS WITH MARKET FORCES

In 1984, the Supreme Court formally recognized the reality that had been building for a hundred years: commercially popular college athletics was a for-profit business and should, therefore, be treated as such. In *NCAA v. Board of Regents*, the Court declared that when college football teams earn a substantial profit, they are an entertainment business subject to antitrust law, just like any other business.[181] That conclusion accelerated the dash for cash by schools which lead to fully professionalizing the revenue sports of football and basketball.[182] This professionalization has created a class of rich athletic departments and another class of athletic departments seeking riches by spending beyond their means. This professionalization has also awakened the "laborers" that produce these large profits to demand their economic rights, thereby pushing big college athletics programs fully into the realities of the business world. The *O'Bannon* and *Alston* decisions have shown big college athletics programs the consequences of making profits off student-athletes.[183] Now, the college sports industry and the larger college education industry are trying to figure out how to manage this brave new world of professional college sports.

The world of professional college sports is unlike any other entertainment industry. This uniqueness explains why applying antitrust law to college athletics has been problematic and may require special treatment in the future. The uniqueness of

---

[181] When the Supreme Court declared that the Sherman Act applied to college sports, the door to fully commercializing college sports was opened. Individual schools were now free to earn a profit off their teams and the path for players to earn money off their status as team members was soon to follow. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 85 (1983).

[182] When student-athletes are members of a team their school uses to earn revenue, the student-athletes are expected to behave as professional in the way they approach their team responsibilities. Receiving payment, the usual test for being a professional athlete, is a secondary test here. The student-athletes are, for all practical purposes, professional in their responsibilities and behavior.

[183] There is a significant ethical and legal difference between trying to recoup expenses by charging admission to a sporting event, akin to what takes place at high school sporting events, and making profits, sometimes large profits off selling television rights and otherwise large revenue off sporting events without compensating the players.

professional college sports begins with colleges and universities, the producers of the product. Colleges and universities primarily engage in producing one product: higher education and graduates with college degrees. Now, however, they seek to produce a secondary product in an entirely different industry, using the customers for their primary product as laborers. Using their students as labor creates conflicts and conflicting interests.

These conflicts represent the second unique quality of professional college athletics. College athletes already have a full-time job, that of being students pursuing a degree. Their job of being a professional athlete, the input labor that helps produce revenue and a profit, is a secondary job, at least by design. Holding down these two jobs creates many conflicts.[184]

The professional college sports industry cannot avoid the conflicts between the competing interests of receiving an education and being a professional athlete. The college football product does not hinge upon its athletes being amateurs, but it does hinge upon them being students. So, the problem is: how are two masters served? How can athletes both be full-time students and professional athletes? How can a school provide a quality education and earn big profits off selling an entertainment product produced by students? So far, schools and their professional teams are doing a poor job. A portion of Division I schools, primarily the Power Five Conference schools, make big profits, but the rest of the Division I schools run deficits trying to keep up. Professional college athletes perform poorly in school compared to their fellow students, often in majors not of their choosing or in majors with poor career prospects. The schools with big athletic programs threaten to split from the rest of the college sports world to increase profits. All schools face pressure to abandon non-revenue sports to put more resources into the revenue sports and realize more profits. Consequently, inclusion and equity in college sports are at risk.

College athletics is now at a crossroads and must do something bold to right itself. It must find a way to rationalize its finances. It must find a way for all athletes to receive the education they

---

[184] As discussed earlier, Division I football players report putting in over forty hours a week in practice and games. A full-time credit load is typically at least twelve credit hours. To graduate in four years, a per-semester load needs to be fifteen credit hours on average. If we stay close to the standard notion of three hours of out of class work for each credit hour, per week, the total weekly school demand would be in the range of sixty hours. But realistically most serious college student put in less, say in the range of forty hours per week. This would mean that to do school right, football players need to put in over eighty hours per week. *See* Jacobs, s*upra* note 117.

deserve. It must find a way to preserve diverse and robust sports offerings. It must find a way to encourage and expand equity, diversity, and inclusion among its athletes.

We should let the marketplace rationalize (and stabilize) athletic spending, particularly the spending on professional sports. By forcing the revenue sports to stand on their own two feet financially, we can truly test the industry's viability by letting the market determine the sustainable demand and supply of the product. No longer should we distort the market by subsidizing the industry with money from the schools' general operating budgets or student fees. We should let demand set the amount of supply produced. At the same time, we need to let the academic infrastructure of each school manage and nurture the non-revenue sports so that they can become robust and diverse while enriching the academic experience of the rest of the student body.

To separate the finances of the revenue and the non-revenue sports, we may need to enlist the help of Congress. People with vested interests who have benefited significantly from the business model of college athletics and the big salaries and plush facilities it has brought them will fight tooth and nail to keep their privileges. To counter these vested interests, Congress may need to step in and fine-tune higher education's tax-exempt status to facilitate separating revenue sports into a standalone sub-unit of their parent schools. Congress could give the new pro-sport athletic departments tax-exempt status and make school-wide tax-exempt status contingent on separating the finances of the revenue sports. Congress might also create protections for professional student-athletes in consideration of their fragile status.

For thirty-five years, I had the privilege of coaching men's and women's cross country and track at Valparaiso University, a small Division I school of about 3000 students in northwest Indiana. Coaching was a thrill and a pleasure because of the eager and dedicated men and women on the two teams. I also had one foot on the academic side of campus for thirty-seven years, teaching sports law and other classes at the Valparaiso University School of Law. Inhabiting both the athletic and the academic sides of campus gave me a unique opportunity to view the role of athletics in campus life.

During those thirty-five years, I witnessed the adverse effects of making money off student-athletes as well as the benefits participation in athletics brought to student-athletes. I saw the burden subsidizing revenue sports put on the rest of the athletic department and university, as well as the school pride created when those revenue sports did well. My experience tells me that we need

to save college sports by rationalizing their spending and protect college athletes by recognizing their realities.

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY

VOLUME 13 FALL 2023 ISSUE 1

CHANGING TIMES IN THE *REAL WORLD*: SEEING REALITY TELEVISION PARTICIPANTS IN A NEW LIGHT

MADELYN BRENNER*

CONTENTS

*Madelyn Brenner is a J.D. Candidate for the Class of 2024 at the University of Florida Levin College of Law. She would like to thank her parents for their support and proofreading, as well as Professor Rachael Jones and Sara Kopetman for their reviews of her initial drafts of the piece, and Garrett Dodd for encouraging her to submit the piece for publication. The author wishes to extend many thanks to the staff of the *Arizona State Sports and Entertainment Law Journal* for their help and support throughout the publication process. Lastly, the author thanks Raj Ghosh for occasionally indulging in reality TV with her, which inspired her to write this Article.

ABSTRACT

As reality television continues to permeate society, increasing numbers of aspiring reality stars have found themselves portrayed in a light they did not expect—be it through sound bites featuring quotes the participants did not say, a creation of clips compiled from varying periods to present a participant as a villain, or footage solely showing a participant crying instead of several other scenes featuring the participant. This Article examines instances of these selective editing practices, beginning with an analysis of the participants in the reality docuseries Afflicted*, to strategize effective ways for these wronged plaintiffs to pursue recourse.*

While privacy torts exist and have been used in the past to help victims like these participants seek redress, the adapting technology and increasingly predatory practices used by producers may be too complex to be handled within the existing legal framework, especially in states such as Florida, where torts such as false light have been abolished. This Article explores potential pitfalls as well as keys to success for participants as they face the consequences of their false portrayal, both in the public eye and the eye of the law. In addition, this Article highlights the need for reform in the legal system to incorporate this new and forthcoming line of case law, as the system is not currently serving plaintiffs' needs.

INTRODUCTION: THE FALSE PORTRAYAL OF THOSE *AFFLICTED*

"[W]e felt betrayed and defeated, misled, lied to, manipulated, and completely misrepresented."[1] Jesse Bercowetz and Bekah Dinnerstein were disappointed when they finally watched their debut on the Netflix docuseries *Afflicted*.[2] They anticipated not being fully satisfied with their portrayal,[3] but they were "totally devastated" to see the "straight-up unethical and damaging" editing

---

[1] Jesse Bercowetz & Bekah Dinnerstein, *The Problem with the Netflix Series 'Afflicted,'* MEDIUM (Aug. 19, 2018), https://medium.com/ [https://perma.cc/P7CK-A666].

[2] *See id.*

[3] *Id.* ("After all, we *were* the weird artist couple that lived in the van.")

that portrayed Dinnerstein's health struggles with little sympathy or focus on facts, instead using her story to promote the producers' own narrative.[4] Producers falsely portrayed Dinnerstein's symptoms of Lyme disease and mental health struggles as psychosomatic, which they attempted to emphasize by parsing together clips of her family referencing past psych ward experiences.[5] While Netflix's series was once a "beacon of hope" for the couple, they felt that after the show the producers "left with everything they wanted, and [left] us totally depleted."[6]

The misrepresentations on the "docuseries"[7] were so intense that an open letter was written to Netflix, signed by nearly four dozen people, including the *Afflicted* participants and other big names, like Lena Dunham and Monica Lewinsky.[8] The letter documented multiple unethical practices that were used to create the docuseries, including misrepresentation of the participants and the use of questionable tactics, such as pressuring participants to undergo certain medical treatments and relying on medical opinions of doctors who never examined the participants,[9] which the signatories state is a violation of the Goldwater Rule.[10] The signatories also claimed the docuseries had medical and scientific flaws, such as excluding research scientists and only including practitioners of alternative medicine to validate the participants'

---

[4] *See id.*

[5] *Id.*

[6] *Id.*

[7] Though the producers expressly stated, "it's not Reality TV," the show lacks many of the traits of journalism that one would expect to see in a documentary series. *Id.*

[8] Truth Behind Netflix's 'Afflicted,' *Open Letter to Netflix Regarding the "Afflicted" Docuseries*, MEDIUM (Sept. 17, 2018), https://medium.com/ [https://perma.cc/Z7JK-XV7P] [hereinafter *Open Letter*]; *see also* Chris Gardner, *'Afflicted' Executive Producer Responds to Controversy, Protest Letter Signed by Lena Dunham, Monica Lewinsky*, THE HOLLYWOOD REP. (Sept. 20, 2018, 1:45 PM), https://www.hollywoodreporter.com/ [https://perma.cc/CTD3-6SFD] (detailing executive producer Dan Partland's response to the negative backlash to the show from both its own participants and the public).

[9] *Open Letter*, *supra* note 8.

[10] The Goldwater Rule was created by the American Psychiatric Association to prohibit its members from giving opinions about individuals they did not personally examine. For a further critique, see John R. Vile, *Goldwater Rule*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV.: FIRST AMEND. ENCYCLOPEDIA (Apr. 1, 2021), https://www.mtsu.edu/ [https://perma.cc/X3F3-VKAA].

claims.[11] The letter demanded that *Afflicted* be removed from Netflix and that the company issue a formal apology to the participants.[12]

The participants faced online abuse after the release of the show,[13] their reputations and professional careers were questioned and uprooted, and they lost friendships.[14] Perhaps worst of all for the participants, *Afflicted* remains available to watch on Netflix in 2023.[15]

However, all hope is not lost for the individuals falsely portrayed on *Afflicted*.[16] In *Hill v. Doc Shop Productions, Inc.*,[17] which will hereinafter be referred to as "the *Afflicted* case," the show's participants successfully negated the network and production company's defenses of consent and waiver (of their rights not to be defamed or misrepresented) due to the network fraudulently misrepresenting the type of show the participants signed up for and pressuring the consents.[18] Because the participants were "duped," the court found their consent and waiver of claims were fraudulently obtained.[19] Additionally, the court evaluated the reality participants' arguments for defamation and false light, finding that they at least had minimal merit (the minimum requirement to survive a SLAPP claim).[20]

Thus, the *Afflicted* case ushers in the possibility that the tort of false light still can be levied against production companies, and it begs the question of whether future reality television (reality TV) participants will also be able to raise similar claims to sue the

---

[11] *Open Letter*, *supra* note 8.

[12] *Id.*

[13] *See* Gardner, *supra* note 8.

[14] *See Open Letter*, *supra* note 8.

[15] *See* Gardner, *supra* note 8; *see also Afflicted*, NETFLIX (Aug. 10, 2018), https://www.netflix.com/ [https://perma.cc/GN7Z-2KF9] (displaying *Afflicted* as a series still available for streaming on the Netflix platform).

[16] *See* Winston Cho, *Defamation Lawsuit Against Netflix Over 'Afflicted' Docuseries Allowed to Proceed*, THE HOLLYWOOD REP. (Apr. 12, 2022, 4:12 PM), https://www.hollywoodreporter.com/ [https://perma.cc/MWK9-4LS9].

[17] Hill v. Doc Shop Prods., Inc., No. B305617, 2022 WL 1078173 (Cal. Ct. App. Apr. 11, 2022).

[18] *Id.* at *5–8; *see* Cho, *supra* note 16.

[19] *Hill*, 2022 WL 1078173, at *2.

[20] *Id.* at *8–10. SLAPP stands for Strategic Lawsuits Against Public Policy, and many states have imposed Anti-SLAPP legislation to prevent suits that infringe on an individual's right to free speech in connection with public issues. *See, e.g.*, FLA. STAT. § 768.295 (2022). This "public issues" aspect is similar to the newsworthy exception discussed *infra* Sections II.C.2, 3.

production companies who use their stories, personalities, or statements against them. This Article explores the history of reality TV, details other tort actions previously pursued against reality show producers, and further evaluates the success of future cases like the *Afflicted* case.

To begin, ever since *The Real World* came on the scene in 1992,[21] the "real" world has been portrayed in a not so "real" light. Participants signing up for reality TV shows might be enticed by the glitz and glam that often follow a reality TV show appearance;[22] however, these participants, much like those who signed up for *Afflicted*,[23] may not realize the risk to which they are exposing themselves. Unconscionable contracts, tortious infliction of emotional distress or negligence, and portrayal in a false light are a few of the many risks that reality TV participants face after signing up to be depicted on national television.[24] Many of the claims reality TV participants could bring, however, are barred by the contract provisions that reality TV shows and their networks cunningly incorporate. [25] Recent cases such as the *Afflicted* case have

---

[21] National Public Radio, *It's Been a Minute: 'True Story': Danielle Lindemann on 'What Reality TV Says About Us*,*'* NAT'L PUB. RADIO, at 2:43 (Apr. 5, 2022), https://www.npr.org/ [https://perma.cc/B5ZM-7H6T] ("If we can say that "The Real World" was perhaps the start of the modern reality television era, I think it's safe to say that "Survivor" was its, like, first true peak."); *see also* Stephanie Rimberg, Note, *The Secrets Behind Reality Television Shows and Their Unconscionable Contracts*, 39 CARDOZO ARTS & ENT. L.J. 1087, 1089–90 (2021).

[22] *See, e.g.*, Margot Harris, *40 Reality TV Stars who Became Mega Instagram Influencers, Ranked by How Many Millions of Followers They Have*, INSIDER (Mar. 23, 2020, 4:52 PM), https://www.insider.com/ [https://perma.cc/AFH3-YT28]; Anna Graham, *The Rise Of Modern Stars: From Reality TV Shows To Instagram Influencers*, FIZZY MAG (Feb. 2022), https://fizzymag.com/ [https://perma.cc/2HNU-GWPN].

[23] Jesse Bercowetz and Bekah Dinnerstein, for example, were enticed to sign up for the show because "Bekah would be able to tell her story, it would be great for her fundraising, and that [the producers] were working to get her some free treatments." Bercowetz, *supra* note 1.

[24] *See generally* Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68 (2004).

[25] *See* Catherine Riley, Note, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 NYU J. INTELL. PROP. & ENT. L. 106, 113 (2013); *see also* Dieu v. McGraw, No. B223117, 2011 WL 38031, at *11 (Cal. Ct. App. Jan. 6, 2011) (finding a reality TV release not to be unconscionable because the plaintiffs had not met their burden of proof).

uncovered a potentially successful way for participants of reality TV shows and docuseries alike to avoid this previously powerful blockade that the networks implement.

Additionally, the growing prevalence of "deepfakes"[26] has begun to permeate the pop culture scene, even invading the realm of reality TV.[27] With this new potential for claims against reality TV production companies tacked on to the growing prevalence of fake depictions, it appears the tort world could be headed towards a future where "Average Joe"[28] plaintiffs, taken advantage of by cunning reality TV producers, are able to bring claims, possibly for defamation and false light, that could stem from reality TV's use of deepfakes.

Part I of this Article begins with a brief introduction to reality TV and illustrates some vulnerabilities of reality TV participants. Part II describes other tort claims that reality TV participants have already brought and analyzes their success. Part III discusses the tort of false light and illustrates its history up until this point, both in general and in Florida. Part IV dives deeper into the *Afflicted* case and its specific claims, and then applies these claims to some of the nuances of reality TV, such as "Frankenbiting" and other deceptive editing practices. Finally, Part V introduces the concept of deepfakes and applies their presence in reality TV as a basis for further concern in the reality TV world. While not meant to scare or discourage potential reality TV participants from pursuing their fifteen minutes of fame, this Article should serve as a warning of the holes in the current legal landscape that could leave participants unprotected if they were falsely portrayed on the next big reality TV show.

---

[26] Lindsey Wilkerson, *Still Waters Run Deep(Fakes): The Rising Concerns of "Deepfake" Technology and Its Influence on Democracy and the First Amendment*, 86 MO. L. REV. 407, 408 (2021) ("Deepfakes . . . are videos that are digitally manipulated to make it look like a person 'is realistically saying or doing something they didn't.'").

[27] Trish Rooney, *Deepfakes Are on Reality TV Now. What Could Go Wrong?*, INSIDEHOOK (Aug. 31, 2022, 12:38 PM), https://www.insidehook.com/ [https://perma.cc/3NZF-37G6].

[28] Get it—another reality show pun. No really, that was a reality show too. *Average Joe*, NBC, https://www.nbc.com/ [https://perma.cc/TUY4-BUKF].

I. A BRIEF BREAKDOWN OF REALITY TV

A. HISTORY

Reality TV is "a form of non-fiction television programming that encompasses a broad spectrum of different programs"[29] and includes the casting of ordinary people who are not actors, unscripted dialogue,[30] and surveillance footage.[31] Although reality TV permeates the television scene now, as anyone who has recently browsed their cable channels or streaming services would notice, it was not always so prevalent.[32] The first notable instance of reality TV[33] emerged in 1973, with the show *The American Family*.[34] However, the next reality show did not appear until 1992 with the debut of *The Real World*.[35] Even still, reality TV did not become the "television of television"[36] until 2000, with the injection of competition into the shows.[37] Reality TV's exponential growth has only continued in the last few decades, with many variations on the original model emerging.[38] Reality TV is often viewed as the lower

---

[29] Katie Hopkins, *Unique Legal Considerations in Reality Television*, 13 U. PITT. J. TECH. L. POL'Y 1, 2 (2012).

[30] The unscripted element of reality TV is largely up for debate. *See* Deborah Reiselman, *Reality TV: Is it for Real?*, U. CIN. MAG. (Dec. 2010), https://magazine.uc.edu/ [https://perma.cc/UP59-ACYP]; *see also* Ree Hines, *'Bachelor' Creator Claims '70 to 80 Percent' of Reality TV is Fake*, TODAY SHOW (June 15, 2012, 11:59 AM), https://www.today.com/ [https://perma.cc/JYQ4-JJQL]. For a recent example of a former reality television participant admitting to a staged scene of previous real-life events, see Moises Menendez II, *The Story Behind Netflix's Real Bling Ring Docuseries*, TIME (Sept. 28, 2022, 11:06 AM), https://time.com/ [https://perma.cc/ZAL2-6SJR].

[31] Hopkins, *supra* note 29, at 2.

[32] *See* Rimberg, *supra* note 21, at 1089.

[33] This identification is in dispute. *Compare* Rimberg, *supra* note 21, at 1089 (claiming first instance was in 1973 with *The American Family*), *with* Hopkins, *supra* note 29, at 2 (identifying *Queen for a Day* as the first instance of reality TV in 1948). In either case, reality TV in the twentieth century was not the same beast it is today.

[34] Rimberg, *supra* note 21, at 1089.

[35] *Id.* at 1089–90.

[36] Kelefa Sanneh, *The Reality Principle*, NEW YORKER (May 2, 2011), https://www.newyorker.com/ [https://perma.cc/45YE-DTUT].

[37] *See* Rimberg, *supra* note 21, at 1089–90.

[38] *See id.* at 1089 (showing reality TV now encompasses nearly every topic one can imagine).

echelon of "TV society,"[39] particularly when compared to scripted sitcoms or dramas.[40] Regardless, many people still choose to participate in these shows, whether by signing up to make appearances or by tuning into the shows daily with a click of their remote.[41]

B. VULNERABILITY

While the contract formation process is an essential component of any business deal, reality TV contracts differ in that there is a consistent discrepancy in bargaining positions between the production companies and the participants who choose to appear on reality TV shows.[42] Reality TV participants typically do not have agents and are inexperienced in the overall process, so they usually do not know what clauses to look for and potentially avoid.[43] Thus, reality TV contracts often favor the drafting, legally-experienced party.[44] "Reality TV cast members are subject to totally unequal terms of negotiations . . . . They are essentially a disposable commodity, and if they don't sign the contract there are hundreds of other people lining up for their spot."[45]

---

[39] *See* Chika Ekemezie, *How Reality TV Fails its Stars*, DAME (Dec. 17, 2021), https://www.damemagazine.com/ [https://perma.cc/ZYH7-MQPE] ("Reality television has an almost universally bad reputation. Those that decry it say that it is vapid and an unwelcome peek into the worst parts of the human psyche, and even those that love it think of it as a guilty pleasure.").

[40] *See* Rimberg, *supra* note 21, at 1090.

[41] *See* Alice Jones, *The Power of Reality TV in a Pandemic Age*, BBC CULTURE (Apr. 20, 2020), https://www.bbc.com/ [https://perma.cc/BRZ6-2GNY] (Particularly during the beginning of the Covid-19 pandemic, reality TV views skyrocketed, with Frances Taylor, an editor for an entertainment magazine, saying viewers are "turning to more light-hearted, escapist programmes . . . . Reality TV is generally far choppier, and edited really snappily so there's not too long to dwell on one thing before you're onto the next, [which] probably serve[d] our scattergun brains at a moment where we [were] finding it harder to concentrate.").

[42] Hopkins, *supra* note 29, at 9.

[43] *Id.*

[44] *See id.*

[45] *See* Edward Wyatt, *TV Contestants: Tired, Tipsy, and Pushed to Brink*, N.Y. TIMES (Aug. 1, 2009) (quoting Professor Mark Andrejevic), https://www.nytimes.com/ [https://perma.cc/6GJ7-TZJU]; *see also* Riley, *supra* note 25, at 113; Chloe Melas, *'Bachelor in Paradise' Contract Revealed: What Contestants Give Up When They Sign On*, CNN MONEY (June 21, 2017, 4:15 PM), https://money.cnn.com/ [https://perma.cc/ML6Q-MY7S] (quoting Attorney Joey Jackson, CNN

Legal academics have discussed the unconscionability of these contracts; however, claims invoking the unconscionability doctrine have rarely been successful.[46] If a contract or one of its terms is unconscionable, "a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."[47] An unconscionable contract or term must be so shocking to the conscience as to violate public policy and be grossly different from the norms of the industry.[48] Additionally, courts typically must find a contract both procedurally and substantively unconscionable.[49] This distinction means the contract must have both the absence of a meaningful choice (procedural unconscionability) and terms that are unreasonably favorable or skewed towards the party with a stronger negotiating position (substantive unconscionability).[50] However, courts are willing to view the two elements on a scale. For example, if a contract is only slightly procedurally unconscionable but extremely substantively unconscionable, a court would still likely find such a contract unenforceable.[51]

Procedural unconscionability can result from high-pressure tactics or if the contract is deemed to be a contract of adhesion.[52] Yet, evidence that a contract is one of adhesion alone does not make the contract procedurally unconscionable.[53] Thus, if a reality TV participant feels pressured to either sign on the dotted line or walk away, that pressure alone does not invalidate a contract based on procedural unconscionability.[54] The coupling of that procedural

---

legal analyst, saying "[w]hen people want to enter into a show and they see fame and fortune, stardom, they aren't going to take it to a lawyer and negotiate with the company because the show will be like, 'There are 13,000 other people who will do this.'").

[46] Riley, *supra* note 25, at 130–36.

[47] RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981). While the Restatement is non-binding, many states have chosen to adopt it, particularly because this provision is modeled after the Uniform Commercial Code § 2-302 to apply outside of the sale of goods.

[48] Riley, *supra* note 25, at 119.

[49] *Id.* at 117–18.

[50] *Id.* at 118–19.

[51] *See id.* at 120.

[52] *Id.* at 118–19.

[53] *Id.*

[54] *See id.*

unconscionability with elements that "shock the conscience"[55] is what allows for a contract to be void or voidable on the grounds that it is unconscionable.[56] Moreover, a contract or clause found to violate public policy can be voided on its own, regardless of the level of procedural unconscionability.[57] Although in this case, because reality TV participants' contracts are not difficult to identify as adhesion contracts, public policy and substantive unconscionability can be lumped together.[58]

Additionally, to conjure up pleasant memories of 1L Contracts courses,[59] legal scholars have opined that the duty of good faith and reasonable efforts should require producers and other parties to a reality TV contract to "abstain from fraudulent misstatements that would result in false light damages to [a] plaintiff."[60] As "producers and networks continue to push the bounds of acceptable television entertainment,"[61] the possibility of reality show participants successfully demonstrating unconscionability or a breach of the duty of good faith seems more plausible.

Because reality TV participants might not be the most sympathetic characters, one might argue that certain reality TV villains *deserve* this unfairness. However, this contention is misguided because reality TV participants sign contracts that are regulated by the same contract laws applicable to everyday citizens.

---

[55] Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984) ("[T]he contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact *did not contain terms which shock the conscience* or differed so grossly from industry norms as to be unconscionable by their terms.") (emphasis added).

[56] *See* Riley, *supra* note 25, at 120.

[57] *See id.* at 120 n.87.

[58] *Id.*

[59] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 215 (N.Y. 1917).

[60] Walter T. Champion, Jr., *Oh, What a Tangled Web We Weave: Reality TV Shines a False Light on Lady Duff-Gordon*, 15 SETON HALL J. SPORTS & ENT. L. 27, 36 (2005).

[61] *See* Riley, *supra* note 25, at 135. No one would have expected a need for producers to protect themselves from lawsuits regarding sexual assault or exposure to known criminals, yet recent events have further demonstrated a need for inclusion of such protections. For examples of these recent events, see David Mack, *Sherry Pie Has Been Disqualified From "Drag Race" After a BuzzFeed News Investigation into Catfishing Allegations*, BUZZFEED NEWS (Mar. 6, 2020, 5:05 PM), https://www.buzzfeednews.com/ [https://perma.cc/7A7Y-PHMB]; Catherine Thorbecke & Nicole Pelletiere, *Corinne Olympios 'Doing Better' After 'Bachelor in Paradise' Controversy*, ABC NEWS GO (Aug. 29, 2017, 11:01 AM), https://abcnews.go.com/ [https://perma.cc/E592-N9UZ].

Therefore, regulating these contracts is important, as their use to undermine the power of the "little guy" could affect ordinary citizens, too.

C. THE CONTRACTS THEMSELVES

The typical reality TV contract has only continued to grow longer and more expansive as intricacies and incidents within the genre further develop.[62] Not only do participants sign a contract, but they are also typically subject to a release, full contestant agreement, and non-disclosure agreement, in addition to medical examinations, background checks, psychological and mental evaluations, and even personality testing.[63] In a contract for *Bachelor in Paradise*, for example, the contestants grant producers "the right to change, add to, take from, edit, translate, reformat or reprocess . . . in any manner [the] Producer may determine in its sole discretion."[64] Contestants of the franchise additionally must acknowledge that their "actions and the actions of others displayed in the Series may be disparaging, defamatory, embarrassing or of an otherwise unfavorable nature and may expose [them] to public ridicule, humiliation, or condemnation."[65] Participants must also agree to the release of any information from their initial application to third parties, which could include medical information, education history, and work history.[66]

In the *Afflicted* release provisions, the plaintiff participants agreed that the show "may include, among other things, documentary-style or 'behind the scenes,' dramatic, humorous, *embarrassing, humiliating*, and satirical elements."[67] Additionally, the show could "reveal information about [the participants] of a personal, private, intimate, surprising, *disparaging, embarrassing, or unfavorable nature, which may be factual and/or fictional*."[68] The participants also acknowledged that the show could have a variety of manufactured elements.[69] The participants confirmed that they had voluntarily

---

[62] Riley, *supra* note 25, at 123.

[63] *Id.* at 123–24.

[64] Melas, *supra* note 45 (quoting sample contract language).

[65] *Id.*

[66] *Eligibility Requirements*, BACHELOR NATION ELIGIBILITY REQUIREMENTS, https://bachelornation.com/ [https://perma.cc/43CL-HGEU]; *see also* Melas, *supra* note 45.

[67] Hill v. Doc Shop Prods., Inc., No. B305617, 2022 WL 1078173, at *2 (Cal. Ct. App. Apr. 11, 2022).

[68] *Id.*

[69] *Id.*

agreed to participate in the show, and that they understood the risks.[70] Most importantly, they agreed to:

> [R]elease and hold harmless a broad category of parties from "any and all claims, judgments, interest, demands, losses, liabilities, causes of action, or costs of any kind (including reasonable attorney's fees and court costs) (collectively, [c]laims) that [they] may have arising out of or in any way resulting from [their] participation in [*Afflicted*], and the use or reuse of the [r]ecordings, and [they] agree[d] not to make any claim against the [r]eleased [p]arties as a result of [their] participation in [*Afflicted*] and/or in connection with any use or reuse of the [r]ecordings (including without limitation, claims based upon *defamation, invasion of privacy, emotional distress, false light, and/or publicity*) . . . ."[71]

Thus, through their contracts, the plaintiffs technically waived their rights to sue the producers or any other parties associated or affiliated with the network.[72] However, because the plaintiffs presented various reasons why their contracts should not be honored, which loosely implicated public policy and unconscionability grounds, these releases did not bar their claims for false light and defamation.[73] This decision has significant implications, potentially opening the floodgates for similarly-duped reality show plaintiffs, or even reality show participants not fully aware of the magnitude of the contract they signed.[74] Participants who have fallen victim to "Frankenbiting,"[75] a practice that approaches the borders of deepfakes, could perhaps use the *Afflicted* plaintiffs' strategy to vindicate their claims.

---

[70] *Id.*

[71] *Id.* (quoting the language of the contract in question).

[72] *Id.*

[73] *Id.*

[74] *But see* Riley, *supra* note 25, at 119 (explaining that simply being complex is not enough to be deemed unconscionable).

[75] Frankenbiting consists of highly selective editing that, much like the Frankenstein monster, is pieced together in a way that is nearly unrecognizable to the party's original statements. *See 'Frankenbiting' Scares Up Reality Controversy*, CHI. TRIB. (July 21, 2005, 12:00 AM), https://www.chicagotribune.com/ [https://perma.cc/NBQ6-9UEA].

II. OTHER TORTIOUS TACTICS OF REALITY TV PRODUCERS

Reality TV participants and other affected parties have previously succeeded in bringing some tortious claims other than false light and defamation.[76]

A. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

Ambush reality TV shows and hidden camera shows that prank unsuspecting parties are prime targets for lawsuits alleging IIED.[77] A cause of action for IIED, also known as outrage in some jurisdictions,[78] exists when one causes severe emotional distress to another by their extreme and outrageous conduct.[79] Conduct characterized by malice,[80] or even with a degree of aggravation high enough to entitle the plaintiff to punitive damages,[81] is generally not enough; the conduct truly must be *outrageous* to satisfy the standard for an IIED claim.[82] Emotional distress can include "mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin,

---

[76] *See, e.g.*, Nicole Weaver, *Reality Shows that Led to Lawsuits in Real Life,* SHOWBIZ CHEATSHEET (June 26, 2018), https://www.cheatsheet.com/ [https://perma.cc/2ZMA-3QMN].

[77] Ugolini, *supra* note 24, at 82–83.

[78] Eric M. Larsson, *Cause of Action for Intentional Infliction of Emotional Distress*, 44 CAUSES OF ACTION 1 (2d ed. 2023).

[79] RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965); *see also* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 798–99 (2007) (noting that the intentional infliction element can also be satisfied if the actor is reckless in their infliction of emotional distress, having conscious disregard for the consequences).

[80] *See generally* John Murphy, *Malice as an Ingredient of Tort Liability*, 78 CAMBRIDGE L.J. 355 (2019) (exploring whether malice is a defensible element of various torts).

[81] Florida's traditional standard for punitive damages, established in *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936), requires that such "damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others."

[82] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. L. INST. 1965) ("Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'").

disappointment, worry, and nausea,"[83] and it must be severe.[84] The distress must also be reasonable and justified;[85] if a particular claimant is overly dramatic and has a highly unusual reaction that would not come from a typical plaintiff, the acting party is generally not held liable.[86]

Ambush and hidden camera reality shows specifically intend to get a reaction out of the often innocent victims, for whom releases likely are not sought until after the incidents have occurred.[87] For example, a couple was involuntarily involved in a prank performed by Ashton Kutcher, pre-*Punk'd*,[88] in which a "corpse" was placed in their suite at a hotel in Las Vegas.[89] The couple was forced to stay in the room after discovering the "dead body," presumably so their reactions could be further captured for the TV show, and they later sued Kutcher and the production company for ten million dollars from each defendant, alleging IIED, among other claims.[90] The show and its successor *Punk'd* were eventually canceled while the lawsuit was still pending, which legal analysts opined was no coincidence.[91]

Reality shows featuring ambush scenarios are particularly susceptible to these IIED suits because of their goal of shocking the victim and their success being based on the level of outrageous

---

[83] *Id.* at cmt. j.

[84] Melody Hsiou, Comment, *Harsh Reality: When Producers and Networks Should Be Liable for Negligence and Intentional Infliction of Emotional Distress*, 23 SETON HALL J. SPORTS & ENT. L. 187, 212 (2013).

[85] RESTATEMENT (SECOND) OF TORTS § 46 cmt. j.

[86] For example, if a normal person would not be alarmed by cats, but a particular plaintiff has a fear of the animal, the defendant would not be responsible for inflicting emotional distress *unless* the defendant had reason to know of the plaintiff's response. This knowledge largely speaks to the intent piece of the tort. *See id.*

[87] Ugolini, *supra* note 24, at 82–84.

[88] The show was aptly named '*Harassment*.' *See* Buckingham, LaGrandeur, & Williams, *What's Funnier Than a Prank-Induced Heart Attack? A Hilarious Million-Dollar Lawsuit*, L. OFFS. OF BUCKINGHAM, LAGRANDEUR & WILLIAMS (Apr. 11, 2018), https://www.boydbuckingham.com/ [https://perma.cc/U338-H8NM].

[89] *Couple sue over TV corpse 'prank,'* BBC NEWS (June 13, 2002), http://news.bbc.co.uk/ [https://perma.cc/TUM9-RR8Z].

[90] *Id.*

[91] Timothy McDarrah, *'Harassment' Lawsuit May Have Sunk 'Punk'd*, LAS VEGAS SUN (Feb. 4, 2004, 10:29 AM), https://lasvegassun.com/ [https://perma.cc/8C6U-UHZE]*; see also* BBC NEWS, *supra* note 89. Unfortunately, the case appears to have been settled out of court, so official liability (and thus the implications of this lawsuit) remains unclear.

reaction.[92] Competition shows are also susceptible to IIED claims because they often push the reality contestants both mentally and physically.[93] Because the contestants also experience large amounts of stress, are often forced into isolation, and get little sleep, the factors coalesce to create a tense environment for reality participants.[94] However, because courts have difficulty determining the genuineness of IIED claims,[95] they are a hard claim to successfully prove.[96] Documentary-style shows in which the producers and networks are merely following participants around, rather than manufacturing or controlling their environments, are much less likely to be successfully challenged with IIED claims.[97]

B. NEGLIGENCE

Negligence suits, particularly in the media context, often turn on whether the plaintiff participant can be considered an employee.[98] In the media context, where the task of determining whether participants are employees or independent contractors is difficult, negligence claims are tough for the plaintiff to bring, since claims can only be successful if the defendant owes a duty to the plaintiff, meaning the plaintiff must be an employee of the defendant.[99] "Reality show participants exist in a blurred area of the law, falling somewhere between being classified as employees of

---

[92] Ugolini, *supra* note 24, at 83 n.73.

[93] Hsiou, *supra* note 84, at 213.

[94] *See id.*; *see also* Complaint at 2, Hartwell v. Kinetic Content, LLC, No. 22STCV21223 (Cal. Super. Ct. Jun 29, 2022) ("Defendants maintained excessive control over virtually every aspect of the lives of [the Cast], including exerting complete domination over their time, schedule, and their ability to eat, drink, . . . sleep, and communicate with the outside world . . . and restricted their ability to engage in a multitude of activities . . . .").

[95] *See* 136 AM. JUR. 3D *Proof of Facts* § 175 (2013) ("The IIED tort is not favored in the law, and only the most egregious conduct is sufficiently extreme and outrageous to establish it.").

[96] Hsiou, *supra* note 84, at 210–11.

[97] *Id.* at 217–18 (explaining that although networks of these documentary-style shows may be considered "morally insensitive," they will likely not be responsible for events that may occur, including the suicide of a cast member's husband).

[98] *Id.* at 195–96.

[99] RESTATEMENT (SECOND) OF TORTS § 4 cmt. a (AM. L. INST. 1965) ("Thus, whether or not [a party] is liable depends upon whether his breach of duty results in an injury to *someone to whom the duty is owing* in such a manner as to make the breach of the duty a legal cause of the injury . . . .") (emphasis added).

TV companies and as independent contractors."[100] Courts typically use a totality of the circumstances approach to make this determination.[101] Factors to be considered include the extent of control over the individual, whether skill is required, whether direct supervision is involved in the work, who supplies the materials and environment, the length of work, the payment method, whether the work is the employer's regular business, and whether both the individual and employee believed they had entered into an employer-employee relationship.[102]

Using these factors, producers of competition reality shows are more likely to be considered employers because producers of those shows control the environment. On the other hand, producers of docuseries reality shows like *Real Housewives* are less likely to be considered employers because the participants decide where the show takes place. However, shows that document the "real lives" of characters but create the environments in which they are viewed, such as *Big Brother* and *The Bachelor* franchise, blur the line between the two genres and thus leave up for debate whether their participants are employees or independent contractors—a decision that has implications for protections of both the producers and the participants.[103]

However, because "[r]eality show contestants . . . are under the direct control of their producers and have generally never been involved in the entertainment industry prior to their appearance on the show, as producers like to cast 'new faces'" and participants are on the show with a primary goal of winning a competition or finding love (or both), many scholars argue that the role of these participants goes far beyond independent contractor and makes these participants much more similar to full-fledged employees.[104] However, participants often are required to agree that "the appearance as a participant in [the show] is not a performance and is not employment."[105] In any case, this determination also influences whether the employer can be held liable for the tortious acts of other participants based on a theory of vicarious liability.[106]

On the other hand, plaintiffs must demonstrate that a show created unlikely scenarios that put them in jeopardy to make a successful negligence claim.[107] One responsibility employers have

---

[100] Hsiou, *supra* note 84, at 195.
[101] Hopkins, *supra* note 29, at 17.
[102] *Id.* at 17–18.
[103] *Id.* at 17.
[104] Rimberg, *supra* note 21, at 1113.
[105] Hsiou, *supra* note 84, at 196 (citation omitted).
[106] Hopkins, *supra* note 29, at 17.
[107] Hsiou, *supra* note 84, at 200.

is to exercise a duty of reasonable care in their hiring.[108] One example of such a claim is rapper The Game's lawsuit against Viacom, the parent company of his show, *She's Got Game*.[109] In the lawsuit, the rapper sued Viacom alleging "Viacom owed him a duty of care through its background screening practices" in addition to claims of negligent misrepresentation, negligent infliction of emotional distress, and breach of fiduciary duty.[110] The woman had accused the rapper of battery and won a seven million dollar judgment against him.[111] The lawsuit, at least according to Viacom's defense counsel, was The Game's way of shifting the judgment from himself to his employer (a roundabout method of vicarious liability).[112] However, the lawsuit was unsuccessful, and The Game's allegation that the network had knowledge of the woman's psychological history and arrest history, including a previous Baker Act[113] and multiple arrests,[114] which he valued at 20 million dollars, failed in court.[115]

C. PRIVACY TORTS

The invasion of the right to privacy tort originated in a law review article by Samuel Warren and Louis Brandeis in 1890,[116] likely in response to overbearing and excessive news coverage of socialites' personal lives.[117] William Prosser later broke up this invasion of the right to privacy tort into four separate privacy torts, which are: 1) intrusion into the plaintiff's private affairs, 2) public disclosure of embarrassing facts about the plaintiff, 3) appropriation

---

[108] *Id.*

[109] Eriq Gardner, *Viacom Faulted in Lawsuit for Not Protecting Rapper From Reality TV Contestant*, THE HOLLYWOOD REP. (May 1, 2017, 12:23 PM), https://www.hollywoodreporter.com/ [https://perma.cc/7XZK-BGJD].

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] FLA. STAT. § 394.463 (2022) (requiring involuntary examination after certain factors are presented that the individual represents a threat to themselves or others).

[114] Gardner, *supra* note 109.

[115] Victoria L. Johnson, *The Game Reportedly Loses $20 Million Viacom Lawsuit Centered Around Sexual Assault Verdict*, COMPLEX (June 6, 2018), https://www.complex.com/ [https://perma.cc/288H-YEMG].

[116] *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[117] *See* John A. Jurata, Jr., Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 492 (1999).

of the plaintiff's name and likeness for the defendant's advantage, and 4) publicity which places the plaintiff in a false light in the public eye.[118]

1. *INTRUSION*

Some legal academics consider intrusion upon seclusion the category of privacy torts that most affects newsgathering.[119] Examples of intrusion upon seclusion include eavesdropping, snooping into another's personal space by looking in windows, and covertly opening someone else's mail.[120] The tort creates a qualified "right to be let alone,"[121] and protects against both physical intrusions and those described as "otherwise."[122] Those described as "otherwise" can involve a sensory invasion or an invasion involving harassment.[123] While reality TV arguably does very little newsgathering, intrusion might be invoked in scenes on reality programming that involve the use of hidden cameras or "hot mics."[124] So long as the intrusion is highly offensive to a reasonable person,[125] reality participants could have actionable claims; however, would-be plaintiffs usually face the barriers of waiver and consent.[126] A plaintiff might prefer to bring an intrusion claim because the tort "focuses on the *methods* used to gather information

---

[118] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[119] Lyrissa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 TEX. L. REV. 433, 436 (1992).

[120] *Id.* at 436 n.30.

[121] *Id.* at 436.

[122] Adam J. Tutaj, Comment, *Intrusion Upon Seclusion: Bringing an "Otherwise" Valid Cause of Action into the 21st Century*, 82 MARQ. L. REV. 665, 670–71 (1999) (analyzing Comment B of the Restatement's definition of intrusion).

[123] *Id.*

[124] *Hot Mic*, CAMBRIDGE DICTIONARY (2023), https://dictionary.cambridge.org/ [https://perma.cc/K8TJ-QJU3] ("[A] microphone . . . that is switched on, especially without the speaker realizing.").

[125] Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 IND. L. REV. 155, 163 (2000) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1965)).

[126] *Cf.* Porsche T. Farr, Comment, *What Good Is Fame If You Can't Be Famous in Your Own Right?: Publicity Right Woes of the Almost Famous*, 16 MARQ. INTELL. PROP. L. REV. 467, 478 (2012) ("Anyone who wants to participate in a reality television show must sign a series of documents, which includes agreements, releases, and waivers. These documents essentially allow the production company to have complete control over the soon-to-be reality stars.").

rather than on the *publication* of it,"[127] and thus the information disclosed is less important to an evaluating court than the manner in which the information was accessed.

2. *PUBLIC DISCLOSURE OF PRIVATE FACTS*

A potentially viable privacy tort that could prove useful for reality show participants is public disclosure of private facts. While inconsistently invoked in various jurisdictions, the tort may apply when private and highly offensive information is publicly disclosed in an unsanctioned manner.[128] Four elements are required to bring such a claim: a lack of newsworthiness, public nature of the disclosure, offensiveness of the disclosure, and the private nature of the information disclosed.[129] The newsworthiness, or legitimate public concern, component has been argued as the most important,[130] which could explain why the tort has been so infrequently invoked in reality TV participants' situations or other celebrity scandals.[131] If the public has any reasonable expectation of knowledge of the information disclosed, a court would be unlikely to find that the information is so inconsequential as to cross the line into completely private fact.[132] Particularly because the Supreme Court in *Florida Star v. B.J.F.*[133] determined that public significance should be interpreted broadly and focus on the general subject matter of the issue rather than the nature of the information disclosed,[134] private information can be considered newsworthy so long as it bears some relation to public interest.[135]

Since reality TV participants willingly sign up to display facets of their lives on TV,[136] the information disclosed likely would not

---

[127] Marmon, *supra* note 125, at 164 (emphasis added).

[128] Patricia Sanchez Abril, *"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 390–91 (2011).

[129] Kirby Shilling, Note, *Bad Publicity: The Diminished Right of Privacy in the Age of Social Media*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 756, 765 (2022).

[130] *Id.*

[131] Another reason it may be infrequently invoked could just be that it is rarely successful when used against media defendants. *See* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 198 (1998).

[132] *See* Sanchez Abril, *supra* note 128, at 390–92.

[133] Fla. Star v. B.J.F., 491 U.S. 524 (1989).

[134] *Id.* at 536–37.

[135] Sanchez Abril, *supra* note 128, at 393.

[136] *See* discussion *supra* Sections I.A, C.

be found to be private and *would* be considered "newsworthy" or of the public interest, no matter how trivial the show may be and regardless of the offensiveness and degree of disclosure.[137] Instances like Tiger Woods' scandal and the "invasion of privacy" he alleged likely do not rise to the level of an actionable tort because of the newsworthy nature of the information.[138] However, the line is blurrier when it comes to newly "famous" reality stars who toe the line between ordinary person and celebrity.

The California Supreme Court articulated a clearer test for whether an issue is newsworthy, or of legitimate public interest, in *Shulman v. Group W Productions, Inc*.[139] "All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest."[140] The court found that the evaluation of newsworthiness should be based on a balancing test between the degree of intrusion and the extent of the plaintiff's involvement in the public event, or the finding of a logical nexus between the plaintiff and the matter.[141] For a person who is involuntarily involved in a newsworthy incident (in this case, the plaintiffs, a mother and son, were injured car crash victims featured on a reality show about emergency responders), "not all aspects of the person's life . . . [are] thereby rendered newsworthy."[142] Finding that courts cannot "sit as superior editors of the press," the court sided with the media defendants even though the plaintiff did not consent to being broadcast and having her injuries and medical ailments aired for all to see.[143] Nonetheless, public disclosure of private facts claims still remain a viable option for those reality show participants who might be able to make a better case that the incidents in which they were involved are not of legitimate public interest.

---

[137] For an argument prognosticating the need for reality TV participants to be grouped into their own category, separate from celebrities, and a plea for privacy law to recognize these participants as limited purpose public figures, see Darby Green, *Almost Famous: Reality Television Participants As Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94, 95 (2003). For a more recent argument acknowledging technological developments necessitate a need for differentiation in public figures, see Shilling, *supra* note 129, at 803.

[138] Sanchez Abril, *supra* note 128, at 394.

[139] Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 222–24 (1998).

[140] *Id.* at 222.

[141] *Id.* at 223–24.

[142] *Id.* at 223.

[143] *Id.* at 229–30.

3. *APPROPRIATION OF NAME & LIKENESS*

Individuals have the right to control the commercial use of their identity,[144] a right stemming from the privacy torts.[145] The right of publicity is generally thought to apply to both celebrity and non-celebrity plaintiffs,[146] and its application varies from state to state.[147] The right of publicity intersects with the First Amendment's freedom of expression guarantees [148] at the common law "newsworthy exception."[149] This exception is often thought of in relation to the public's right to know.[150] However, there is currently no bright line rule to determine whether an issue constitutes a matter of public interest, so the law is unclear as to whether TV shows may forgo an individual's right of publicity by defending it under the First Amendment and the newsworthy exception.[151] This unclear guidance complicates matters further when one considers whether reality TV should be considered newsworthy or in the public interest.[152] The public surely has a right to know of major events, particularly relating to safety, so it is logical and anticipated that publicity rights be overridden in a *news* context. However, in relation to entertainment content, it is difficult to argue that the public really *needs* to see any of the programming.[153] Without the public interest exception, it seems unlikely that reality TV producers should have a right to exploit their participants for commercial gain, using their name and likeness in ways they could never have anticipated.

---

[144] *See* Ryan Westerman, *As Seen on TV: Your Compromising Cameo on National Reality Programming*, 12 J. MARSHALL REV. INTELL. PROP. L. 403, 407–08 (2013).

[145] *See* discussion *supra* Section II.C.

[146] Westerman, *supra* note 144, at 407.

[147] Florida's right of publicity statute assures that an individual's name or likeness cannot be used for commercial or advertising purposes without the individual's express consent. FLA. STAT. § 540.08 (2022).

[148] U.S. CONST. amend. I.

[149] Westerman, *supra* note 144, at 409.

[150] *See id.* at 409 n.39.

[151] *See id.* at 409–10. Particularly, the Supreme Court has yet to consider any case involving reality TV. *Id.* at 410.

[152] Reality television of late could better be categorized as sensationalist rather than informative. *See* Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 629–30 (2005).

[153] For an in-depth discussion of this dilemma and proposed test to differentiate between news and entertainment, see Westerman, *supra* note 144, at 418–21.

In one questionable ruling,[154] a court found for the media defendants after a plaintiff sued them for the impermissible use of her name and image when she appeared on *Female Forces*, a "COPS"-like reality show.[155] The plaintiff never signed a consent form, but the show still aired her name and image over thirty times and was offered for sale digitally.[156] The court found that "[t]he status of *Female Forces* as an entertainment program, as opposed to a pure news broadcast, does not alter the First Amendment analysis."[157] The court likened the broadcast to the news depictions of local arrests that are in the public interest and thus found that the plaintiff's claim could not stand due to the First Amendment.[158] Thus, even though the broadcast was arguably *not* for the general benefit of the public interest, but rather for sensationalism and financial incentive purposes, reality shows have received the benefit of the public interest protection.[159]

III. THE TORT OF FALSE LIGHT

While scholars have previously argued that reality TV producers, particularly those of ride-along reality shows, could be held liable for the other privacy claims,[160] false light claims have been less frequently invoked against TV producers. False light is one of the four privacy torts formalized by William L. Prosser[161] based on his evaluation of the work of Warren and Brandeis.[162] False light occurs when "[o]ne . . . gives publicity to a matter concerning another that places the other before the public in a false light."[163] This person can be held liable for invasion of privacy if the false light the other was placed in would be "highly offensive to a reasonable person, *and* . . . the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[164]

---

[154] *See id.* at 411–12.
[155] Best v. Berard, 776 F. Supp. 2d 752, 754–55 (N.D. Ill. 2011).
[156] *Id.* at 755.
[157] *Id.* at 758.
[158] *Id.*
[159] Westerman, *supra* note 144, at 412–13.
[160] *See* Eduardo W. Gonzalez, Comment, *"Get That Camera Out of My Face!" an Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy*, 51 U. MIAMI L. REV. 935, 939 (1997).
[161] Prosser, *supra* note 118, at 389.
[162] Warren & Brandeis, *supra* note 116.
[163] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).
[164] *Id.* (emphasis added).

A. HISTORY

False light can be invoked when a plaintiff's image is used in connection with something she is not related to or involved in, thereby creating an innuendo linking the two.[165] The representation that the plaintiff claims is false does not *have* to be defamatory, but defamation and false light claims are often linked.[166] The tort protects a reputational interest, and thus is tied to publicity, but differs from disclosure in that the information disclosed here is *untrue*.[167]

In other words, to have a successful action for false light, a plaintiff must demonstrate that the representations made are false and offensive. "[T]o sustain a false light invasion of privacy claim, [a] portrayal must be substantially false and offensive to an ordinary person."[168] Truth, then, is essentially a complete defense to this tort claim, in that if a defendant can prove that, however bad the information is, it is accurate (or not inaccurate), then the defendant cannot be found liable for a false light claim.[169] This differentiation is in contrast to the other three privacy torts[170] and makes the tort closer to defamation, with the difference between the two being that false light material can be false without being defamatory.[171] In addition to this falsity requirement, the defendant must also have a requisite level of fault, which is usually state dependent.[172]

B. CONTROVERSY

Many scholars argue that of the four privacy torts discussed by Prosser,[173] false light is the least viable, problematizing its "free speech-impairing over-tones and such hazy philosophical underpinnings."[174] However, the need for the tort is evident in that without it, plaintiffs are left without recourse if the facts of their

---

[165] Prosser, *supra* note 118, at 399.

[166] *Id.* at 400.

[167] *Id.*

[168] Machleder v. Diaz, 801 F.2d 46, 49 (2d Cir. 1986).

[169] *Id.* at 53.

[170] *See supra* Section II.C.

[171] *Machleder*, 801 F.2d at 53.

[172] *Id.* at 54 (referencing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.")).

[173] Prosser, *supra* note 118, at 389.

[174] Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 451 (1989).

cases do not make a viable defamation claim.[175] Nevertheless, the tort has been "render[ed] . . . 'the least-recognized and most controversial aspect of invasion of privacy,'"[176] and the tort and its resulting effects on society, particularly the media, are thought to be chilling.[177]

The Supreme Court's history (or lack thereof) of recognizing false light as an actionable tort sheds light on the difficulties of the tort's interaction with the First Amendment.[178] The Supreme Court, after imposing the actual malice standard to defamation claims by public officials in 1964,[179] and later extending the standard to public figures,[180] examined the interaction between the First Amendment and privacy torts in 1967.[181] It was at that point when the Court expanded the actual malice standard to invasion of privacy cases but failed to distinguish between the invasion of privacy torts and defamation,[182] resulting in a higher pleading standard for false light cases than defamation cases.[183] Some scholars consider the case as the Supreme Court's official recognition of false light,[184] but the Court, in subsequent cases, has not considered whether actual malice explicitly applies to false light claims.[185] The fallibility of these decisions is yet another reason why scholars push for the eradication of false light claims, particularly because the assessed "injury" is arguably different from that of injury to person or

---

[175] *See* Nathan E. Ray, Note, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713, 715 (2000) (illustrating a case where an amusement entertainer's image was used without her permission in a pornographic magazine, which would not have been actionable without the tort of false light).

[176] Kristen Rasmussen, Comment, *Shedding (False) Light: How the Florida Supreme Court's Rejection of the Tort Falsely Implies Protection for Media Defendants*, 61 FLA. L. REV. 911, 913–14 (2009) (citing Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994)).

[177] *Id.* at 918.

[178] *See* Ray, *supra* note 175, at 720–22.

[179] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964).

[180] Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

[181] *See generally* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[182] *Id.* at 391.

[183] *See* Ray, *supra* note 175, at 721 (arguing that false light plaintiffs must prove knowing misrepresentation or reckless disregard rather than defamation plaintiffs, who, if they are not public figures, only have to prove negligence).

[184] *Id.* at 721–22.

[185] *Id.*; *see also* Cantrell v. Forest City Pub. Co., 419 U.S. 245, 250–51 (1974) (allowing jury award for false light claim after newspaper printed known falsehoods about family).

property resulting from a crime, even if the fallibility still remains.[186]

C. TREATMENT IN FLORIDA

The Florida Supreme Court rejected false light claims in 2008 in *Jews for Jesus, Inc. v. Rapp*.[187] In considering a claim for false light, among other privacy torts, after an organization falsely advertised that the plaintiff had joined the organization, the Florida Supreme Court declined to recognize the tort because of its duplicative nature with existing privacy torts.[188] However, the court recognized a cause of action for defamation by implication[189] and also held "that a communication can be considered defamatory if it 'prejudices' the plaintiff in the eyes of a 'substantial and respectable minority of the community.'"[190] The court found false light to protect the subjective interest of emotional injury rather than reputational interests protected under the tort of defamation.[191] Members of the court described false light's standard as a "thin-skinned one."[192]

Although the court's decision was intended to protect the First Amendment and was rejoiced by the media, scholars argue that the decision meant much less constitutionally and much more procedurally.[193] In other words, "the effect is not to protect the news media from litigation that would chill speech, but merely to collapse one set of cases, false light, into another, defamation by implication,"[194] and thus what Florida courts once saw as false light cases will *still* appear on the docket, just as defamation by implication cases instead.[195]

---

[186] Zimmerman, *supra* note 174, at 420–21.

[187] Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008).

[188] *Id.* at 1100.

[189] Defamation by implication claims allow for literally true statements that create a false impression of a plaintiff to be considered defamatory. Rasmussen, *supra* note 176, at 915.

[190] *Jews for Jesus, Inc.*, 997 So. 2d at 1100 (quoting RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (AM. L. INST. 1977)).

[191] Rasmussen, *supra* note 176, at 915–16.

[192] *Id.* at 916 n.39.

[193] *Id.* at 917–18.

[194] *Id.* at 918.

[195] *Id.* at 918 n.54.

IV. THE *AFFLICTED* CASE & ITS POTENTIAL SUCCESSORS

Among those reality participants feeling falsely portrayed after signing away their rights to appear on reality television were Jesse Bercowetz and Bekah Dinnerstein.[196] The two, along with the other plaintiffs in the *Afflicted* case,[197] sued for defamation, false light (invoked as an invasion of privacy claim), and fraud.[198] The defendants (Netflix, the producers of *Afflicted*, and the president of the production company, collectively "Netflix") attempted to strike the complaint based on California's SLAPP statute,[199] but the motion was denied.[200] Netflix appealed, claiming that the plaintiffs failed to make a strong enough showing to overcome Netflix's defenses of consent and release.[201] Netflix also asserted that Bercowetz and the other plaintiffs did not demonstrate that their claims had minimal merit.[202] The appellate court sided with Bercowetz, affirming the lower court's judgment,[203] and thus possibly unlocking the gate that has kept many false light claims out of court.

A. GETTING HERE: CONSENT & WAIVER AS THE GATEKEEPERS

Generally, most cases where reality TV participants sue production companies for defamation and other privacy claims—such as false light—are found unsuccessful due to the waiver and consent defense barriers that the production companies mount.[204]

---

[196] *See* Bercowetz, *supra* note 1.

[197] Hill v. Doc Shop Prods., Inc., No. B305617, 2022 WL 1078173, at *1 (Cal. Ct. App. Apr. 11, 2022).

[198] *Id.*

[199] For an explanation of Anti-SLAPP statutes (commonly also referred to solely as SLAPP statutes) see *supra* note 20.

[200] *Hill*, 2022 WL 1078173, at *1.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *See, e.g.*, Shoemaker v. Discovery Commc'ns, LLC, 66 N.Y.S.3d 655, at *2 (Sup. Ct. 2017) ("Plaintiffs clearly waived their right to bring this action and are precluded from doing so. Plaintiffs expressly consented to permitting Defendants to retain broad discretion to edit, alter the contents of the footage and fictionalize it, even if such alterations resulted in Plaintiffs being depicted in an embarrassing, humiliating and denigrating manner.").

As a general principle, courts want to uphold valid contracts.[205] An example from the mockumentary context, which can largely be equated with that of reality shows,[206] stems from *Moore v. Baron Cohen*,[207] a case similar to the *Afflicted* case in that the plaintiff Judge Roy Moore, a U.S. politician and Senate candidate, believed he was signing up for an Israeli news show rather than an American comedy series put on by Sacha Baron Cohen, the comedian behind the infamous *Borat*.[208] Judge Moore also did not anticipate being screened using a sex offender and pedophile detector, with the device beeping as it scanned him, alluding to him possibly being such an individual.[209] Even though the contract for the TV segment was signed between Moore and a shell company (which Moore believed to be legitimate),[210] the U.S. District Court honored the contract in which Moore, as part of a one-page Standard Consent Agreement, had waived his right to sue for any possible privacy claims,[211] finding in Cohen's favor.[212]

This judgment was affirmed by the Second Circuit, which discredited Judge Moore's arguments that the waiver provision was unenforceable because it was procured fraudulently.[213] The court followed New York law to find that "when a provision of a contract . . . 'states that a contracting party disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations.'"[214] Because Judge Moore had stipulated that he did not rely on any representations made to him, he was unable to argue that the agreement was executed in reliance

---

[205] *See* Roy S. Gutterman, *Liable, Naaaht: The Mockumentary: Litigation, Liability and the First Amendment in the Works of Sacha Baron Cohen*, 13 HARV. J. SPORTS & ENT. L. 141, 149 (2022).

[206] *See id.* at 155 ("Because the mockumentary genre incorporates and replicates elements of reality television, contract-based defenses to litigation emerging from reality television provides an additional, non-constitutional body of law supporting the mockumentary.").

[207] Moore v. Baron Cohen, No. 21-1702-CV, 2022 WL 2525722 (2d Cir. July 7, 2022).

[208] Moore v. Cohen, 548 F.Supp.3d 330, 334 (S.D.N.Y. 2021), *aff'd sub nom.* Moore v. Baron Cohen, No. 21-1702-CV, 2022 WL 2525722 (2d Cir. July 7, 2022).

[209] *Id.* at 335–36.

[210] *Id.* at 342–43; *see also* Gutterman, *supra* note 205, at 150.

[211] Gutterman, *supra* note 205, at 153 n.84 (describing the exact terms of the contract, which included a waiver of false light claims).

[212] *Baron Cohen*, 2022 WL 2525722, at *2.

[213] *Id.*

[214] *Id.* (citations omitted).

on other representations.[215] Because Judge Moore did not rely on any *express* misrepresentations but rather was generally misinformed of the true plan for the programming, he was unable to use fraud to counter Cohen's defense of waiver.[216] Thus, this case would seem to demonstrate that in order to demonstrate fraudulent consent, a plaintiff likely needs to point to a specific example of fraudulent procurement. [217]

Even if a false light claim clears the hurdles of waiver or consent by demonstrating that the waiver was fraudulently obtained (or if there was no consent, in the case of ambush shows or if the event is "newsworthy" enough that the First Amendment reigns supreme),[218] the claim still must meet the elements of a false light claim. Thus, a plaintiff must show that the information is false, that it is highly offensive, and that the defendant knew, or recklessly did not bother to verify, that the information was false.[219] Generally, it would seem that in the reality TV context, where the plaintiffs are often considered limited public figures, intentional misconduct or willful or grossly negligent acts are necessary to render a release unenforceable; [220] unknowing, unintentional, or inconsequential falsehoods are generally not actionable.

B. THE *AFFLICTED* DECISION: UNLOCKING THE GATE

What makes the *Afflicted* decision different is its clearing of both barriers; not only does the case demonstrate possibly overcoming consent and waiver through potential substantive unconscionability, but it also illustrates an example of what could be successful false light claims in a context that sees success infrequently.[221] Much like Judge Moore,[222] the *Afflicted* participants

---

[215] *Id.*

[216] *See id.*

[217] *Cf. e.g.*, Weil v. Johnson, No. 119431/02, 2002 N.Y. Misc. LEXIS 1728, at *6 (Sup. Ct. Sep. 27, 2002) ("[A] plaintiff may not avoid his obligations under a clearly worded release on the ground that the defendant falsely misrepresented the true significance of the document to him in order to secure his signature.").

[218] *See supra* Section II.C.2.

[219] *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

[220] *See* Gutterman, *supra* note 205, at 161 n.125 (citing Klapper v. Graziano, 10 N.Y.S. 3d 560, 562 (App. Div. 2015) ("The allegations against the . . . defendants are insufficient to demonstrate willful or grossly negligent acts or intentional misconduct which would render the Appearance Release unenforceable.")).

[221] *See* Cho, *supra* note 16.

[222] Moore v. Cohen, 548 F.Supp. 3d 330, 334 (S.D.N.Y. 2021), *aff'd sub nom.* Moore v. Baron Cohen, No. 21-1702-CV, 2022 WL 2525722 (2d Cir. July 7, 2022).

thought they were participating in a documentary, but instead "were duped by [d]efendants into participating in a salacious reality television program."[223] Additionally, like Judge Moore and others described in this Article, the participants signed a release of any and all claims against the production company, including false light.[224] The participants also acknowledged that their appearances on the show might be embarrassing or disparaging and that information (factual or fictional) may be revealed about them.[225] A key factor in the *Afflicted* case was the situations surrounding the participants' signing of the release forms.[226] Instead of giving the participants the opportunity to fully read the releases or encouraging them to seriously consider their provisions, the producers handed the releases to participants in rushed situations.[227] In one case, the participant physically could not see or read the document, and in another, the participants were in a state that rendered them unable to fully comprehend what they were signing.[228] The producers told the participants that the releases were mere formalities that needed to be signed for their faces to be on camera.[229] Producers also assured the participants on numerous occasions that *Afflicted* would be "a serious documentary about chronic illness."[230] The participants claimed they signed under pressure as the producers told them they would otherwise be unable to participate in the series.[231] These elements of procedural unconscionability[232] seem to play a role in the *Afflicted* plaintiffs' unlocking of the gate.

The court found that the participants met the burden[233] of demonstrating that they did not knowingly and voluntarily waive their ability to bring the false light and defamation claims.[234] Additionally, when turning to the merits of the false light claims, the court concluded that because the show "could be reasonably understood as falsely implying that (1) the four sick plaintiffs were

---

[223] Hill v. Doc Shop Prods., Inc., No. B305617, 2022 WL 1078173, at *2 (Cal. Ct. App. Apr. 11, 2022).

[224] *Id.*

[225] *Id.*

[226] *See id.* at *8.

[227] *Id.* at *6.

[228] *Id.*

[229] *Id.* at *6.

[230] *Id.*

[231] *Id.*

[232] *Id.* at *10.

[233] Typically, to survive a SLAPP motion to dismiss, claims must only have minimal merit. *See id.*

[234] *Id.*

imagining their illnesses due to some psychological or mental condition and (2) their caregivers were gullible pawns or enablers who had been duped into providing care for persons who did not need it," the plaintiffs could demonstrate the plausibility of their claims.[235]

While the *Afflicted* case is not a slam dunk—the plaintiffs merely crossed the threshold allowing them to *bring* their claims; they did not necessarily *win* yet—it is still a big step that could enable future reality TV show participants to get their feet in the metaphorical door if they suffer a similar fate. Based on analyzing the similarities and differences between successful cases, where plaintiffs could overcome defendants' defenses of consent and waiver, and unsuccessful cases, it seems that the winning formula requires three factors: (1) some element of procedural unconscionability, such as pressure or concerning circumstances surrounding the obtainment of consent; (2) a misleading representation or assurance regarding the purpose for which the consent is given; and (3) *actual* presentation of the plaintiffs in a false light by the defendants. In other words, "[y]ou cannot have a release for 'Show A' apply to 'Show B.'"[236] The circumstances surrounding such release should make it unclear whether the plaintiffs truly consented voluntarily, and Show B must present falsities surrounding the plaintiffs.

C. FUTURE CASES: WHAT THE *AFFLICTED* DECISION MEANS

It seems possible to apply this formula to future cases, especially when considering a recent trend in reality TV shows, where participants sign up for one show but are "surprised" to find out they are actually on another. The show *Too Hot to Handle* comes to mind—on the show's most recent season, production went to great lengths to make contestants think they were on a completely different show, "Wild Love," even hiring Mario Lopez to be the fake host.[237] Considering these participants *literally* signed up for one show and ended up on another, one step of the formula is complete. Thus, if the participants can show that they were pressured to sign up for the show (or arguably even without this

---

[235] *Id.* at *9.

[236] Craig Clough, *Netflix Says 'Afflicted' Subjects Signed Away Control*, LAW360 (Mar. 2, 2020, 10:46 PM), https://www.law360.com/ [https://perma.cc/A4H8-9RNJ] (quoting the plaintiffs' attorney) (internal quotations omitted).

[237] Justin Curto, *Too Hot to Handle Faked Out Ten New Singles with Mario Lopez's Help*, VULTURE (Nov. 30, 2022), https://www.vulture.com/ [https://perma.cc/M6LM-HTBX].

step),[238] then so long as they are presented falsely, they would plausibly have a successful false light claim.[239] Even in a state like Florida, where false light is not explicitly recognized as a viable claim,[240] claims for defamation by implication should also have a stronger chance using the *Afflicted* formula.

Another relatively new concept that the *Afflicted* case could impact is "Frankenbiting."[241] Frankenbiting practices have grown more common and egregious,[242] with overworked producers feeling the need to craft the perfect sequence to capture the most views.[243] It seems plausible that individuals who are falsely portrayed—through the strategic piecing together of clips to create an entirely different narrative of events—might have actionable claims, so long as they also have evidence of a misrepresentation of the show's

---

[238] The circumstances surrounding the participants in *Afflicted* arguably could have been sufficient even without the misrepresentation of the show, since some participants referred to the false assumption of the type of show, others pointed to the pressure, and others raised the argument that they did not have the capacity to consent at the time the release was presented. *See Hill*, 2022 WL 1078173, at *8. Thus, it is possible that one of these possibilities on its own would be sufficient when coupled with the outrageously false representations to constitute a false light claim. *But see* Shapiro v. NFGTV, Inc., No. 16 Civ. 9152, 2018 U.S. Dist. LEXIS 22879, at *24 (S.D.N.Y. Feb. 8, 2018) (barring claims, including defamation, when plaintiff was led to believe the show's premise was uplifting rather than disparaging).

[239] Presuming that the requirements are met. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977) (requiring that the publication be highly offensive to a reasonable person and done with the requisite intent regarding knowledge of the falsity); *see also* Lundin v. Discovery Commc'ns Inc., 352 F. Supp. 3d 949, 964 (D. Ariz. 2018), *aff'd*, 796 F. App'x 942 (9th Cir. 2020) (holding individual's *belief* of a false depiction is insufficient if the actual contents of the episodes do not provide a basis for the claims).

[240] *See supra* Section III.C.

[241] *See* discussion *supra* note 75.

[242] *See* Noor Brara, *"They Murdered Me": Reality TV Stars Push Back at Producers' Cheapest Trick*, VANITY FAIR (July 8, 2021), https://www.vanityfair.com/ [https://perma.cc/H275-FURR] ("For a long time, cast and crew alike were mum on how Frankenbiting works. But that has started to change as audience expectations change—and with them, demands on producers and contestants to deliver the best content as quickly as possible.").

[243] *See* Toni-Ann Lagana, *Reality TV's Overburdened, and Underrepresented, Workforce (Guest Column)*, THE HOLLYWOOD REP. (Jan. 21, 2021, 6:45 AM), https://www.hollywoodreporter.com/ [https://perma.cc/58J6-6ZXQ].

objective *or* pressure surrounding signing the release.[244] Even if the separate pieces of content are authentic, if they are pieced together to create a false reality, the potential plaintiffs could have a viable claim.[245]

While this opportunity seems to usher in a promising future to vindicate plaintiffs and their privacy interests, it should be taken with a grain of salt. After all, reality TV producers are known for their editing.[246] Thus, while the *Afflicted* formula might be an approach that could lead to increased success for future reality TV plaintiffs, it does not appear to be foolproof. It seems these claims will always conflict with the omniscient First Amendment.[247] "As the world grows more crowded, an individual's right to privacy becomes increasingly more valuable. This right, however, constantly conflicts with the First Amendment, which guarantees the freedoms of speech and press."[248] There is, however, hope that

---

[244] A defense of intoxication at the time of signing the agreement could also be sufficient, when coupled with the false light claims. *See* Amirmotazedi v. Viacom, Inc., 768 F. Supp. 2d 256, 263 (D.D.C. 2011) (allowing action for false light to proceed regardless of Arbitration Agreement because of plaintiff's claim she was intoxicated at the time of signing).

[245] *See* Clark v. E! Ent. Television, LLC, 60 F. Supp. 3d 838, 851 (M.D. Tenn. 2014) ("Literal accuracy of separate statements will not render a communication 'true' where the implication of the communication as a whole was false. . . . The question is whether [the defendant] made discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting [the plaintiff] in a false light.") (quoting Santillo v. Reedel, 634 A.2d 264, 267 (Pa. 1993)) (internal quotations omitted).

[246] *See* Klapper v. Graziano, 10 N.Y.S. 3d 560, 562 (App. Div. 2015) (rejecting claims for defamation and tortious interference after an unfavorable reality show appearance, stating "[a]part from vague, unsubstantiated claims of conspiracy and concerted action, there is no allegation that the corporate defendants did *anything other than what would normally be expected of the producers of a reality show*. Therefore, the Appearance Release is enforceable.") (emphasis added).

[247] "Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction." De Havilland v. FX Networks, LLC, 21 Cal. Rptr. 3d 625, 630 (Ct. App. 2018).

[248] Allison L. Lampert & William Kirrane, *Media: Asset Or Liability? An Argument in Favor of Holding the Media Liable for Invasion of Privacy*, 15 ST. JOHN'S J.L. COMM. 165, 165 (2000) (footnotes omitted).

courts can provide recourse when people's actions and words get pieced together for reality TV in a way that does not reflect reality.

In dealing with future cases, one approach courts could take is considering whether reality TV producers adequately comport with the principles of journalism.[249] These principles, or elements, include treating the truth (rather than entertainment) as the task's first obligation, putting public interest above self-interest, and ensuring discipline in the verification process.[250] Because courts already use cases involving journalism as precedent for decisions regarding reality TV,[251] holding reality TV producer defendants to the same standard as journalists by using these principles could be a good start to holding the producers accountable.[252]

V. THE PATH FORWARD

The need for increased protections for individuals who may be falsely represented is even more dire as the presence of deepfakes is growing in many contexts, including reality TV.[253] This prevalence is concerning because deepfakes can be used to spread misinformation and make it appear as if people are saying or doing things that they are not.[254] Scholars posit that the increase in deepfakes will lead to a distrust in all information found online,[255] and others believe that courts will begin to see increasing cases regarding deepfakes, which will also lead to increased false light claims.[256] While the current main concerns for deepfakes, which are

---

[249] *See What is Journalism?*, AMER. PRESS INST., https://www.americanpressinstitute.org/ [https://perma.cc/3D6B-MVWM] (explaining that while some journalists would be hard-pressed to consider reality shows "journalism," journalism can be defined as "the activity of gathering, assessing, creating, and presenting news and information . . . [and] the product of these activities."). Journalistic principles apply to all facets of recording, to which reality producers are not immune.

[250] *The Elements of Journalism*, AMER. PRESS INST., https://www.americanpressinstitute.org/ [https://perma.cc/UH6M-N2B7].

[251] *See, e.g.*, Lundin v. Discovery Commc'ns Inc., 352 F. Supp. 3d 949, 960 (D. Ariz. 2018), *aff'd*, 796 F. App'x 942 (9th Cir. 2020) (relying on false light claims against newspapers and television outlets to deny false light claim).

[252] Just like journalistic selective editing has been a problem in the past, Frankenbiting and more egregious editing could be the growing trend seen in courts.

[253] Rooney, *supra* note 27.

[254] *Id.*

[255] *Id.*

[256] *See* Wilkerson, *supra* note 26, at 430–31.

still in their early stages of proliferation, relate to pornography and election contexts,[257] it is easy to imagine deepfakes popping up in the reality TV context, especially since at least one reality show already employs them.[258] "Deepfakes, by definition, place an individual before the public in a false light."[259] Thus, assuming the portrayal is highly offensive, an individual whose likeness is used to create a deepfake could have a viable false light claim, with the *Afflicted* model serving as a helpful guide.

Reality TV's increased popularity as well as an increase in risky and predatory practices taken by reality producers calls for a resurrection of the torts that serve to protect the underrepresented participant plaintiffs. These participants have cognizable harms recognized by the courts, but courts seem to struggle to find a firm justification for the grounds on which they decide these cases.[260] Courts are willing to recognize unconscionability in the reality TV contracts,[261] signaling an understanding of the disparity in bargaining power and the unfairness resulting from (and likely *intended* by) these contracts, but they are left with little law to apply that fits these scenarios. Much like internet law might be moving away from the "law of the horse,"[262] perhaps cases such as the *Afflicted* case and others introduce a justification for moving away from a strict tort and First Amendment application to these scenarios and creating a new tort or claim that can fully encompass the harms these participants face. Without an outlet for redress at this moment in time, reality participants will likely continue to be taken advantage of by producers who are willing to test the limits of what unfamiliar courts will allow. Whether through resuscitating old torts to provide actionable claims for these plaintiffs or defining further exclusions for what may be waived in a contract of adhesion, courts should, and will likely need to, consider defining a new source of

---

[257] *Id*. at 425–27.

[258] Rooney, *supra* note 27.

[259] Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 380 (2019).

[260] *See* Hill v. Doc Shop Prods., Inc., No. B305617, 2022 WL 1078173, at *1 (Cal. Ct. App. Apr. 11, 2022) (recognizing a disparity in bargaining power between the parties that led to an unjust result, but having to find technical grounds, which might not be available to future plaintiffs, on which to justify the decision).

[261] *Id.*

[262] *See* Hon. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207, 215–16 (1996) (discussing how to shape law that accommodates the evolving cyberspace). *But see* Mary Anne Franks, *How the Internet Unmakes Law*, 16 OHIO ST. TECH. L.J. 10, 11–12 (2020) (discussing how Congress has not followed Judge Easterbrook's approach).

redress, as technology, reality TV, and the quest for fame could coalesce into an unregulated disaster without a new interpretation of existing law.

CONCLUSION

The tort of false light has been around for ages, but with the increase in risky editing strategies and techniques employed by reality TV producers, there is a growing need to regulate the genre, which could bring the tort back into use. Even though the reality TV industry has seemingly found a way to lock potential plaintiffs out of these claims, recent caselaw may have found a key to unlocking the gate by negating the traditionally employed defenses of consent and waiver. With deepfakes rising in prevalence in both reality TV and the real world, this key could help potential plaintiffs ensure that they can bring the important false light claim if they are depicted in a way that is inconsistent with reality. Hopefully, courts will use the *Afflicted* case and future cases to set protections for falsely portrayed reality TV plaintiffs.

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY

VOLUME 13 FALL 2023 ISSUE 1

TREE SPEECH: A FIRST AMENDMENT EXPLORATION OF VICE INDUSTRY NIL ENDORSEMENT RESTRICTIONS

FORREST M. ZIMMERMAN*

CONTENTS

*Forrest M. Zimmerman is a concurrent J.D. / MSLB student in the Class of 2024 at the Sandra Day O'Connor College of Law, Arizona State University. He also serves as the Executive Managing Editor for the *Arizona State Sports and Entertainment Law Journal*. The author wishes to extend his gratitude to Professor Andrew Carter for his outstanding guidance as well as the Journal's staff for their vital editing and proofreading assistance throughout the publishing process.

ABSTRACT

Last year, the Supreme Court ushered in a new era of college athletics with its decision in National Collegiate Athletic Association v. Alston that permits college athletes to be compensated for their name, image, and likeness (NIL). The NCAA punted issues of guidance and regulation to the state, naturally creating complex and novel legal scenarios. Chiefly among them is the quandary of state regulations governing student-athlete compensation deals.

A common trend sees legislatures proscribing student athletes' promotion of "vice" industries like alcohol, tobacco, and adult entertainment. At times, cannabis is included in this unsavory category. However, constitutional questions arise when commercial speech is curtailed in this way, especially in states that have authorized cannabis for recreational and medical use. Over the years, First Amendment jurisprudence has strengthened protections of commercial speech. This analysis finds that states' "vice" restrictions of cannabis for student-athlete commercial speech are unlikely to pass constitutional muster.

INTRODUCTION

In the spring of 2021, N'Kosi Perry found himself out of a job, figuratively speaking.[1] The 22-year-old quarterback from Ocala, Florida had played for the fabled University of Miami Hurricanes for parts of three seasons, starting nine games but appearing in twenty-four total contests overall.[2] Perry, the former four-star recruit, had backed up star University of Houston transfer D'Eriq King during the 2020 pandemic-shortened season.[3] King chose to

---

[1] Zach Weinberger, *N'Kosi Perry Prepares to End 6-year Jouney that Took Him from Miami Hurricanes to FAU Owls*, THE PALM BEACH POST (Aug. 5, 2022, 2:57 PM), https://www.palmbeachpost.com/ [https://perma.cc/3H8K-ZB63].

[2] Phillip Suitts, *Former Miami Hurricanes Quarterback N'Kosi Perry is Transferring to Florida Atlantic*, THE PALM BEACH POST (Apr. 28, 2021, 6:06 PM), https://www.palmbeachpost.com/ [https://perma.cc/9MH2-QNUH].

[3] *Id.*

return for another season, leading to Perry's decision to explore other opportunities.[4]

Those other opportunities bore fruit in the form of an offer to transfer to nearby Florida Atlantic University towards the end of spring practice in April 2021.[5] At this juncture, Perry had never been able to monetize his name, image, and likeness (NIL) as a well-known Division I athlete. Weeks after his decision to transfer, though, this would change overnight. With the Supreme Court's ruling in *NCAA v. Alston*, college athletes could capitalize off their status and sign endorsements to collect an income.

N'Kosi Perry subsequently etched his name into a very niche area of sports history on September 8, 2021. On that day, he signed what is believed to be the first NIL endorsement deal with an alcoholic beverage maker, Islamorada Beer Company, a local brewery in the Florida Keys.[6]

Florida's NIL legislation, signed into law by their governor on June 12, 2020[7], does not contain any prohibitions on NIL content, though this is not always the case in other states' largely similar NIL laws. Typically, the specifics of vice industry regulations, and even more specifically, their interaction with NIL deals, are left to the states. "Vice" products are generally ones that are highly regulated, albeit legal, due to a risk of over-consumption by purchasers.[8] Alcohol has long been a "vice" industry; however, this Article focuses on cannabis—a vice with a more recent societal transformation—and its place in the burgeoning NIL world.[9] Illinois's NIL legislation is somewhat unique, as it reads: "No student-athlete shall enter into a publicity rights agreement or receive compensation from a third-party licensee for the endorsement or promotion of . . . cannabis . . . or any other product or service that is reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution."[10] The question becomes: What constitutional questions would arise if N'Kosi Perry lived in a state that prohibited NIL endorsements of vice products, particularly cannabis, one of the latest vice products

---

[4] *Id.*

[5] *Id.*

[6] Joseph Salvador, *FAU Quarterback N'Kosi Perry Signs First NIL Deal with Alcohol Company*, SPORTS ILLUSTRATED (Sep. 8, 2021), https://www.si.com/ [https://perma.cc/6DDV-FYF4].

[7] S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020).

[8] Richard Yao, *The Future of Vice Economy*, MEDIUM (Oct. 24, 2019), https://medium.com/ [https://perma.cc/ST4N-P5WZ].

[9] *Id.*

[10] 110 ILL. COMP. STAT. ANN. 190/20 (West 2022).

to break into the nation's mainstream consciousness and acceptance?

Following the Introduction, this Article examines the legal background of name, image, and likeness compensation for college athletes in Part I. The second part lays out the ground-breaking *Alston* case decided by the Supreme Court, among other noteworthy decisions. Part II outlines the states' race to enact legislation for this arena. Part III explains the federal and state statuses of cannabis, along with the medicinal and recreational designations. Part IV chronicles the development of commercial speech in the context of the First Amendment by highlighting the most noteworthy cases in this sector of jurisprudence. Moreover, this section elaborates on selected decisions affecting the most common "vice" industries. The nuance of these other vice industry restrictions will be compared and contrasted to the state of cannabis while connecting these distinctions to their impact to NIL deals. Finally, Part V chooses one of the aforementioned states' NIL laws, Illinois, and analyzes its prohibition of cannabis endorsements by its resident college athletes under the First Amendment framework outlined in Part IV. In conclusion, the Illinois government is unlikely to establish a material link between its outright restriction of student-athlete cannabis endorsement deals and its substantial interest in avoiding scandal or disrepute from afflicting its higher education institutions.

I. THE RUN-UP TO *ALSTON*

Athletes have waged the battle for NIL rights for many years, but the first sign of real progress appeared in the case *O'Bannon v. NCAA*.[11] In 2008, Ed O'Bannon, a former UCLA basketball player, was notified that a video game had been released depicting him during his playing days.[12] He had not been asked for permission or been compensated for this appearance in the video game, which was licensed by the NCAA.[13] O'Bannon and some other former college athletes brought suit, alleging the NCAA's amateurism rules were an anticompetitive restraint of trade, in violation of the Sherman Act.[14]

The Ninth Circuit held these amateurism rules, which specifically restricted athlete compensation to scholarships only, did

[11] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

[12] *Id.* at 1055.

[13] *Id.*

[14] *Id.*

not violate the Sherman Act because these policies' procompetitive effects tipped the rule of reason scales back in the direction of the NCAA.[15] The Court found that there were no less restrictive means of accomplishing the NCAA's goal of promoting amateurism in sports, as implementing less restrictive means would logically lead to compensating the athletes—thus, making the athletes more than amateurs.[16] While *O'Bannon* was vital in opening the judicial door to the NIL conversation, it unfortunately did not break the plane in creating change for athletes.

A few years later, the Ninth Circuit addressed a tangential issue in the case *Dawson v. NCAA*: whether student-athletes are employees of the NCAA and their athletic conference.[17] Dawson played football at the University of Southern California.[18] He alleged the NCAA and the conferences met the definition of an employer because they "prescribe[ed] the terms and conditions under which student-athletes perform services."[19] He claimed he was injured due to a lack of wages paid, particularly overtime, by the defendants.[20]

The Court rejected Dawson's arguments on several grounds. First, the NCAA did not award a scholarship to Dawson.[21] Second, the NCAA wielded no apparent power to "hire and fire" student-athletes.[22] Third, the Court held that the NCAA did not concoct its vast bylaws of rules and restrictions on student-athletes to flout labor law; in fact, the Fair Labor Standards Act cited by the plaintiff was passed nearly two decades after the NCAA's first regulations.[23] And fourth, the classic revenue argument—that because the student-athletes generate exorbitant sums of money for the NCAA, conferences, and their schools, they should be compensated as employees—was shot down by the Court based on precedent that rejects the automatic existence of an employment relationship in these generalized circumstances.[24] As such, this recent case unequivocally stated that student-athletes are not employees, with the critical distinction that the opinion only addressed this claim

---

[15] *Id.* at 1073.
[16] *Id.* at 1074–75.
[17] Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 907 (9th Cir. 2019).
[18] *Id.*
[19] *Id.* at 908.
[20] *Id.*
[21] *Id.* at 909.
[22] *Id.* at 910.
[23] *Id.*
[24] *Id.*

with the NCAA and conferences as the employer in mind.[25] This decision aligned with the 2016 Fifth Circuit case, *Berger v. NCAA*, that cited the "tradition of amateurism in college sports" which distinguished student-athletes from employees.[26]

II. *NATIONAL COLLEGIATE ATHLETIC ASSOCIATION V. ALSTON*: THE GAME-CHANGER

In the summer of 2021, the United States Supreme Court altered the landscape of American college sports forever with its unanimous decision in *NCAA v. Alston*. The plaintiffs in this case were current and former Division I student-athletes who filed a class action against the NCAA and its eleven Division I conferences, challenging the governing bodies' rules that limit the compensation they may receive in exchange for their athletic talents.[27] More specifically, the plaintiffs alleged that the NCAA's prohibitions of athlete compensation violate §1 of the Sherman Act.[28] This section prohibits "contracts, combinations, or conspiracies in restraint of trade or commerce."[29]

The NCAA conceded the evidence undoubtedly showed that they, along with the member conferences, enacted these very limits on athlete compensation as well as subsequent punishments for violations.[30] The United States District Court for the Northern District of California examined these restraints to determine if they comported to the law, deploying the standard "rule of reason" analysis.[31] That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition."[32] The word "restraint" has long been interpreted by the courts to mean "*undue* restraint."[33] The analysis proceeded by assessing the restraint's actual effect on competition, specifically aiming to identify the restraints that are harmful to consumers and separate those from restraints acting in consumers' best interests.[34]

---

[25] *Id.* at 913.

[26] Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291 (7th Cir. 2016).

[27] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[28] *Id.* at 2151.

[29] 15 U.S.C. § 1 (2004).

[30] *Alston*, 141 S. Ct. at 2151.

[31] *Id.* at 2144.

[32] *Id.*

[33] *Id.* at 2151 (emphasis added).

[34] *Id.* at 2160.

The District Court viewed the NCAA as the dominant player in its relevant market of college sports.[35] Therefore, the NCAA's restraints on compensation "produce significant anticompetitive effects."[36] Upon this finding, the court entered an injunction enjoining the NCAA from limiting compensation athletes may receive.[37] Both the plaintiffs and the defendants appealed the order, but the Court of Appeals affirmed the District Court's order in full.[38] That decision led the NCAA to appeal up to the Supreme Court.[39]

The Supreme Court affirmed.[40] In the opinion, authored by Justice Gorsuch, the Court agreed with the District Court that the NCAA and its member universities are commercial enterprises subject to the Sherman Act.[41] Justice Kavanaugh, in a particularly biting concurrence, declared that ". . . the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product."[42] He bluntly pointed out that "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."[43]

Since the *Alston* decision, the NCAA has punted athlete compensation guidelines to state legislatures; their website promises that "[t]he national office and member schools and conferences will continue working with Congress to develop a clear solution that works for the entire country."[44] A link to a progress-tracking page[45] is provided, but no hard timeline is given for the introduction of permanent, rather than interim, guidelines on NIL compensation.[46]

---

[35] *Id.* at 2152.
[36] *Id.*
[37] *Id.* at 2145.
[38] *Id.* at 2154.
[39] *Id.*
[40] Comment, *NCAA v. Alston*, 135 HARV. L. REV. 471, 474 (2021).
[41] *Id.*
[42] *Id.* at 475.
[43] *Id.*
[44] *Name, Image, Likeness*, NCAA, https://www.ncaa.org/ [https://perma.cc/8G9H-LJFL].
[45] *Name, Image and Likeness Interim Policy Resources*, NCAA, https://www.ncaa.org/ [https://perma.cc/N6VB-4ATR].
[46] *Name, Image, Likeness*, *supra* note 44.

III. THE FRENZY OF POST-*ALSTON* LEGISLATION

In the brief period leading up to and following the *Alston* decision, states around the country quickly passed their own name, image, and likeness laws. At the time this Article was written, thirty-two states had passed NIL legislation. The remaining eighteen states have either proposed but not yet codified legislation or remain silent on the issue.

The reader may wonder why student-athletes are not considered employees of their university, athletic conference, or the NCAA. On a few occasions, wary of legislating from the bench, judges have left the student-athlete employment issue to state legislatures or Congress. Even when avoiding a firm ruling on this question, judges have been more hostile to the NCAA's consistent position against employee status for student-athletes. Sympathy for the student-athletes' cause is particularly evident in *O'Bannon*. However, the Third Circuit case *Johnson v. NCAA*, argued in early 2023, marked a stark deviation from this pattern when one of the presiding judges commented that he frankly could not see how student-athletes are not considered employees.[47] This view, and its influence on the court's ultimate decision, will be closely followed in the coming months.

A. A DISCUSSION OF STATES THAT HAVE PASSED NIL LEGISLATION

To date, the NIL legislation passed by the thirty-two states apply to all student-athletes, universities, and conferences that do business in the state.[48] Three additional states have proposed, but not yet passed, similar NIL legislation: Massachusetts, Rhode Island, and Washington.[49] The remaining fifteen states have not yet passed nor proposed legislation addressing NIL.

---

[47] Nicole Auerbach, *In Johnson v. NCAA, Judges Are Asking the Right Questions of the College Sports Model*, THE ATHLETIC (Feb. 15, 2023), https://theathletic.com/ [https://perma.cc/TLE4-5Y6Y].

[48] *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING LLP, https://www.saul.com/ [https://perma.cc/52BQ-AECG].

[49] *Id.*

State	Effective Date
Arizona	90 days after State Legislature adjourns
Arkansas	January 1, 2022
California	January 1, 2023
Colorado	July 1, 2021
Connecticut	Original bill - July 1, 2021; Amendment permitting use of institutional marks July 1, 2022
Florida	July 1, 2021
Georgia	July 1, 2021
Illinois	July 1, 2021
Kentucky	July 1, 2021
Louisiana	June 10, 2022
Maine	March 31, 2022
Maryland	July 1, 2023
Michigan	December 31, 2022
Mississippi	July 1, 2021
Missouri	August 28, 2021
Montana	June 1, 2023
Nebraska	Permitted immediately; required no later than July 1, 2023
Nevada	January 1, 2022
New Jersey	5th academic year after passage
New Mexico	July 1, 2021
North Carolina	July 2, 2021
Ohio	July 1, 2021
Oklahoma	Permitted immediately; required no later than July 1, 2023
Oregon	July 1, 2021
Pennsylvania	Permitted immediately
South Carolina	July 1, 2022
Tennessee	January 1, 2022
Texas	July 1, 2021
Virginia	July 1, 2022

Many states' NIL bills nearly mirror California's 2019 Fair Pay to Play Act, which was the first of its kind in the country to be passed.[50] A common provision across many states prohibits athletes from signing individual sponsorship deals that conflict with school sponsorship deals.[51] For example, Arizona State University athletics

[50] *Id.*

[51] Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J. L. & ARTS 47, 55 (2021).

teams exclusively wear Adidas uniforms and gear. Under this exclusive, multi-million-dollar partnership, an ASU student-athlete could not then sign an endorsement deal with Nike. Some may not view this restriction as problematic, considering the university already has these agreements in place when the athlete signs their letter of intent to play there. However, since essentially all these states' laws require the student-athlete to disclose the contract to the university within a specified timeframe[52], the schools' ability to reject contractual agreements they are not a party to undoubtedly raises some eyebrows. The university, not a party to the contract, exercising invalidation powers may be viewed by many as contrary to well-established public policy of contracts.

The more questionable provisions of state NIL deals intend to restrict the content or industry that the student-athlete agrees to endorse for compensation. Many states' laws include prohibitions on athletes signing deals with certain "vice" industries,[53] including alcohol, tobacco, adult entertainment, gambling, sports betting, controlled substances, performance-enhancing drugs, and cannabis.[54] The state's objective seems to be avoiding any negative publicity or adverse reflection of the schools' image.[55]

Not all states' laws include the specific prohibitions on vice industry endorsements listed above. However, certain member schools in those non-specifying states have gone a step further than the text of the legislation. For example, in Nevada, NIL law declares in general terms that: "A contract entered into pursuant to this subsection may not conflict with any provision of a contract between the student athlete and the institution in which the student athlete is enrolled."[56] This clause falls under the subsection that permits student-athlete compensation for their name, image, and likeness by organizations that are not the university that they attend.[57] Yet, on the University of Nevada-Las Vegas Athletics website, a state institution that is subject to this law, the compliance department "discourages student-athletes from participating in activities that do not align with UNLV's mission and core values, as well as NCAA bylaws."[58] The university website does not define

---

[52] *See, e.g.*, Pa. Public School Code of 1949 – Omnibus Amendments P.L. 158, § 2006-K, (2021) (requiring athletes to disclose proposed NIL agreements at least seven days in advance of execution).

[53] Ehrlich, *supra* note 51, at 56.

[54] *See, e.g.*, 110 ILL. COMP. STAT. ANN. 190/20(i) (West 2022).

[55] *Id.*

[56] A.B. 254, 2021 81st Leg. Sess., § 6 (Nev. 2021).

[57] *Id.*

[58] *UNLV Athletics - Name, Image & Likeness*, UNLV ATHLETICS, https://unlvrebels.com/ [https://perma.cc/338W-CMFN].

what constitutes a conflict with the school's mission or core values. It remains unclear if universities have outright veto power over agreements entered into by student-athletes and a business or organization not affiliated with the school.

Interestingly, though, another common provision in several states' laws bars institutions from preventing a student-athlete from receiving compensation from a third party for their name, image, and likeness.[59] This is the core provision of NIL laws. Nevada's law contains a carve-out that allows institutions to create and enforce "reasonable restrictions" on student-athlete NIL deals with parties whose products or goals run contrary to the mission of the institution.[60] This section of the Nevada law is likely the source of the UNLV Athletics Compliance statement above. However, it should be noted that the law communicates only a discouragement, not an overt ban. Practically, this insinuates that the universities, as third parties to the contractual agreements between the student-athletes and businesses, could not interfere with the performance of the contracts pursuant to their state's law.

IV. AN OVERVIEW OF CANNABIS LAW

In review, two of the thirteen state NIL regimes that are beside recreational cannabis, Illinois and Virginia, expressly preclude cannabis endorsements. The other eleven states' regimes contain language that arguably authorizes schools to preclude these endorsements as well. The following discussion seeks to establish one portion of the legal basis for NIL cannabis endorsements by examining the current position of cannabis law around the United States and its multi-decade evolution to arrive at this point of greater acceptance.

The Controlled Substance Act (CSA), passed and signed into law by President Nixon in 1970, marks one of the early steps taken by the federal government to nationalize drug enforcement.[61] CSA was authored with the intention of combining all previous federal drug laws into one central authority to allow federal law enforcement to combat the trafficking and consumption of controlled substances.[62]

---

[59] *See, e.g.*, A.B. 254, *supra* note 56, § 5(1)(a).

[60] A.B. 254, *supra* note 56, § 5(2)(a).

[61] 21 U.S.C. § 801.

[62] Nicole R. Ortiz & Charles V. Preuss, *Controlled Substance Act*, NAT'L LIBR. MED. (Mar. 24, 2023), https://pubmed.ncbi.nlm.nih.gov/ [https://perma.cc/MYU4-VEB8].

Section 812 of the CSA lays out the five "schedules"—a way of categorizing the drugs based on three factors: the potential for abuse, accepted uses for medical treatment, and the accepted safety of use under medical supervision.[63] Schedule I drugs are considered the most dangerous to public health by the federal government, and therefore, are penalized the most severely.[64] Marihuana[65] is a Schedule I drug pursuant to the CSA, meaning it has been deemed to have a high potential for abuse and no medical use.[66] Many point out that heroin and LSD are also examples of Schedule I drugs to emphasize the imbalance in severity of some other drugs that share Schedule I status with marijuana.[67]

The federal government's attitude towards cannabis was first altered under the Obama Administration in 2009.[68] An internal Department of Justice memo, famously referred to as the "Ogden Memo" after Deputy Attorney General David Ogden, was issued.[69] The memo essentially established a new federal policy, relaxing enforcement of cannabis prohibitions on medical marijuana providers and patients so long as they were compliant with their state's law.[70] Though marijuana remains federally illegal and a Schedule I controlled substance, President Biden recently announced his administration's intention to "de-schedule" the drug after pardoning several thousand federal marijuana convictions while urging state attorneys general to do the same.[71] After all, numerous states have approved adult use of recreational marijuana, and even more have approved medicinal marijuana within the last decade.

---

[63] 21 U.S.C. § 812.

[64] Michael J. Lopez & Charles V. Preuss, *Drug Enforcement Administration Drug Scheduling*, NAT'L LIBR. MED. (July 30, 2023), https://www.ncbi.nln.nin.gov/ [https://perma.cc/RR5L-QQU3].

[65] The 'h' in place of the 'j' is an antiquated spelling that is still employed by a few states, particularly in the Midwest. *See, e.g.*, *Why is Marijuana Sometimes Spelled with an "H" and Other Times Spelled With a "J"?*, CANNABIS REGUL. AGENCY, https://www.michigan.gov/ [https://perma.cc/R69K-UUVU].

[66] 21 U.S.C. § 812(b)(1); *See also Federal Laws and Penalties*, NORML, https://norml.org/ [https://perma.cc/K6AA-NJZK].

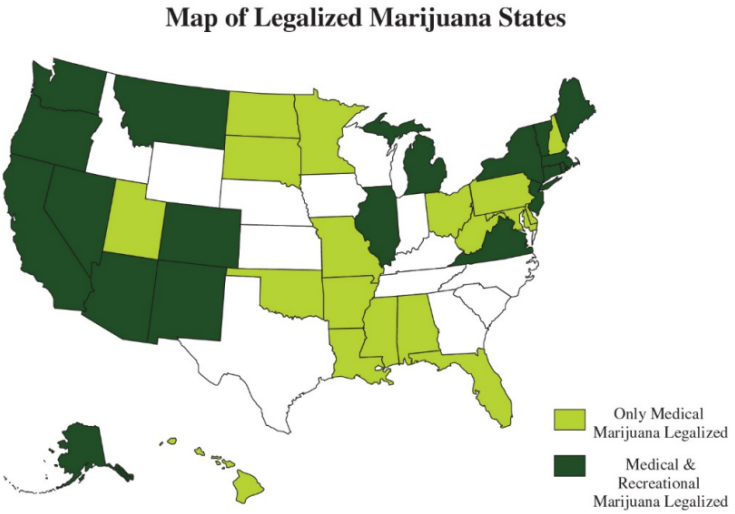
[67] Eugene Daniels & Natalie Fertig, *Biden Pardons Marijuana Offenses, Calls for Review of Federal Law*, POLITICO (Oct. 6, 2022), https://www.politico.com/ [https://perma.cc/4L45-KKTM].

[68] Christopher Smith, *State Cannabis Reforms—Medical Programs Emerge & Evolve From 1996 Through 2012*, *in* CANNABIS LAW DESKBOOK § 2:3 (2023–2024 ed.).

[69] *Id.*

[70] *Id.*

[71] Daniels, *supra* note 67.



72

B. MEDICINAL VERSUS RECREATIONAL CANNABIS

In the scope of American history, the recent movement of cannabis legalization has presented an excellent case study on federalism.[73] While there were some decriminalization efforts in the 1970s, full-fledged cannabis legalization commenced in 1996 with the passing of Proposition 215 in California.[74] Prop. 215, also known as the Compassionate Use Act of 1996, was borne out of an effort to alleviate the suffering of HIV/AIDS patients in the state.[75] The Act "enabled cannabis to be a recommended medication by doctors to their patients,"[76] specifically "as a remedy for chronic pain and appetite suppression."[77] Beyond this medicinal purpose, the Act marked a reduction in cannabis' stigmatization, even though

---

[72] Map of Legalized Marijuana States (illustration), *in* PRACTICAL LAW COMMERCIAL TRANSACTIONS, Marijuana State Legal Status Charts: Overview, Westlaw.

[73] Christopher Smith, *Introduction*, *in* CANNABIS LAW DESKBOOK § 2:1 (2023-2024 ed.).

[74] *Id.* § 2:2.

[75] Isabella Vanderheiden, *25 Years Later: How Prop. 215 Changed the Cannabis Landscape for Humboldt County and California*, TIMES STANDARD (Nov. 6, 2021), http://times-standard.com/ [https://perma.cc/KV5B-BPMJ].

[76] *Id.*

[77] Smith, *supra* note 68.

it still faced significant local and federal legal challenges.[78] Many of these legal challenges, like the famed Supreme Court case *Gonzales v. Raich*[79], sought to prohibit the use of cannabis within their jurisdictional borders.[80] In that case, federal agents destroyed the respondents' homegrown marijuana plants for personal use under the Controlled Substances Act.[81] The respondents had approval from California officials under the state's Compassionate Use Act, an early medical marijuana law.[82] Unfortunately for them, the Supreme Court held that Congress could regulate their use and production of marijuana at home through its Commerce Clause power.[83]

While opponents of cannabis use scored some major victories in court due to the federal prohibition of cannabis and Congress's Commerce Clause power, they seemed only to have won the battle of the moment but lost the war over time. Fortunately for proponents, the tide of public opinion began to shift from viewing cannabis as a harmful narcotic to a medicinal plant with benefits for certain people.[84]

Once the wave of litigation slowly subsided, the California legislature passed the Medical Marijuana Program Act in 2003.[85] Along with the Compassionate Use Act, mentioned above, this bill created a framework for medical cannabis programs that soon spread across the country.[86] The framework is comprised of four main tenets: (1) criminal immunity for qualified patients; (2) immunity from licensing punishment for physicians recommending cannabis; (3) personal possession limits; and (4) establishment of a caregiver system where an individual is permitted to cultivate and provide cannabis for qualified patients.[87] In the fifteen years following California's passage of the Compassionate Use Act, sixteen states passed and implemented similar medical marijuana schemes, most of which originated from the state legislature.[88] A few were enacted by the people themselves through ballot initiatives.[89]

---

[78] *Id.*
[79] Gonzales v. Raich, 545 U.S. 1 (2005).
[80] Smith, *supra* note 68.
[81] *Gonzales*, 545 U.S. at 1.
[82] *Id.* at 5–7.
[83] *Id.* at 39 (Scalia, A., concurring).
[84] Vanderheiden, *supra* note 75.
[85] Smith, *supra* note 68.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

Adult-use cannabis came about several years after much of the country warmed up to the idea of medical cannabis. In 2012, nearly two decades after California's Prop. 215, Colorado and Washington state passed their own ballot measures legalizing cannabis for adult recreational consumption.[90] This next step of legalization came about naturally as medical cannabis became more entrenched and expansive in the United States.[91] It should not be lost in history that many political scientists believe that legalization would likely have failed without the citizen ballot referendum process.[92] At the time, no Colorado or Washington legislators publicly supported the affirmative option of their local referendum.[93] Both states' governors openly opposed the measure.[94] Now, Washington Governor Jay Inslee, still in office, has completely changed his tune. In 2019, Governor Inslee announced the Marijuana Justice Initiative, which intends to provide legal relief to those convicted of misdemeanor marijuana offenses before the referendum's passing.[95] This policy is incredibly demonstrative of the rapid change of public opinion on cannabis.

Though the movement to legalize cannabis took decades, the momentum built by 21st-century ballot initiatives is likely too strong for any opposition to overcome. In the 2022 election cycle, even staunchly conservative Missouri voted to pass adult-use recreational cannabis by a six-point margin, with Maryland following suit.[96] However, three other states rejected a recreational cannabis measure.[97] Regardless, nineteen states have joined the party in the last decade,[98] signaling that federal legalization may be nigh.

---

[90] Christopher Smith, *State Cannabis Reforms—First Mover States to Pass Adult-Use Programs: Colorado and Washington*, *in* CANNABIS LAW DESKBOOK § 2:6 (2023–2024 ed.).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Marijuana Justice Initiative*, THE GOVERNOR OF WASH., https://www.governor.wa.gov/ [https://perma.cc/KS7B-88HJ].

[96] Kurt Erickson, *Missouri Voters Approve Legalizing Recreational Marijuana*, ST. LOUIS POST-DISPATCH (Nov. 9, 2022), https://www.stltoday.com/ [https://perma.cc/9M23-L44D].

[97] Solcyre Burga, *Why Marijuana Had a Terrible Night in the 2022 Midterm Elections*, TIME (Nov. 9, 2022, 5:37 PM), https://time.com/ [https://perma.cc/XK4X-GQN9].

[98] Erickson, *supra* note 96.

V. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

The trend toward legal cannabis use in America presents a question in the NIL arena of college athletics: On what grounds can states prohibit NIL endorsements of an entirely legal product? In other words, is this a legitimate restriction of these student-athletes' right to free speech in a commercial context? This section outlines the judicial development of the commercial speech doctrine, a less discussed chapter of the First Amendment canon.

Commercial speech has only recently come under the protection of the First Amendment. In fact, the words "commercial speech" were not used in a judicial opinion until 1971.[99]

This protection was first recognized in the landmark Supreme Court case of *Bigelow v. Virginia*. In this case, the newspaper owned by Bigelow ran an advertisement encouraging readers with unwanted pregnancies to contact the listed organization should they need assistance obtaining an abortion.[100] At the time of publication, this ad violated a Virginia state law that made it a misdemeanor to encourage or prompt an abortion through the sale or circulation of a publication. [101] Bigelow challenged this by claiming that the prohibition of commercial speech unconstitutionally abridged his First Amendment rights.[102]

The Supreme Court held that the State is not free from constitutional restraint simply because the speech arrives in commercial form or has commercial interests.[103] While fighting words, obscenity, and incitement are examples of unprotected speech, a newspaper advertisement clearly did not fall within any of those categories. [104] The Court went on to find that "the advertisement conveyed information of potential interest and value to a diverse audience" and that this ad for abortion services "pertained to constitutional interests."[105]

An important point made by the Supreme Court in *Bigelow* is that "a State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its

---

[99] Floyd Abrams, Founder, Abrams Institute for Freedom of Expression, Introduction for Panel at the Information Society Project of Yale Law School: Commercial Speech and the First Amendment (June 2, 2020).

[100] Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

[101] *Id.*

[102] *Id.*

[103] *Id.* at 818 (citing Pittsburgh Press Co. v. Hum. Rel. Comm'n, 413 U.S. 376, 384 (1973); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

[104] *Bigelow*, 421 U.S. at 819.

[105] *Id.* at 822.

own citizens may be affected when they travel to that State."[106] It may disseminate information to its citizens so that they can make informed decisions, but may not reach beyond its borders.[107] However, advertising may be subject to reasonable regulatory measures that further a governmental interest.[108] A court would then weigh the governmental interest against the citizen's First Amendment interests.[109] *Bigelow* thus became the first instance where the Supreme Court recognized commercial speech as speech that falls under the First Amendment's protection. *Bigelow* set the stage for thoughtful First Amendment analysis in today's challenges to modern state NIL legislation by acknowledging commercial speech's rightful place in the canon of freedom of speech.

Bigelow established that commercial speech, like the content of NIL endorsement deals, is protected by the First Amendment. The year after *Bigelow*, the Supreme Court unequivocally enshrined commercial speech within the protections of the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[110] A Virginia state law provided that a pharmacist was guilty of unprofessional conduct if they advertised or promoted the price of prescription drugs.[111] While a state is free to require essentially whatever professional standards it likes from licensed occupations, "it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[112] Although commercial speech is protected "like other varieties," some regulation is still permissible.[113]

For example, restrictions on the time, place, or manner of expression are permissible provided that (1) their justification is unrelated to the content of the speech, (2) they serve a significant governmental interest, and (3) they allow for ample alternative channels for communication of the information.[114] Restrictions on false, deceptive, or misleading commercial speech are valid as well.[115] Framed differently, the State's interest in promoting the free

---

[106] *Id.* at 824.
[107] *Id.*
[108] *Id.* at 826.
[109] *Id.*
[110] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976).
[111] *Id.* at 749-50.
[112] *Id.* at 770.
[113] *Id.*
[114] Friedman v. Rogers, 440 U.S. 1, 9 (1979) (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771).
[115] *Id.*

flow of accurate or informative content is significant enough that some regulation is permissible, if not necessary.[116]

A. *CENTRAL HUDSON* AND *44 LIQUORMART*: FOUNDATIONAL PRECEDENTS

Five years later, the Supreme Court issued another landmark First Amendment opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. This controversy arose when the Public Service Commission of New York ordered all electric utilities in the state to cease any advertisements promoting electricity consumption.[117] The order aimed to conserve energy usage during the frigid New York winter so as to avoid blackouts.[118] Central Hudson, a major electric utility provider, opposed this ban on First Amendment Grounds.[119]

In response, the Court promulgated a four-part test to determine whether a restriction on commercial speech is constitutionally valid:

> (1) the speech must concern lawful activity and not be misleading;
> (2) the government must have a substantial interest in restricting the speech;
> (3) the regulation must directly advance the asserted governmental interest; and
> (4) the regulation must be narrowly tailored to serve the governmental purpose.[120]

The Court determined that the Commission's restriction of Central Hudson's advertising was unconstitutional.[121] The Court turned its focus to the fourth prong of the test, which requires the regulation to be narrowly tailored to the governmental purpose. They found the Commission did not demonstrate that its interest in electricity conservation could be protected adequately by more limited regulation of the appellant's commercial expression.[122] The Court suggested that to further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising more narrowly.[123] In other words, the Commission's regulation was not narrowly tailored to serve its

---

[116] *Id.* at 10 (quoting *Va. State Bd. of Pharmacy,* 425 U.S. at 772).
[117] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.C., 447 U.S. 557, 558–59 (1980).
[118] *Id.* at 559.
[119] *Id.*
[120] *Id.* at 564.
[121] *Id.* at 570.
[122] *Id.* at 571.
[123] *Id.* at 570-71.

interest in furthering electricity conservation efforts. The Commission's blanket ban on any advertisement promoting electricity consumption was overbroad.

The commercial speech doctrine transformed significantly in *44 Liquormart, Inc. v. Rhode Island*. The plaintiffs brought suit against the State of Rhode Island, alleging that its law prohibiting the advertisement of liquor prices anywhere except the point of sale was unconstitutional.[124] The Supreme Court agreed with the plaintiffs, finding that "Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, non-misleading speech about a lawful product," which is undoubtedly unconstitutional.[125] In the subsequent opinion, the Court enacted their transformation of commercial speech doctrine by elevating it to nearly the level of protection that noncommercial expression enjoys.[126]

A key aspect of the *44 Liquormart* opinion is that the Court, per Justice Stevens, refused to recognize any sort of vice exception to commercial speech restrictions.[127] He opined that "almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to vice activity."[128] Furthermore, a vice exception would either permit state legislatures to justify censorship by labeling selected lawful activities as "vices," or require the federal courts to establish a federal common law of vice.[129] As such, a "vice" justification to restrict commercial speech, without a parallel legislative prohibition of the commercial activity, does not pass constitutional muster.[130]

A few years after *Central Hudson*, the Court slightly refined the four-prong test in *Board of Trustees of State Univ. of New York v. Fox*. The Court deployed a cost-benefit test that affects the third and fourth prongs from *Central Hudson*: the government must establish that it has "carefully calculated" the burdens imposed by its regulation of speech and that those burdens are justified by the government's articulated interest.[131] This refinement was reiterated in *Lorillard Tobacco Co. v. Reilly*, where the Court held that the Massachusetts regulations of tobacco advertising at issue were unconstitutional, clarifying that the regulation need not be "[t]he

---

[124] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 484 (1996).

[125] *Id.* at 504.

[126] RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 20:9, Westlaw (database updated April 2023).

[127] *44 Liquormart*, 517 U.S. at 513.

[128] *Id.* at 514.

[129] *Id.*

[130] *Id.*

[131] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 479 (1989).

least restrictive means" but a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective."[132] The Court referred to this as the "critical inquiry" in First Amendment cases such as these.[133] The "reasonable fit" test, a partial merging of the third and fourth *Central Hudson* prongs, has proven to be a difficult obstacle for the government to overcome.[134]

B. COMMERCIAL SPEECH RESTRICTIONS AND SUBSEQUENT LEGAL CHALLENGES IN "VICE" INDUSTRIES

Certain commercial speech restrictions stand today for heavily regulated industries. Often, these restrictions fall upon the aforementioned vice industries.

1. *TOBACCO*

Many critics might raise the following questions in response to an attack on cannabis advertising restrictions: when was the last time you saw or heard of a tobacco product being advertised on television, social media, or the radio? Should we limit cannabis advertising in the same fashion, with extreme caution? A proper answer can be found in the unique and extensive history of tobacco legislation and litigation.

The Family Smoking Prevention and Tobacco Control Act, more frequently termed the Tobacco Control Act, was signed into law in 2009.[135] This legislation gives the Federal Trade Commission (FTC) the authority "to enforce the laws under its jurisdiction with respect to the advertising, sale, or distribution of tobacco products."[136] The FTC shares this authority with the Federal Communications Commission (FCC), which maintains jurisdiction over the airwaves.[137] In turn, the federal government completely prohibits the advertising of tobacco products via any means of electronic communication that falls under the FCC's jurisdiction, which naturally includes television.[138]

---

[132] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

[133] *Id*. at 561.

[134] *See, e.g.,* City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (holding that the city's distinguishing prohibition on commercial handbills, but not newspapers, bore no relationship whatsoever to the furtherance of their aesthetic interest in reducing visual clutter as both types of print media were to blame for litter-filled streets).

[135] 21 U.S.C.A. § 387(g) (West 2009).

[136] 21 U.S.C.A. § 387n (a)(1) (West 2009).

[137] 15 U.S.C.A. § 1335 (West 1973).

[138] *Id.*

Prior to the Tobacco Control Act, fifty-two state and territory governments along with the federal government agreed to a settlement with the four largest tobacco companies.[139] The state plaintiffs of the original lawsuit sought to recover billions of dollars in medical and related costs incurred by patients whose conditions were onset by tobacco usage.[140] Forty-five more tobacco companies ultimately joined what was dubbed the Tobacco Master Settlement Agreement (MSA).[141] The overarching goal of this settlement agreement was to reduce smoking in the United States, particularly by the nation's youth.[142]

The MSA outlines a wide variety of provisions to combat youth tobacco consumption and to educate the general public about the dangers posed by tobacco consumption.[143] This agreement required tobacco companies to pay unfathomably large monetary damages to all the states involved.[144] Under the MSA, any tobacco company party to the agreement that is selling products in the U.S. has to make payments in perpetuity, meaning the full financial scope of this agreement may not ever be known.[145] Beyond the money, companies that signed on to the MSA became subjected to highly restrictive advertising regulations.[146] These companies may not target youth in their advertising by, for example, using cartoons in commercials or packaging.[147] Further, they may not distribute merchandise printed with the name of their company or their products. They may not engage in "product placements"—the payment of money in exchange for their brand to be featured in a TV show or movie—for example.[148] They also cannot sponsor events or sports with a significant youth audience.[149] This summary, however, is not exhaustive, as there are several similar advertising restriction provisions contained in the MSA that are enforced.

The tobacco industry has refrained from bringing legal challenges to the constitutionality of these commercial speech restrictions in the two-and-a-half decades since the MSA. The MSA

---

[139] *The Master Settlement Agreement*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/ [https://perma.cc/YW9S-ZKHR].
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *The Master Settlement Agreement*, *supra* note 139.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*

prohibits tobacco companies from challenging state laws aimed at curbing youth exposure to tobacco advertising.[150] This includes any lobbying, including the appropriation of paid settlement funds away from the beneficiaries defined in the MSA.[151] Consequently, the industry continues to self-regulate its advertising in conjunction with the rules laid out by the settlement.[152] The tobacco industry is unique in this sense—advertising of its product is nearly outlawed entirely on the platforms where consumers are most likely to view any advertising content. Yet, the industry continues to thrive in accordance with the MSA and its self-regulations of advertising.

Therefore, it should be noted that an allowance of advertising through non-legislative means, albeit extremely limited in scope, for a different industry does not directly translate to a power to regulate commercial speech. Since cannabis is a nascent industry, no settlement agreements have been made with any major cannabis cultivator, producer, or retailer. In turn, no provisions exist that require cannabis businesses that fall under any of those three categories to self-regulate advertising. Cannabis research, while advancing rapidly, has not been pursued for nearly as long as tobacco research, meaning the basis of any restrictions would likely be difficult to construct. Thus, the parallel between tobacco and cannabis advertising to advance state restrictions on the latter industry's commercial speech cannot be made in earnest.

2. *ALCOHOL*

Alcohol advertising has long enjoyed the broadest discretion of the law's foray into vice industry advertising. Most alcohol advertising restrictions deal with the specific facts of the beverage marketed.

For example, one of the most widely known cases involving alcohol is *Rubin v. Coors Brewing Company*, decided by the Supreme Court in 1995. Here, the famous commercial beer company challenged the constitutionality of the Federal Alcohol Administration Act (FAAA), which prohibited beer labels from displaying the drink's alcohol content.[153] Coors submitted an application to the Bureau of Alcohol, Tobacco, and Firearms (ATF) seeking approval of labels and advertisements that disclosed the alcohol content of its beer.[154] The ATF rejected the application

---

[150] *Summary of Key Points in the Master Settlement Agreement*, PA. OFF. OF ATT'Y GEN., https://www.attorneygeneral.gov/ [https://perma.cc/6PKR-73TA].

[151] *Id.*

[152] *Id.*

[153] Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

[154] *Id.*

because it violated the FAAA.[155] The government's stated purpose of the FAAA was to thwart "strength wars" between the major commercial brewers—a race to the bottom of who could sell the most potent beers to consumers.[156]

The Supreme Court took on the case under a First Amendment review.[157] The parties agreed that Coors only intended to disseminate truthful, verifiable, and non-misleading factual information to consumers about its products' alcohol content.[158] Therefore, the Court's analysis only needed to focus on the remaining three prongs of the *Central Hudson* test: determining whether the government's substantial interest in regulating this commercial speech was valid and whether their methods directly advanced the interest while being no more restrictive than necessary.[159]

The FAAA did not directly advance the government's asserted interest.[160] The Court was highly skeptical of the connection between this ban on alcohol content disclosure and its ultimate deterrence of "strength wars," commenting that the government's policy for beer did not align with its policy for other alcoholic beverages.[161] For example, distilled spirits, which are higher in alcohol content than beer, may have contained alcohol content disclosures as they rested on store shelves right next to cases of beer.[162] Naturally, the Court found this nonsensical. To clarify, they noted that the objective in combatting "strength wars" was valid, but the "puzzling regulatory framework" rendered this regulation a violation of the First Amendment.[163] The government could take many less restrictive avenues to further their goal.[164]

States have also attempted to narrow the scope of alcohol advertising regulations to specific content sources. *Educational Media Co. at Virginia Tech, Inc. v. Insley* is instructive. Here, the petitioner, an on-campus newspaper, challenged a regulation enacted by the Virginia Alcoholic Beverage Control Board that prohibited college newspapers from running alcohol advertisements

---

[155] *Id.*
[156] *Id.* at 479.
[157] *Id.* at 480.
[158] *Id.* at 483.
[159] *Id.* at 484.
[160] *Id.* at 488.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 489.
[164] *Id.* at 491.

in their editions.[165] The district court ruled for the government, holding that "the challenged regulation is a constitutionally appropriate restriction of commercial speech given Virginia's substantial interest in combatting underage and abusive drinking on college campuses."[166] The newspapers appealed to the Fourth Circuit.

On appeal, the newspapers argued that the regulation failed both the traditional First Amendment examination of strict scrutiny and the more permissive *Central Hudson* test for commercial speech.[167] While this was undoubtedly a commercial speech issue, the petitioners claimed that the strict scrutiny test should apply since the regulation is both content-based and speaker-based.[168] In practice, the college newspapers would be subject to higher regulation than newspapers unaffiliated with higher education.[169]

The Fourth Circuit chose not to apply the strict scrutiny test to the Virginia regulation because their analysis concluded that it failed the more permissive *Central Hudson* test anyways.[170] The parties concurred that the first prong, that the speech concerned lawful and non-misleading activity, was not disputed.[171] The Court dispatched of the second prong in short order too, finding that the government's interest in discouraging or curbing underage drinking by students at its public universities is substantial.[172] The third prong, whether the regulation advanced this governmental interest, was bypassed based on a technicality in the facts: this challenge to the regulation was "as-applied," meaning the generality of the regulation was in focus, not its effect on the specific parties bringing the suit.[173] Therefore, the third prong was satisfied by the government.[174]

Ultimately, the Fourth Circuit decided that the Virginia regulation failed the fourth prong of the *Central Hudson* test, thus rendering it unconstitutional. The Court elaborated that "the challenged regulation fails . . . because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to

---

[165] Educ. Media Co. at Va. Tech, Inc., 731 F.3d 291, 294 (4th Cir. 2013).
[166] *Id.*
[167] *Id.* at 295.
[168] *Id.* at 297.
[169] *Id.*
[170] *Id.* at 298.
[171] *Id.* at 299.
[172] *Id.*
[173] *Id.* at 299–300.
[174] *Id.*

consume."[175] A majority of the newspapers' readership was over 21, so the regulation was overbroad and inappropriately tailored to advance the government's substantial interest in reducing alcohol abuse by college students.[176] One could easily translate this ruling to the cannabis landscape today: a majority of the target audience for cannabis advertisements is over 21. A restriction of a student-athlete of legal age to disseminate truthful information about available cannabis products may be overbroad and inappropriately tailored to advance the government's substantial interest in reducing the abuse of cannabis or unlawful usage by minors, for example.

A theme of these notable alcohol advertising cases is the courts' hesitation to green-light a government practice of deciding what lawful, truthful, and non-misleading commercial information benefits consumers and what does not. Oftentimes, the government comfortably passes the first three prongs of *Central Hudson*. Though the third prong, whether the regulation directly advances the government's interest in regulation, is often passed, the second half of this "reasonable fit" test that marries the third and fourth prongs causes more difficulty. That final prong, determining the appropriate means of advancing the substantial government interest, has proven to be a difficult bar to clear for the State.

3. *GAMBLING*

On the other side of the coin of vice industry advertising sits sports betting. As opposed to tobacco advertising, gambling advertising is present nearly everywhere a consumer looks due to the flurry of states that hastily legalized online sports betting in the last few years.

The rapid greenlighting of sports betting, like the NIL boom, was kicked off by the Supreme Court only a handful of years ago. In 2018, the Court delivered a slip opinion in *Murphy v. NCAA* that overturned the 1992 law known as the Professional and Amateur Sports Protection Act (PASPA).[177] This act made any state's authorization of sports betting unlawful.[178] Curiously, PASPA does not make a violation of this act a federal crime.[179] Rather, it permits

---

[175] *Id.* at 301.

[176] *Id.* at 301–02.

[177] Murphy v. Nat'l Collegiate Athletic Ass'n, No. 16-476, slip op. at 1 (U.S. May 14, 2018).

[178] *Id.*

[179] *Id.*

the Attorney General or professional and amateur sports organizations to sue over violations.[180]

An exception allowed legal sports betting to continue in a small number of states, including New Jersey.[181] New Jersey could have furthered a gambling foothold into Atlantic City within a year, but the state government did not take action until 2012.[182] That year, the state legislature passed a law legalizing sports betting, prompting a lawsuit from the NCAA and other professional sports organizations.[183] The plaintiffs argued that this new legislation violated PASPA.[184]

The civil action worked its way up to the Supreme Court five years later. There, the Court sided with the State of New Jersey.[185] More specifically, the Court held that PASPA violated the anti-commandeering doctrine, an age-old constitutional tenet that bans Congress from passing legislation that issues direct enforcement orders to the States.[186] PASPA prohibited states from authorizing sports betting; even though this is not an affirmative command to act, the Court saw an order to refrain from action as no different.[187]

In the wake of the *Murphy* ruling, sports betting advertisements now proliferate nearly all corners of life.[188] One can view these solicitations on TV, hear them on the radio, or encounter them on an internet site loosely related to sports in any of the thirty-five states (plus D.C.) that have legalized sports betting in the last half-decade.[189] Little advertising regulation has followed the boon aside from standard disclaimers about the legal age to gamble and hotlines to call if the consumer believes they may have developed a gambling problem.[190] These specifications are left entirely up to the states.

One of the more significant, and controversial, commercial speech decisions in Supreme Court history came in the gambling case *Posadas de Puerto Rico Associates v. Tourism Company of*

---

[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 1–2.
[184] *Id.*
[185] *Id.* at 30–31.
[186] *Id.* at 18.
[187] *Id.* at 28–29.
[188] Joe Hernandez, *Sports betting ads are everywhere. Some worry gamblers will pay a steep price*, NPR (June 18, 2022), https://www.npr.org/ [https://perma.cc/2KEM-U6DR].
[189] *Id.*
[190] *Id.*

Puerto Rico.[191] A Puerto Rico statute outlawed advertising of casino gambling aimed at Puerto Rican residents.[192] Posadas held a franchise to operate a casino in Puerto Rico stemming from a 1948 law permitting gambling enterprises under a limited scope.[193] This law also restricted advertising by these enterprises, so tightly, even, that the word 'casino' was not allowed to appear anywhere so much as a napkin.[194] Posadas brought suit, claiming that this violated the company's First Amendment rights.[195] The lower court agreed, "declaring that appellant's constitutional rights had been violated by the Tourism Company's past application of the advertising restrictions, but that the restrictions were not facially unconstitutional and could be sustained . . . ."[196] Then, the lower court issued some guidelines for the two parties, which basically amounted to permission to advertise casinos on the premises of said casinos and a decision to uphold the prohibition of external advertising intended to entice potential gamblers.[197]

The Supreme Court deployed the customary *Central Hudson* test for Puerto Rico's casino advertising regulation.[198] The activity advertised was lawful and was not misleading or fraudulent.[199] The Court agreed that the Puerto Rican government has a substantial interest in protecting its citizens' "safety and welfare" from casino gambling's "serious harmful effects."[200]

The final steps of the *Central Hudson* analysis "involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends."[201] The legislature's belief that by restricting casino gambling advertising aimed at locals, they would protect locals from the advertising's potentially harmful effects—encouraging more gambling.[202] The scheme is only intended to protect local advertising, not advertising aimed at

---

[191] Smolla, *supra* note 126, § 20:20.

[192] Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 330 (1986).

[193] *Id.* at 332–33.

[194] *Id.*

[195] *Id.* at 334.

[196] *Id.* at 336–37.

[197] *Id.* at 346–47.

[198] *Id.* at 340.

[199] *Id.* at 340–41.

[200] *Id.* at 341.

[201] *Id.* at 341–42.

[202] *Id.* at 342.

tourists.[203] Therefore, the Puerto Rican law passes all the *Central Hudson* prongs of constitutional muster.[204]

However, the Court's decision in *44 Liquormart*, discussed *supra*, abrogated its decision in *Posadas*. The State of Rhode Island argued that the "reasoning in *Posadas* does support the State's argument" that their restriction of alcohol price advertisements was reasonably construed to the government's substantial interest in reducing alcohol consumption.[205] Yet, the *44 Liquormart* Court concluded that "*Posadas* erroneously performed the First Amendment analysis."[206] They continued on, observing that "[t]he casino advertising ban was designed to keep truthful, non-misleading speech from members of the public for fear that they would be more likely to gamble if they received it."[207] As a result, the State's anti-gambling policy was not subjected to any public scrutiny as it hid behind the curtain of regulation.[208] Given the Court's long-held reservations to commercial speech regulation like this, they determined "*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."[209]

Similar to the cannabis industry, to be discussed in the following section, the world of gambling is, to an extent, a nascent industry in many parts of the country that are not tribal lands or Las Vegas. At the time of this writing, thirty-one states plus the District of Columbia have legalized online sports betting, the latest frontier in gambling regulation.[210] Undoubtedly, lawsuits tackling advertising and other regulatory issues will follow the wildfire of legalization that spread out of the Supreme Court's ruling in *Murphy*. That said, gaming restrictions are likely more digestible due to the sports world's longstanding prohibition on participant gambling. The NCAA actively prohibits any sports betting by student-athletes, whether the wagers are placed on a contest they are participating in or another sport, even the professional level.[211] Any betting by those competing calls into question the integrity of the game, a blemish that all involved wish to avoid. Student-athletes

---

[203] *Id.* at 343.
[204] *Id.* at 348.
[205] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509 (1996).
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N, https://www.americangaming.org/ [https://perma.cc/FJ3S-F3KV].
[211] *Sports Wagering*, NCAA, https://www.ncaa.org/ [https://perma.cc/UC9K-LX4G].

and endorsers alike would be expected to avoid NIL partnerships since the student athlete's eligibility would be gravely at risk if an agreement was entered into with a gaming company.

4. *CANNABIS*

As a newly developed industry, cannabis does not have the same breadth of state regulation on advertising that the previously discussed vice industries boast. While many states have instituted restrictive laws on cannabis advertising, First Amendment challenges only arise in a few cases.

In 2020, California passed Proposition 64.[212] It contained a prohibition of billboard advertising on any interstate highway that crosses the California border.[213] The state's Bureau of Cannabis Control published an interpretation of this law clarifying that no billboard advertising would be permitted within fifteen miles of a border shared by California with another state.[214] A plaintiff by the name of Farmer brought suit against the Bureau of Cannabis Control, claiming that their looser interpretation of the statute exposed his child to cannabis advertising.[215] The court found for the plaintiff and overturned the Bureau's interpretation.[216] The court's order mandated that the Bureau meet with the plaintiff to design a presumably stricter ban on outdoor advertising along the state's highways.[217] Even though the Bureau declined to appeal, some analysts harbor concerns about an overall chilling effect that this may have on speech related to cannabis, especially instances that are not advertising retail products.[218] State NIL laws generally do not contemplate this effect, but courts worry about the prevention of the dissemination of truthful information, like in *Educational Media Co.*, discussed *supra*.

Colorado has faced similar legal challenges to its cannabis advertising restrictions. One of these restrictions prohibits cannabis advertising in print or media where more than 30% of the audience

---

[212] Christopher Smith, *Chronology of State Adult-Use Cannabis Reforms*, *in* CANNABIS LAW DESKBOOK app. 2B (2023–2024 ed.).

[213] *Id.*

[214] *Id.*

[215] *Id.*; Farmer v. Bureau of Cannabis Control, 2020 Cal. Super. LEXIS 3579, at *9 (Cal. Super. Ct. Nov. 20, 2020).

[216] *Id.* at *28-29.

[217] Brendan Charney, Nicole Phillis & Chris Morley, *California Court Bans Cannabis Billboard Advertising on All Highways That Cross State Line*, DAVIS WRIGHT TREMAINE: MEDIA L. MONITOR (May 26, 2021), https://www.dwt.com/ [https://perma.cc/72L9-TD9C].

[218] *Id.*

is comprised of minors.[219] In *Colorado Press Association v. Brohl*, the plaintiff challenged this regulation on two grounds: (1) that the regulation was an impermissible restraint on their First Amendment rights of commercial speech; and (2) that the regulation unconstitutionally amended the Colorado Constitution, which provides that cannabis should be regulated similarly to alcohol.[220] Unfortunately for the Colorado Press Association, the court ruled that neither the association nor its members had standing to bring suit as they did not suffer any harm as a result of the restriction.[221] Thus, the door remains open for a more qualified plaintiff to bring a similar suit.

Washington has faced a couple of challenges to its cannabis advertising laws that restrict the format and locations in which cannabis advertisements can be published.[222] None of these cases have been litigated in a precedent-setting court, as the cases have been adjudicated in county superior courts around the state, whose decisions are non-binding.[223] At least two of the cases have applied the *Central Hudson* analysis and concluded that the state's restrictions were valid, primarily based on the government's compelling interest in preventing cannabis advertising from reaching the eyes and ears of minors.[224] These opinions could provide a preview to higher Washington courts should future lawsuits ascend the appellate ladder.

The Supreme Court of Montana recently addressed a dispute over the state's total cannabis advertising ban.[225] In *Montana Cannabis Industry Association v. State*, the industry group argued that the Montana law was an unconstitutionally overbroad restriction of their First Amendment rights.[226] The lower court had found for the plaintiffs after reviewing their First Amendment argument.[227] The Supreme Court of Montana disagreed, holding that the restriction did not unconstitutionally infringe on First

---

[219] Sierra McWilliams & Jonathan Pitel, *Minimizing Exposure of Minors to Cannabis Advertising*, *in* CANNABIS LAW DESKBOOK § 20:13 (2023-2024 ed.).

[220] Colo. Press Ass'n, Inc. v. Brohl, No. 14-CV-00370, 2015 WL 13612122, at *1, *2 (D. Colo. Mar. 13, 2015).

[221] *Id.* at *7.

[222] McWilliams & Pitel, *supra* note 219.

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131, 1137 (Mont. 2016).

[227] *Id.* at 1136.

Amendment free speech rights.[228] The Court reasoned that the lower court erred in applying strict scrutiny instead of the *Central Hudson* test.[229] The first prong of the *Central Hudson* test is not met by the state's restriction because federal law governs this issue's analysis.[230] As marijuana remains illegal under federal law, and the restriction only applies to commercial speech, the restriction passes muster.[231]

Justice Wheat's dissent in this case was sharply critical of the majority's reliance on the illegal federal status of marijuana.[232] He reasoned that the more traditional strict scrutiny test deployed by the district court was the correct avenue to examine the statute rather than the four-pronged *Central Hudson* test.[233] According to Justice Wheat, the language of the advertising prohibition contained in the statute was overbroad and vague, violating Art. II §7 of the Montana constitution, which almost duplicates the First Amendment: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty."[234] The statute's language creates a content-based restriction of speech, thereby violating First Amendment rights.[235]

The State of Massachusetts encountered one of the early cannabis advertising cases back in 2004 in *Ridley v. Massachusetts Bay Transp. Authority*.[236] The plaintiff filed the case in federal court under subject-matter jurisdiction because the First Amendment was implicated. Unlike the Montana Supreme Court, the First Circuit, hearing the case on appeal from the District Court, held that the MBTA engaged in unconstitutional viewpoint discrimination by refusing to run a trio of marijuana ads on public transportation.[237] These ads were related to an effort to change marijuana laws in Massachusetts; the MBTA argued that they encouraged minors to use the drug.[238] The court did not find the MBTA's argument

---

[228] *Id.* at 1150.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.* at 1159 (Wheat, J., dissenting).
[233] *Id.* at 1160 (Wheat, J., dissenting).
[234] *Id.*
[235] *Id.*
[236] Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).
[237] *Id.* at 89.
[238] *Id.* at 90.

convincing—the connection "between the rejection of these three advertisements and the protection of children" was too feeble.[239]

With new states' voters (or even legislatures themselves) approving adult-use recreational cannabis seemingly every election cycle, the subsequent advertising restrictions are certain to be met with First Amendment challenges. These select early cases will serve as the foundation of commercial speech jurisprudence as it relates to the cannabis industry. Similar to the respondent in *Ridley*, the government must pass a significant threshold in establishing the connection between the means of its advertising restriction and the content it seeks to block. Thus, it follows that this higher threshold would still apply should a state NIL restriction be challenged on First Amendment grounds.

VI. EXAMINATION OF STATE PROHIBITIONS OF NIL ENDORSEMENTS WITH CANNABIS COMPANIES

Many of the states that have enacted NIL legislation prohibit, to some extent, their college athletes from providing endorsements for certain unsavory companies. As mentioned earlier, legislative language is facially constructed to protect the institutions of which the athletes purportedly chose to act as representatives.[240] However, this intended protection is unlikely to constitute a substantial enough connection to the blanket ban on endorsing particular companies or products.

A. A CASE STUDY OF ONE OF THESE PROHIBITIONS: ILLINOIS

As referenced in the Introduction, the State of Illinois is one example of this new and relatively confined occurrence. Hearken back to the hypothetical posed, where N'Kosi Perry is a student-athlete for a public university in Illinois that has a cannabis retailer endorsement deal on the table rather than a deal with a local brewery. In July 2021, essentially in conjunction with *Alston*, the Illinois government signed into law the Student-Athlete Endorsement Rights Act (SAERA).[241] The state prohibits the endorsement of cannabis in § 20(i). The language is as follows:

> No student-athlete shall enter into a publicity rights agreement or receive compensation from a third party licensee for the *endorsement or promotion* of gambling, sports betting, controlled substances,

---

[239] *Id.*

[240] Nat'l Collegiate Athletic Ass'n v. Alston, No. 20–512, slip op. at 9–14 (U.S. June 21, 2021).

[241] 110 ILL. COMP. STAT. ANN. 190/20 (West 2022).

> *cannabis*, a tobacco or alcohol company, brand, or products, alternative or electronic nicotine product or delivery system, performance-enhancing supplements, adult entertainment, *or any other product or service that is reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution* or that negatively impacts or reflects adversely on a postsecondary educational institution or its athletic programs, including, but not limited to, bringing about public disrepute, embarrassment, scandal, ridicule, or otherwise negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution.[242]

Naturally, the language is hyper-specific while also allowing significant leeway for the institution. To be expected, the statute provides no exact definition for what may rise to the level of "scandal" or "public disrepute."[243]

B. A HYPOTHETICAL SCENARIO

This concluding analysis portion of the Article breaks down a hypothetical situation where an Illinois athlete, like N'Kosi Perry in Florida, desires to strike an endorsement deal with a cannabis company, but the university[244] steps in and blocks the agreement by citing § 20(i) of the Student-Athlete Endorsement Rights Act. Section 20(i) and other relevant portions of the SAERA will be probed under the First Amendment framework detailed in Part V.

1. *A BRIEF DISPOSAL OF THE STRICT SCRUTINY STANDARD*

Many freedom of speech cases are decided under a strict scrutiny standard, which is the highest possible bar for the government to clear.[245] Courts refer to the standard as the "least

---

[242] *Id.* (emphasis added).

[243] *Id.* § 5.

[244] The question of the *Central Hudson* analysis application of private universities is beyond the scope of this Article. In short, Congress can use its spending power to achieve social welfare objectives through channels of state actors. However, a discussion of this area of constitutional law would deviate too far from this Article's topic, so the hypothetical proceeds only with public institutions in focus.

[245] *Strict Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/ [https://perma.cc/MD7L-M6ET].

restrictive means" test.[246] This test inquires whether the government can achieve the same desired end through an alternative, more palatable way.[247] If the answer is yes, then the government's scheme will be deemed unconstitutional.[248] However, as illustrated in Part V, the Supreme Court has created a separate test for commercial speech cases. As discussed in *Central Hudson*, the means by which the state's compelling interest is furthered must be narrowly tailored for a state's restriction of speech to be valid.[249] Therefore, the strict scrutiny route need not be followed in this analysis.

A court would be unlikely to apply the least restrictive means test to § 20(i) of SAERA. Section 20(i) prohibits a particular type of commercial agreement between two specific classes of parties: collegiate student-athletes and vice industry operators. Thus, the hypothetical court in this scenario would certainly approach this as a commercial speech question. Hence, the *Central Hudson* four-prong test, later modified by *44 Liquormart*, is more appropriate—not only for the distinguishable nature of the regulation but also the vice industry context.

2. *APPLYING THE* CENTRAL HUDSON *TEST TO THE SCENARIO*

As explained above in Part V, the *Central Hudson* test contains four prongs: (1) the speech must concern lawful activity and not be misleading; (2) the government must have a substantial interest in restricting the speech; (3) the regulation must directly advance the asserted governmental interest; and (4) the regulation must be narrowly tailored to serve the governmental purpose.[250] The Court in *44 Liquormart* slightly modified the third and fourth prongs, revising the requirement so that the government's regulation need not pass the least restrictive means test.[251] It only must represent a reasonable fit between the government's end goal and the means undertaken to achieve said goal.[252] This new version provides a slightly easier bar for the government to clear than the least restrictive means. The *44 Liquormart* court refused to endorse a vice industry exception for restrictions of commercial speech.[253]

---

[246] JOHN E. NOWAK & RONALD D. ROTUNDA, ROTUNDA AND NOWAK'S TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE AND PROCEDURE § 20.10 (5th ed. 2012).

[247] *Id.*; *See* Shelton v. Tucker, 364 U.S. 479, 489 (1960).

[248] *Id.*

[249] *See* NOWAK & ROTUNDA, *supra* note 246.

[250] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.C., 447 U.S. 557, 564 (1980).

[251] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513–14 (1996).

[252] *Id.*

[253] *Id.* at 514.

On its face, the hypothetical scenario in Illinois would comfortably pass the first prong of *Central Hudson*. As of January 1, 2020, recreational cannabis is legal for adult consumption in Illinois.[254] Medical cannabis has been legal in the state since 2013.[255] The recreational law requires purchasers or consumers to be over twenty-one years old.[256] For our case, this one caveat does arise: the student-athlete, naturally, must be over the age of 21. These age-specific facts read similarly to those in *Educational Media Co.*, discussed *supra* at note 163. Assuming many juniors in college are of the legal consumption age, and the content of the hypothetical student-athlete's endorsement is not misleading, the analysis will move forward. The cannabis consumption is a lawful activity in Illinois for its citizens over 21 years of age, and courts assume the information disseminated from the hypothetical endorsement deal is not misleading.

The second prong requires the government's interest in restricting the speech to be substantial. In *44 Liquormart*, the State of Rhode Island argued that its interest in banning the advertisement of alcohol prices was substantial because they sought to promote temperance among their citizens.[257] The Court is not entirely sure what "temperance" entails, but they give the State the benefit of the doubt.[258] Thankfully, § 20(i) of SAERA leaves far less up to interpretation. The second half of the section precisely dictates the government's substantial interest: endorsements cannot be "reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution or that negatively impacts or reflects adversely on a postsecondary educational institution or its athletic programs . . . ."[259] Illinois wants to avoid "bringing about public disrepute, embarrassment, scandal, [or] ridicule"[260] to their postsecondary educational institutions. One would struggle to find a court that disagrees that this interest is 'substantial.'

Since *44 Liquormart* melds the third and fourth prongs into the "reasonable fit" test, these final two prongs of the *Central Hudson* test will be fleshed out in tandem. Once the government asserts this interest, the state must show that the regulation directly advances the interest in the third prong. The definition of "directly advance"

---

[254] 410 ILL. COMP. STAT. ANN. 705/10-5 (West 2022).

[255] *Medical Cannabis Patient Registry Program*, ILL. DEP'T OF PUB. HEALTH, https://perma.cc/Q85B-32WG (last visited March 13, 2023).

[256] 410 ILL. COMP. STAT. ANN. 705/10-5 (West 2022).

[257] *44 Liquormart*, 517 U.S. at 504.

[258] *Id.*

[259] 110 ILL. COMP. STAT. ANN. 190/20 (West 2022).

[260] *Id.*

has some inherent flexibility within the reasonable fit. Yet, the government still must show that it advanced the substantial interest to a "material degree."[261] For example, the Court in *44 Liquormart* was tasked with determining whether the Rhode Island price advertising ban resulted in a significant reduction in alcohol consumption in line with its temperance interest.[262] The Court rejected this argument, however, because the state did not present any hard evidence of this effect.[263] While it was logical conclusion, the overbroad nature of the ban dissuaded the Court from giving Rhode Island the benefit of the doubt again.[264]

Beyond the actual jurisprudence, many public policy considerations are at play. A few years ago, Illinois decided to legalize the recreational use of cannabis, which, by many accounts, has benefitted the state in a myriad of ways. Public universities in the state now offer and promote cannabis degree certificates at multiple campuses. One of Illinois's stated objectives in §20(i) of SAERA is to avoid any negative publicity or scandal that could detrimentally affect the public higher education institutions. The state's means to achieving those ends was by prohibiting athletes at those institutions from agreeing to endorsement deals with cannabis companies, in part. This mechanism may directly advance that valid, substantial interest. However, the direct advancement of the "reasonable fit" of this scenario gets a bit hairy for a few reasons.

Illinois's defined objective of avoiding ill repute for its universities gets undermined by a couple of factors. First, the Illinois legislature approved the legalization of recreational cannabis in 2020, becoming the first state in the nation to do so through elected officials rather than a ballot initiative.[265] The nature of this change in the law creates slightly contradictory optics—the state recognized that for college students of age, cannabis consumption was permissible. A court might not be fully receptive to the argument that a state government that voted to pass legislation legalizing cannabis believes that the advertisement of the same legal cannabis by student-athletes deemed university representatives harms institutions' reputations. Furthermore, the state surely does not mind the immense tax revenue that it rakes in from sales of this cannabis. For reference, Illinois retailers have reportedly sold $3.2 billion worth of adult-use recreational cannabis since the market

---

[261] *44 Liquormart*, 517 U.S. at 504.
[262] *Id.*
[263] *Id.* at 506.
[264] *Id.*
[265] 410 ILL. COMP. STAT. ANN. 705 (2019).

launched on January 1, 2020.[266] Governor J.B. Pritzker touted the state's $445.3 million tax revenue from sales in the 2022 fiscal year, a roughly fifty percent increase from the 2021 fiscal year.[267] At the same time, Illinois's Department of Revenue Director celebrated cannabis's positive impact on the state, lauding its job creation as well as the opportunity to reinvest funds back into many communities from the tax revenue raised.[268] The state government's promotion of the widespread benefits of recreational cannabis cannot also imply ill repute for Illinois's public universities, should the two become associated.

Furthermore, many public universities in Illinois offer courses in cannabis-related topics. For example, the University of Illinois at Urbana-Champaign, the state's flagship public university, offers a certificate in "Cannabis Production and Management" through the Crop Sciences department of their College of Agricultural, Consumer, and Environmental Sciences.[269] The school's webpage for this certificate explains that the "cannabis certificate program will help students become equipped with knowledge for cannabis indoor, outdoor, and large-scale field production," along with other biological skills applicable to the cannabis industry. [270] The University of Illinois-Springfield offers a few cannabis certificates, like one in the "Business of Cannabis."[271] This particular certificate includes courses such as "Scaling Operations," which covers topics like marketing and sales in the cannabis industry.[272] Springfield's cannabis certificate webpage, like Illinois's Department of Revenue Director, lauds the job creation potential of the cannabis industry.[273] All told, the University of Illinois system, along with eleven community colleges, now offer courses exploring various aspects of

---

[266] Zach Mentz, *Majority of Ohioans Approve of Adult-Use Cannabis Legalization: Poll*, CANNABIS BUS. TIMES (Oct. 5, 2022), https://www.cannabisbusinesstimes.com/ [https://perma.cc/TB8Q-GYLU].

[267] Sharon Wren, *IL Announces $445 Million in FY 2022 Adult-use Cannabis Tax Revenue*, OUR QUAD CITIES (July 25, 2022), https://www.ourquadcities.com/ [https://perma.cc/5TT5-HM9R].

[268] *Id.*

[269] *Cannabis Production and Management Certificate*, UNIV. OF ILL. URBANA-CHAMPAIGN, https://cropsciences.illinois.edu/ [https://perma.cc/QZC5-B7A8].

[270] *Id.*

[271] *The Business of Cannabis Certificate*, UNIV. OF ILL. SPRINGFIELD, https://cannabiseducation.uis.edu/ [https://perma.cc/7CLQ-DFE2].

[272] *Id.*

[273] *Id.*

the cannabis industry.[274] A court is unlikely to accept the idea that the state of Illinois can fund and offer many higher education courses so its students can foster careers in the cannabis industry while also prohibiting some of those same students, who happen to be athletes, from participating in that industry to avoid a scandal.

Perhaps a more "reasonable fit" would involve the Illinois legislature concocting more specific requirements on a student-athlete's endorsement deal with a cannabis company. For example, the state could mandate a disclaimer of the minimum age requirement on each social media post made by the student-athlete for the paid partnership. Disclaimer labels are already found on cigarette containers or in alcohol commercials. This means of achieving the ends of the state's interest in protecting the public from underage consumption is hardly burdensome.

Of course, the federal status of cannabis may complicate the possibility of student-athlete cannabis endorsements, too. Cannabis remains a Schedule I drug. If the *Central Hudson-44 Liquormart* test is employed, federal law governs the issue at hand. However, like many other states, Illinois's constitution adopts the freedom of speech as an inalienable right of its citizens, just as the United States Constitution does. A determination by the hypothetical's presiding judge that federal law should not control would be surprising. Still, cannabis's illegal federal status would likely have no impact on the success of a student-athlete plaintiff via the *Central Hudson-44 Liquormart* test based on the federal government's increasingly permissive view of the drug.

CONCLUSION

The question presented throughout this piece boils down to whether a hypothetical N'Kosi Perry in Illinois could be statutorily prohibited from using his name, image, and likeness as a college athlete to endorse a cannabis product rather than an alcoholic beverage. The answer to this question is "no": the case law and adjacent state policy decisions indicate that this prohibition would not satisfy a First Amendment commercial speech analysis.

Some concern remains with the status of marijuana remaining illegal at the federal level. Furthermore, an inherent risk lies in college athletes promoting cannabis products, specifically on their social media: the increased interest of adolescents in consuming

---

[274] Patrick Filbin, *Cannabis Courses Offered By More Illinois Colleges As Sales of Legal Marijuana and Hemp Products Grow*, CHI. SUN TIMES (Sep. 16, 2022), https://chicago.suntimes.com/ [https://perma.cc/9V3Y-E73U].

these age-restricted products. A less obvious detraction might appear in connection with another new development by the NCAA: the transfer portal. It is difficult to imagine a world where a college athlete is attracted to transfer from their cannabis-resistant locale to a school in another state where a cannabis endorsement is lawful.

College athletes now reap the benefits of their hard work and revenue generation with a vast array of name, image, and likeness endorsement deals. The financial byproducts implicated in permitting NIL cannabis would reach far and wide, benefitting college athletes and local businesses alike. Those like the Illinois version of N'Kosi Perry might very well add cannabis to this growing list of agreements should the not-yet-filed legal challenges to the state's restrictions succeed.

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY

VOLUME 13 FALL 2023 ISSUE 1

INNOVATIVE CONTRACT DRAFTING TO PROTECT BLACK ARTISTS

CARLTON FEARON*

CONTENT

*Carlton Fearon successfully completed his legal studies at the Sandra Day O'Connor College of Law, Arizona State University in Fall 2023. Prior to his time at ASU, Mr. Fearon earned a degree in kinesiology from Valley City State University in North Dakota. During his tenure at Valley City State, he garnered numerous academic and athletic accolades for his contributions to the football team. As a proud Sun Devil, Mr. Fearon has actively engaged with various campus organizations, including the Black Law Students Association, Diverse Law Students Association, Women Law Students' Association. He extends his gratitude to Professor Susan Chesler for her guidance and inspiration in the pursuit of publication.

ABSTRACT

Systematic exploitation and appropriation of Black musicians reflects patterns of relationships established during and after slavery. While many artists in the industry have managed to achieve great success, Black artists have historically faced unique challenges in their careers, including discrimination, marginalization, and limited access to resources and opportunities. The impact of these challenges is particularly evident in entertainment contracts. These contracts, which are often complex and difficult to navigate, can have significant and disproportionate effects on Black artists, including limiting their earning potential, restricting their creative freedom, and perpetuating inequities in the industry.

This Article provides a comprehensive analysis of the ways in which entertainment contracts can disproportionately affect Black artists. Drawing on case studies and interviews with industry experts and artists, this Article explores how these contracts can perpetuate systemic biases and marginalize Black artists in the entertainment industry. The Article then suggests potential contract terms that can be used to expand legal protections for artists. It argues that addressing the impact of entertainment contracts on Black artists is essential for promoting greater equity and inclusion in the industry and ensuring that all artists can achieve their full potential. Finally, this Article highlights the urgent need for greater attention and action to address the unique challenges faced by Black artists in the entertainment industry. By recognizing the disproportionate effects of entertainment contracts on Black artists and working to address these issues, we can take an important step towards creating a more just and equitable entertainment industry.

INTRODUCTION

The entertainment industry has a long history of taking advantage of African Americans. Throughout much of the 20th century, Black performers were often relegated to stereotypical roles or excluded from mainstream media altogether, while white performers profited from their work.[1] This pattern of exploitation continues to the present day, with Black artists facing barriers to entry, limited representation in the industry, and inequity in

[1] K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008) (discussing the 20th century extortion of Black performers).

contracts.[2] These inequities can have significant consequences for Black artists, both in terms of their financial well-being and their ability to control their own narratives and creative output. To address these issues, it is important for the entertainment industry to promote greater transparency and accountability in the contracts it offers to Black artists. Furthermore, the entertainment industry must work towards greater representation and inclusion of Black voices and perspectives at all levels.

It is difficult to get away from contracts, as people often must interact with them in both their professional and personal lives. Contracts are debatably the area of law people encounter the most, considering they create ongoing, legally binding obligations on the parties.[3] While contracts are typically formed with the goal of allocating risk between the parties, it is important to ensure that the terms of the contract are fair and reasonable for both sides.[4] Equity in contracting helps to ensure that the parties to the contract are on equal footing and that neither side is unfairly advantaged nor disadvantaged. This includes considerations such as the parties' bargaining power, the clarity and completeness of the contract terms, and the potential for unforeseen circumstances to arise. By promoting fairness and balance in contractual relationships, equity helps to promote trust and confidence in the marketplace and to facilitate the smooth functioning of business transactions.[5] As such, understanding the principles of equity in contracting is critical to drafting adequate entertainment contracts.

Though freedom of contract is a staple in American jurisprudence,[6] equity in contracting is particularly important because it can help address historic power imbalances between

---

[2] *Id*. at 1218.

[3] 1 Richard A. Lord, *Williston on Contracts: A Treatise on the Law of Contracts* § 1:1 (4th ed. 1990).

[4] Calomiris v. Woods, 727 A.2d 358, 368 (Md. 1999), *reh'g denied* (explaining "[c]ontracts play a critical role in allocating the risks and benefits of our economy, and courts generally should not disturb an unambiguous allocation of those risks in order to avoid adverse consequences for one party.").

[5] Kevin J. Fandl, *Can Smart Contracts Enhance Firm Efficiency in Emerging Markets?*, 40 NW. J. INT'L L. & BUS. 333, 341 (2020) (discussing what is necessary to develop an effective institution).

[6] *See Freedom of Contract*, CORNELL L. SCH., https://www.law.cornell.edu/ [https://perma.cc/3K2D-KK85] ("Freedom of contract is the ability of parties to bargain and create the terms of their agreement as they desire without outside interference from the government. It is the opposite of government regulation.").

artists and record labels. Black artists have long been exploited by the industry, with record labels taking advantage of their talent and labor while offering unfair and inequitable contract terms.[7] By promoting equity in contracting, artists can negotiate contracts that better reflect their true worth and that protect their interests. This includes considerations such as fair compensation for their work, control over their creative output, and transparency in accounting and revenue sharing. I argue that by fighting for equity in contracting, Black music artists can both improve their own economic prospects and help challenge the systemic inequalities that have long plagued the entertainment industry. Often, artists overlook implementing strong contract terms into their agreements to address unfair treatment. Instead, they typically wait for legislative bodies to create or amend laws or seek change through the judicial system.[8]

However, the quickest and most efficient way to effectuate change likely does not involve waiting for the legislature or judicial system. These traditional methods rely on the ability to make changes to public laws.[9] A clearer path to substantial change for Black artists likely comes from private law in the form of creative contract drafting.[10] Contract drafting choices can have an immediate effect on the entertainer, whether it relates to salary, intellectual property, termination of the agreement, or some other matter. Historically, artists of color have had little to no bargaining power in negotiating contract terms against more powerful transacting parties. However, Black celebrities have lately become the most well-known, influential, marketable personalities and trendsetters across the entertainment landscape.[11] I suggest that Black artists use

---

[7] *See generally* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMS. & ENT. L. J. 339 (1998), https://repository.uchastings.edu/ [https://perma.cc/24AU-6S5V].

[8] LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS, BRENNAN CTR. FOR JUST. (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015), https://www.brennancenter.org/ [https://perma.cc/3KWZ-FGAU].

[9] For purposes of this Article, public law refers to the part of law that governs relations between legal persons and a government or government agency. Public law affects society as a whole and includes constitutional law, administrative law, and criminal law.

[10] For purposes of this Article, private law affects the rights and obligations of individuals, families, businesses, and small groups and exists to assist citizens in disputes that involve private matters. Its scope is more specific than public law and does not affect society as a whole.

[11] *Black Influence Goes Mainstream in the U.S.*, NIELSEN (Sept. 2015), https://www.nielsen.com/ [https://perma.cc/9XNS-RPGG].

their influence and recent gain in bargaining power to implement terms that would not only benefit them personally but also change the norms of the industry.

Additionally, legislative or judicial intervention often demands changes in contract law to achieve their goal of equity. For example, in response to the #MeToo movement, activists across the globe insisted that there be changes to the policies and practices allowing sexual harassment, sexual assault, and sexual abuse in the workplace.[12] The #MeToo movement encouraged several states to enact new laws, many of which are directed at protecting marginalized groups through the substance of employment contracts.[13] The most common change was to limit the use of non-disclosure agreements by employers.[14] Although these changes seem promising, if contracting parties opted to include protective language in their agreements preemptively, substantial change would likely be achieved sooner. Moreover, there is an argument that, historically, Black people fare better with free labor markets as opposed to federal regulation.[15] During the early twentieth century, many courts declared a variety of regulatory statutes unconstitutional on liberty of contract grounds.[16] For example, the Supreme Court in *Lochner v. New York* found that the plaintiff's general right to make a contract relating to his business was protected by the Fourteenth Amendment and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power.[17] There is a debate between scholars whether those decisions striking down government regulations aided Black interests.[18]

This Article argues that creative contract drafting should be considered as the principal means for Black artists to achieve more equitable agreements. It will examine some of the challenges that artists of color face in the entertainment industry and suggest terms these entertainers should consider adding or eliminating from their agreements.

---

[12] *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234–35 (2018).

[13] Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 991–92 (2021).

[14] *See id*.

[15] Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1541 (2002).

[16] *Id.* at 1542.

[17] Lochner v. New York, 198 U.S. 45, 63-64 (1905).

[18] Douglas, *supra* note 15, at 1541–42.

Part II of this Article examines the history of the entrainment industry taking advantage of Black artists through inequitable contracting, dating back to slavery. Part III examines how artists are paid through royalties and reviews a recent study that demonstrates bias against Black artists is still prevalent, allowing Black artists to be paid less than their white counterparts. Part IV suggests contract terms for entertainers to include in their agreements to better protect their interests and suggest terms Black artists should lobby to limit or remove completely from their employment agreements. Part V concludes. While there is a long history of change through legislative and judicial intervention, this Article aspires to establish why creative contract drafting can be used as an effective means for change.

I. HISTORY OF THE ENTERTAINMENT INDUSTRY TAKING ADVANTAGE OF BLACK ARTISTS

The history of the music industry taking advantage of African Americans can be traced back to the days of slavery.[19] Slaves were forced to work on plantations, and music was a form of entertainment to help them forget their harsh living conditions.[20] Slave owners began exploiting this form of music, using it to increase productivity and profit by forcing slaves to sing while they worked. This exploitation continued after the abolition of slavery, with Black musicians being exploited by white record label executives who stole their music and profits. Even today, Black musicians continue to face systemic racism within the music industry.

A. EXPLOITATION: SLAVERY THROUGH THE 1980S

The music industry's exploitation of African Americans reflects a pattern established during and after slavery.[21] Slave owners were businessmen who thrived on getting the greatest return on their most important asset—slaves.[22] These ideals continue to shape the music industry.[23] The story of the American composer and pianist Thomas Wiggins (Blind Tom) is one of the most notorious instances of a slave exploited for their musical talents.

---

[19] Olufunmilayo Arewa, *Denying Black Musicians Their Royalties has a History Emerging Out of Slavery*, THE CONVERSATION (May 12, 2021), https://theconversation.com/ [https://perma.cc/2QZ4-D7TC].

[20] *Songs Related to the Abolition of Slavery*, LIBR. OF CONG., https://www.loc.gov/ [https://perma.cc/A3AG-CAEZ].

[21] Arewa*, supra* note 19.

[22] *Id.*

[23] *Id.*

Wiggins was born into slavery on a Georgia plantation in 1849, blind and with undiagnosed autism. He was sold, along with the rest of his family, for a discount to James Neil Bethune.[24] Wiggins was unable to perform the work that other slaves performed outdoors, thus allowing him to explore indoors.[25] He quickly found a piano, which Mr. Bethune's daughter learned to play on, and began to copy different sounds that he would hear.[26] Once Mr. Bethune realized that Wiggins was naturally talented, he used Wiggins' ear for music as an opportunity to increase the return on his investment.

It is reported that Wiggins soon began playing up to twelve hours a day to perfect his craft; however, it is unclear if his dedication was solely self-motivated.[27] At the age of six, Mr. Bethune had toured Wiggins across the country. By the time he reached eight, he was being hired out to the entertainment industry to tour the country. Wiggins' talents would make his promoter and Mr. Bethune over $100,000 a year ($3.4 million today). In total, the Bethune family is thought to have exploited Wiggins to the tune of $750,000 ($25.4 million).[28]

Wiggins was a musical genius with an excellent memory and a host of exemplary accomplishments, including a repertoire of over 7,000 songs, touring Europe when he was only sixteen, helping raise money for the confederacy during the Civil War, and being the first African American to perform at the White House.[29] Despite these accomplishments, the media described him as an animal which could be made to perform for the public's amusement.[30]

The manipulation doesn't stop there. Even after the Emancipation Proclamation and the ratification of the 13th Amendment outlawing slavery, record labels continued to take advantage of Black artists. Richard Wayne Penniman (Little Richard), one of the most influential artists of his time, was the

---

[24] Anthony Tommasini, *He Was Born Into Slavery, but Achieved Musical Stardom*, N.Y. TIMES, (Mar. 3, 2021), https://www.nytimes.com/ [https://perma.cc/R35M-X7G3].

[25] *Id.*

[26] *Id.*

[27] GENEVA HANDY SOUTHALL, BLIND TOM, THE BLACK PIANIST-COMPOSER (1849-1908): CONTINUALLY ENSLAVED 56 (1999).

[28] *Id.*

[29] *Id.*

[30] Sophia Alexandra Hall, *The Exploitation of Pianist Thomas Blind Tom Wiggins, the Musical Prodigy Born into Slavery*, CLASSIC FM (Aug. 4, 2023, 4:36 PM), https://www.classicfm.com/ [https://perma.cc/LF3G-ZEP5].

eldest of twelve brothers and sisters.[31] He was born in Macon, Georgia, and became the head of the household when his father passed away when he was nineteen years old.[32] The responsibility fell on him to provide for his mother and siblings. He was a dishwasher at a Greyhound bus station by day and performed at miscellaneous clubs throughout the southeast at night.[33] Regardless of the number of dishes washed or shows performed, he could not make ends meet. He believed that his only chance to create a sustainable life for his family was to create a hit song.[34]

Specialty Records, one of the only labels that would work with Black artists at the time, gave Little Richard his first big opportunity after he called them almost every week for a year.[35] One of the first five songs he created, Tutti Frutti, changed music history and was the groundwork for what later became known as rock 'n' roll. Tutti Frutti was an instant success. Within a week of its release, the song had already sold 200,000 plus copies, continuing to sell over three million by 1968.[36] The royalties from Tutti Frutti made the specialty owner, Art Rupe, millions of dollars.[37] Little Richard on the other hand was paid $50 for his song and half a cent for every copy it sold – ten times less than his white colleagues.[38] Little Richard later told his biographer, "[i]f you wanted to record, you signed on their terms or you didn't record."[39]

Skipping to the '80s, the "golden age" of Hip Hop, Black artists were still not receiving their fair share. When MTV (a network that, at the time, was dedicated to music videos) launched in 1981, it was difficult to find a Black face.[40] J.J. Jackson was the sole Black entertainer on the cast, and People of Color were given little screen time.[41] There was a combination of White and Black artists that

---

[31] Drew Schwartz, *Black Artist are Still Getting Ripped Off the Way Little Richard Was*, VICE (Oct. 21, 2020), https://www.vice.com/ [https://perma.cc/G8VG-XTVS].

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] David Browne, *Little Richard, Founding Father of Rock Who Broke Musical Barriers, Dead at 87*, ROLLING STONE (May 9, 2020), https://www.rollingstone.com [https://perma.cc/8T65-8NDU].

[36] *Id.*

[37] CHARLES WHITE, THE LIFE AND TIMES OF LITTLE RICHARD 209 (Omnibus Press 3d ed. 2003).

[38] *Id.*

[39] *Id.*

[40] Nadra Kareem Nittle, *How MTV Handled Accusations of Racism and Became More Inclusive*, LIVE ABOUT (Jan. 14, 2020), https://www.liveabout.com/ [https://perma.cc/B4BJ-C4SS].

[41] *Id.*

played a major role in getting MTV to end the "Black Out" and grant better contract terms to Black artists.[42] First, Michael Jackson and his record label would have to battle with MTV to get his hit track, Billie Jean, aired on their network. Reportedly, the president of CBS Records at the time threatened to remove all CBS videos from MTV before the network would agree to air Jackson's "Billie Jean."[43] Though "Billie Jean" did receive substantial airtime once it finally made it on MTV, MTV's demographic was still monochromatic. Second, during the same year in an interview with MTV, David Bowie asked a question that brought more attention to this dilemma, stating, "I'm just floored by the fact that there are so few Black artists featured on [MTV]. Why is that?"[44] This was a critical moment because a well-known, young White artist was advocating for artists of color. Finally, although MTV's market was initially prominently rock 'n' roll, the popularity of pop music, hip hop, and R&B forced the network to diversify.

B. EXPLOITATION: 1990S TO PRESENT

Fast forward ten years and little changed. Many articles have interpreted the contract between Prince and Warner Brothers.[45] Though they all give varying perspectives, a general understanding of the agreement can be ascertained: on the surface, the deal awarded Prince 100 million dollars, when in reality the contract was only hypothetically worth that amount.[46] The complicated compensation structure provided Prince with approximately ten

---

[42] *Id.*

[43] *Id.*

[44] Elahe Izadi, *This is How David Bowie Confronted MTV When it Was Still Ignoring Black Artists*, WASH. POST (Jan. 11, 2016, 3:58 PM), https://www.washingtonpost.com/ [https://perma.cc/VN7X-6GNJ].

[45] *See, e.g.*, Richard Harrington, *Prince's Contract Tiff is a Maze of Numbers*, SEATTLE TIMES (Oct. 28, 1994), https://archive.seattletimes.com/ [https://perma.cc/2UA6-Q7PK]; Chuck Phillips, *Just How Princely is Prince's Deal?*, L.A. TIMES (Sept. 5, 1992), https://www.latimes.com/ [https://perma.cc/Y6N2-HJ3S]; Jon Bream, *Prince's Behind the Scenes Bankability*, MINNEAPOLIS STAR TRIB. (Sept. 5, 1992), https://prince.org/ [https://perma.cc/5A4U-2SWL]; Fred Goodman, *A Man of Many Talents (and $100 Million?)*, N.Y. TIMES (Nov. 1, 1992), https://www.nytimes.com/ [https://perma.cc/9PEU-8T88]; Chuck Phillips, *A King's Ransom for Prince: Artist Signs $100 Million Contract with Warner*, L.A. TIMES (Sept. 4, 1992), https://www.latimes.com/ [https://perma.cc/A3JJ-AMCX]; Jon Bream, *Prince's New Record Deal*, ENT. WKLY. (Sept. 18, 1992), https://ew.com/ [https://perma.cc/LK2H-N6H5].

[46] Bream, *supra* note 45, ¶6.

million dollars for each of the six required album productions.[47] But he would only receive the ten million dollars if the prior released album sold five million copies. Many speculate that the contract was designed in this way to incentivize Prince to devote more time to each album and promote them through gradual releases of his singles, as opposed to freely releasing the albums.[48]

Prince detested this royalty model, as he was less concerned about the financial aspect of the deal, favoring more autonomy over the releases of his music instead. He did not want to be subject to the record label's timeline.[49] Prince was also upset with the contract he received regarding his master tapes. The owner of the master tapes of a recording controls the work, including determining whether it can be licensed and used in video games, television commercials, or soundtracks.[50] Often, as a part of their agreement, artists are required to relinquish rights to their master tapes to their record label.[51]

Prince was a wealthy, successful entertainer when he signed his contract with Warner Brothers in 1992.[52] Unlike many novice entertainers, Prince had the bargaining power and resources to find

---

[47] *Id.*

[48] Andy Greene, *The 25 Boldest Career Moves in Rock History*, ROLLING STONE (Mar. 18, 2011), https://www.rollingstone.com/ [https://perma.cc/K8U6-49S3].

[49] Jon Pareles, *A Re-Inventor of his World and Himself*, N.Y. TIMES (Nov. 17, 1996), https://www.nytimes.com/ [https://perma.cc/97EN-9LTZ] (quoting Prince) ("The music, for me, doesn't come on a schedule. I don't know when it's going to come, and when it does, I want it out. Music was created to uplift the soul and to help people make the best of a bad situation. When you sit down to write something, there should be no guidelines. The main idea is not supposed to be, 'How many different ways can we sell it?' That's so far from the true spirit of what music is. Music starts free, with just a spark of inspiration. When limits are set by another party that walks into the ball game afterward, that's fighting inspiration. The big deal we had made together wasn't working.").

[50] *See* THE COMM. ON ENT. LAW OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, MUSIC RIGHTS PRIMER (Jan. 2003), https://www.nycbar.org/ [https://perma.cc/M9ST-Y7EN] (providing an explanation of the rights of the holder of master tape recordings).

[51] Ed Christman, *Ray Charles' Copyrights a Lucrative Business*, REUTERS ENT. NEWS (May 30, 2010), https://www.reuters.com/ [https://perma.cc/AJH2-MGQX] (explaining that Ray Charles was one of the few prominent recording artists who maintained ownership of his master tapes for much of his career).

[52] *See* Chuck Philips, *Just How Princely is Prince's Warner Bros. Deal?*, L.A. TIMES, (Sept. 5, 1992, 12:00 AM), http://www.latimes.com [https://perma.cc/3HXE-BDC8].

the best attorneys. Yet, he still could not surmount the pressures of the record companies. Traditional principles of contract law fail to adequately address the complexities of real-life contract transactions. The neo-classical contract theory argues that there is already a certain level of natural fairness and self-regulation in contracting, even when there is unequal bargaining power between the parties.[53] Additionally, it has been claimed that "contract law theory is objective, eschewing any notion of social inequities."[54] Although scholars have long called for reforming this theory, seeking more realistic and current analyses of factors that contribute to unconscionable contracts, little has been done to date. Courts rarely overturn contracts based on inequity in bargaining power alone.[55] Furthermore, judges analyzing contract law typically refuse to deliberate the appropriateness of consideration [56] in an agreement.[57]

TLC was one of the most influential music groups of the '90s; their four career Grammy Awards, five MTV Video Music Awards, and five Soul Train Music Awards propelled them to spend over two years on the Billboard 200.[58] Their album "CrazySexyCool" was a hit in Australia, hitting number five on the ARIA Charts and going on to sell fourteen million copies. [59] "CrazySexyCool" became the best-selling album by an American female group and remains the only album by a female group to receive a diamond certification from the Recording Industry Association of America—which they have certified as going platinum twelve times in the USA.[60]

---

[53] Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 832 (2008).

[54] Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 68 (1998).

[55] Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005).

[56] *Consideration*, LAW DICTIONARY, https://thelawdictionary.org/ [https://perma.cc/FZW2-CGC7].

[57] Greene, *supra* note 7.

[58] *Recording Academy Grammy Awards*, GRAMMY, https://www.grammy.com/ [https://perma.cc/R79D-6RHA].

[59] *TLC Album Sales*, BEST SELLING ALBUMS, https://bestsellingalbums.org [https://perma.cc/WNQ8-Q4WQ].

[60] *Id.*

Nevertheless, on July 3, 1995, TLC filed for Chapter 11 bankruptcy.[61] TLC claims to have fallen victim to predatory contract agreements between both their agent, Pebbitone, and their record label, Arista Records.[62] The group's demise came quickly. First, Pebbitone and Arista recouped their investment in recording costs, manufacturing, and distribution, which is the standard practice in the industry.[63] The label agrees to pay the initial costs but expects to recoup their investment regardless of whether an artist achieves success.[64] Second, Pebbitone and Arista went on to charge for an array of other exaggerated expenses, including but not limited to airline travel, hotels, promotion, music videos, food, and clothing.[65] The higher the artists rose in the charts, the more indebted they became.[66] The bleeding continued— managers, lawyers, producers, and taxes were still left to be paid. At the end of the day, each member of the group walked away with less than $50,000 a year for their work.[67] It is a serious injustice when an artist earns only 0.07% of the revenue they generate for their record label.

The same egregious exploitation of Black artists that started when men, women, and children were shackled and forced to perform free labor continues to take place in America today.[68] Major record labels prey on young, poor, Black artists by offering inequitable contracts where the label owns the artist's music rights in perpetuity.[69] These labels offer these artists the same fraction of royalties Little Richard received in 1955. Like that of Little Richard, many of these artists are in situations where this deal may be their only chance.[70] They often try to fight their circumstances to find a better way for themselves and their families; however, the inequities in education and economic disparities that plague the Black community are used as a bargaining tool to make it easier to persuade Black artists to accept bad deals.[71]

A model based on record labels owning artists' intellectual property in perpetuity is profoundly disturbing. The label

---

[61] Jacob Colliver, *The Dark Tale of TLC Going Bankrupt in the 90's*, BEAT (Apr. 13, 2021), https://beat.com.au/ [https://perma.cc/6EY8-KB9P].
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Schwartz, *supra* note 31.
[69] *Id.*
[70] White, *supra* note 37.
[71] *Id.*

effectively owns a creation the artist paid for.[72] It is difficult to find another industry where a person pays for a good and does not receive title. For example, when a customer purchases a car on credit from a dealership, the dealership owns the car. Yet, once the customer pays the dealership back in full, title transfers to the customer. This is not so in the music industry.

The increase of NDAs in artists' contracts limits society's exposure to the exploitation unless artists air their frustrations publicly. The news is littered with Black artists manipulated by the entertainment industry. In 2018, Megan Thee Stallion brought suit in Harris County to expedite the release of her album "Suga," recoup one million dollars in damages, and terminate her contract with 1501.[73] She alleged the label was engaged in fraud, breach of contract, negligent misrepresentation, and other civil law violations.[74] Stallion explained that she felt taken advantage of by the label. She was twenty-three when she signed her first record deal and felt the label "took complete advantage of her and fraudulently induced her to enter into the contract."[75] The terms of her contract entitled 1501 to 60% of her recording profits, higher than the industry standard of 50%. The contract was structured as a "360 deal" where artists are also required to share profits from sectors that labels previously left to artists.[76] For example, 1501 would take 50% of Stallion's publishing, 30% of touring income, 30% of merchandising, control of her merchandising rights, and a portion of sponsorships and endorsement deals.[77]

The tides have not turned. In January 2019, Kanye West filed two lawsuits against Sony and Universal Studios.[78] Though most of the information was redacted, West went on a Twitter rant in September 2020, announcing that he would refuse to release any new music until he was released from his current contract with Universal and Sony.[79] Drawing attention to entertainment contracts,

---

[72] Colliver, *supra* note 61.

[73] Marc Hogan, *Why is Megan Thee Stallion Suing Her Record Label?*, PITCH FORK (Mar. 6, 2020), https://pitchfork.com [https://perma.cc/5FE8-FYBP].

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Rania Aniftos, *Kanye West Compares Himself to Nat Turner, Says He's Not Releasing Music Until He's 'Done' With Sony & Universal Contracts*, BILLBOARD (Sept. 15, 2020), https://www.billboard.com/ [https://perma.cc/39ZT-JMW9].

[79] *Id.*

West posted a copy of the agreement, stating, "I need every lawyer in the world to look at these," while later referring to the music industry as "modern-day slavery."

II. TYPES OF PROBLEMS THAT REMAIN IN BLACK ARTISTS' CONTRACTS

The music industry has a long history of inequitable royalty deals and unfair contract terms, and these practices continue to affect Black artists disproportionately. Despite their immense talent and contributions to the industry, Black artists have historically received lower royalties and been subjected to unfair contract terms, often resulting in lost revenue and limited creative control. This systemic injustice has perpetuated the exploitation of Black artists and the economic disparities within the music industry. Despite recent efforts to address these issues, such as the implementation of new legislation and the rise of independent record labels, much work remains to be done to ensure Black artists receive the recognition, compensation, and creative autonomy they deserve.

A. INEQUITABLE ROYALTIES

Royalties are payments to artists, songwriters, composers, publishers, and other copyright holders for the right to use their intellectual property.[80] Historically, royalty payments from physical album sales were one of the primary sources of revenue for record labels.[81] Labels negotiated low royalty payments to artists for the sale of physical albums in return for providing the high album manufacturing and distribution costs.[82] These labels sought to retain most of the royalties as recoupment for their investment in the expensive physical distribution system.[83] Though artists may fare better because a smaller portion of their income is made from album sales or radio royalties, which can be taken by record labels, labels continue to appropriate most of their income through streaming

---

[80] Rory PQ, *How Music Royalties Work in the Music Industry*, ICON COLLECTIVE (Mar. 30. 2020), https://www.iconcollective.edu/ [https://perma.cc/ZR8Y-JAKJ].

[81] Lauren K. Turner, *The Impact of Technology on Pre-Digital Recording Agreements: An Examination of* F.B.T. Productions, LLC v. Aftermath Records, 114 W. VA. L. REV. 347, 352 (2011).

[82] Brief for The Motown Alumni Ass'n as Amicus Curiae Supporting Appellants at 10-11, F.B.T. Prods., L.L.C. v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010) (No. 09-55817), 2010 WL 2751584, at *10–11.

[83] *Id.*

royalties, neighboring rights royalties, digital performance royalties, public performance royalties and mechanical royalties.[84]

As labels struggled to adjust to modern music distribution systems, they continued to shrink royalty payments to artists. One strategy they employed was to interpret contracts as they were interpreted before the digital age of music.[85] Older recording contracts did not address streaming or other methods to digitally distribute music; record labels asserted that music purchased through an online retailer service constituted a sale under their traditional royalty regime.[86] Artists opposed this reasoning, arguing that online sales of albums were licenses and not sales, which would provide the artist with the industry norm of fifty percent.[87]

Artists and their labels are not the only parties to this disagreement, as U.S. courts struggle to interpret contract terms considering new digital distribution methods. In *Malmsteen v. Universal Music Group, Inc.*, the U.S. District Court for the Southern District of New York held that digital downloads are considered to be a record sold, providing the artist with a reduced royalty rate (i.e., eight to fifteen percent).[88] In contrast, the Ninth Circuit in *F.B.T. Productions, L.L.C. v. Aftermath Records* ruled that a purchase of a record through an online retailer was considered a license, which demanded a higher royalty percentage (i.e., fifty percent) to the artist for each digital download.[89]

---

[84] David Hesmondhalgh, *Is Music Streaming Bad for Musicians? Problems of Evidence and Argument*, 23 NEW MEDIA & SOC'Y, no. 12, 3593, 3595–97 (2021).

[85] Brief for The Motown Alumni Ass'n as Amicus Curiae Supporting Appellants, *supra* note 82, at *9–11.

[86] *iTunes*, APPLE, https://www.apple.com/itunes [https://perma.cc/R4BE-DLQ4].

[87] Historically, the industry rate for royalties accrued for licensed records was 50%. The percentage was based on the record company's net receipts, meaning the costs paid by the purchaser, minus costs of duplication, shipping, etc. Recently, however, labels have created new departments within their companies, normally referred to as "special markets" or "catalog" departments. These departments are tasked with taking recordings and developing creative ways to make money off of them. To cover the costs of these departments, labels charge a fee of fifteen to twenty-five percent of master license receipts, which is taken off the top, before an artist's royalty is deducted. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 144-45 (9th ed. 2015).

[88] Malmsteen v. Universal Music Grp., Inc., 940 F. Supp. 2d 123, 131–32 (S.D.N.Y. 2013).

[89] F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958, 966–67 (9th Cir. 2010).

Entertainment contracts often contain complex and lengthy language that can be difficult for even the most experienced lawyers to decipher. It has become increasingly clear that the use of certain contract terms can have a disproportionately negative impact on Black artists.[90] For example, option clauses that give record labels or production companies the right to extend an artist's contract term without their consent result in tying artists to a label or production company against their wishes for years. Additionally, recoupment clauses that require an artist to pay back all of their expenses before receiving any royalties can make it nearly impossible for some Black artists to recoup their investments, as they are often required to pay for their recording costs, touring expenses, and other costs upfront.[91] Although these issues plague any young artist, the effect is even more damaging to the Black community because these contract terms can create significant barriers for Black artists trying to break into the entertainment industry and can perpetuate inequalities that have existed in the industry for decades.

Historically, legal devices such as restrictive covenants were used to exclude certain "out" groups from access to property.[92] African Americans constituted those archetypal "out" groups.[93] Social status and copyright law replicated inequality and deprived the Black community of millions in royalties and other revenues.[94] African Americans, as a class, received less protection for artistic musical works due to inequal bargaining power, the clash between the structural elements of copyright law and the oral predicate of Black culture, and broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works.[95]

---

[90] Patrice L. Johnson, *Are Black Entertainers More Likely to Receive Unfair Contract Agreements Than Their White Counterparts?*, RACE, RACISM & L. (July 27, 1998), https://academic.udayton.edu/ [https://perma.cc/PX37-F2DG].

[91] *TLC Album Sales*, *supra* note 59; Colliver, *supra* note 61.

[92] Racially restrictive covenants in real estate sales were enforceable until the late 1940s. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (striking down state enforcement of racially restrictive covenants in real property titles).

[93] Justice Stone, in his famous footnote four, coined the term "discrete and insular minorities" to describe such "out' groups in our society. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[94] The amount of revenue lost due to creative appropriation and cultural devaluation cannot be quantified, but it is not unreasonable to presume it is a staggering sum. *See* Paul Robeson, *The Negro Artist Looks Ahead*, *in* 6 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 85, 85–86 (Herbert Aptheker ed., 1993).

[95] Greene, *supra* note 7.

For example, Frankie Lymon and his Black band members co-wrote the song "Why do Fools Fall in Love," which became a 1950s hit.[96] Commonplace at the time, the group's manager registered the song under only Lymon's and the manager's names, leaving the other Black authors without royalties. Similarly, Bo Diddley authored many hit songs but was unable to reap the financial benefits because the White performers who "covered" his work eliminated his opportunity.[97]

Artists are still agreeing to low-rate royalty deals, and because of the legalese and dense contract terminology, these contracts are more suffocating than they appear.[98] In some instances, record labels include deductions on royalties for a variety of factors, from the format people use to consume the music to the territory people access the music in. For example, in a small sub-section of a ninety-three-page contract, there may be a term that states: "any revenue earned internationally on Spotify, Apple Music, or Amazon Music, the artist only receives 75% of their agreed-upon royalty rate."[99] Much of the archaic standard language used in the 1950s contracts remains in artists' contracts today.[100] Artists are still paying for "packing deductions," which are included for CD packaging—though now major artists rarely release music on CD.[101] It is evident that labels continue to take advantage of and manipulate Black artists through the use of predatory deal-making, unfair contracts, and hidden clauses. But it is often difficult to compare how frequent or egregious the inequity is in entertainment contracts due to Non-Disclosure Agreements (NDAs), which require the artist to keep all

---

[96] *Id.*

[97] *Id.* at 373.

[98] *See* Emily Tribulski, *Look What You Made Her Do: How Swift, Streaming, and Social Media Can Increase Artists' Bargaining Power*, 19 DUKE L. & TECH. REV. 91, 96–97 (2021) ("Even as one of the most powerful artists in the world, Swift was locked into a 'bad deal' that she made at a young age.").

[99] Kanye West, *Kanye West - Contract Leak - Contract 04*, INTERNET ARCHIVE 24 (Sept. 9, 2020), https://archive.org/ [https://perma.cc/R9ZP-V6BT] (including multiple stipulations to Kanye West's royalty payments on the twenty-fourth page of a fifty-two-page agreement from record company).

[100] *Id.*

[101] Bobby Owsinski, *The Music Album is Dead, but Not Everyone's Accepted It Yet*, FORBES (Mar. 10, 2018, 10:00 AM), https://www.forbes.com/ [https://perma.cc/69MR-JM35]; *U.S. Music Revenue Database*, RIAA (2023), https://www.riaa.com/ [https://perma.cc/6SFL-2E56].

terms of the agreement confidential. If labels are allowed to hide the alleged discrimination, a clear path to change is unobtainable.

B. BMG STUDY DISPLAYING ROYALTY DISPARITIES

Currently, an artist's income is comprised of a variety of different royalty schemes, including streaming, digital performance, public performance, and mechanical royalties.[102] These schemes become even more complex when you consider that an identical royalty scheme can yield different payouts, depending on the context of its use. For example, your favorite restaurant and global streaming services pay out public performance royalties with very different processes. Even more complication arises when artists gain international recognition because pay rates vary vastly depending on the country, and certain royalty types are unavailable in all countries. For example, U.S. master rights holders do not get royalties for radio airplay, while they do in most of the world. The complexities of these contracts likely assist in perpetuating the discriminatory contract terms included in Black artists' contracts.

BMG, a Germany-based company, announced in June 2022 that it would examine the contracts of the recorded music catalogs it had acquired between 2008 and 2019 to determine whether there was any evidence of racial inequity.[103] The company launched the study after the music industry's Blackout Tuesday, a memorial event recognized globally in the wake of the killing of George Floyd.[104] The company's COO, Ben Katovsky, led the study and said that analyzing the thousands of artists' royalty accounts and millions of lines of data was a "huge undertaking."[105] BMG has recently acquired several recording catalogs, including thirty-three labels by 3,163 artists, with 1,010 (32%) of those being Black.[106] The recorded catalogs date back to the 1960s, giving a broad timeline to base results.[107] BMG used a review of their own recorded catalogs of more than 800 recording agreements to establish a control for the

---

[102] *How Music Royalties Work: 6 Types of Music Royalties*, SOUNDCHARTS BLOG (Jan. 8, 2020), https://soundcharts.com/ [https://perma.cc/KK7L-64D9].

[103] Jem Aswad, *BMG Finds Evidence of 'Discriminatory Contract Terms for Black Artists' in Four Catalog Labels*, VARIETY (Dec. 18, 2020, 6:55 AM), https://variety.com/2020/music/news/bmg-catalogs-racial-discrimination-1234865532/.

[104] *See id.*; Joe Coscarelli, *#BlackoutTuesday: A Music Industry Protest Becomes a Social Media Moment*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/ [https://perma.cc/KN42-MGVJ].

[105] Aswad, *supra* note 103.

[106] *Id.*

[107] *Id.*

study, which found no discrimination between Black artists and their counterparts across their data.[108] Of the labels acquired between 2008 and 2019, fifteen featured both Black and non-Black artists.[109] After review, four of those labels were found to discriminate against Black artists by paying them reduced recording royalty rates.[110] The difference in rates ranged from 1.1 to 3.4 percentage points.[111] While these numbers may not seem drastic, BMG currently accounts for less than 2% of the global recorded music market and are aware that their study could never accurately represent the discrimination that plagues the industry.[112]

III. SUGGESTED CONSIDERATIONS FOR BLACK ARTISTS' CONTRACTS

For Black artists, negotiating fair and equitable contracts with record labels and other industry players is crucial to achieving success and financial stability in the music industry. The music industry has a history of exploiting Black artists and perpetuating economic disparities through unfair contract terms and unequal bargaining power. As such, Black artists must clearly understand the key contract considerations they should be aware of when negotiating with industry players. This section will discuss some suggested contract considerations for Black artists, including definitions, transparency, plain English contract drafting, morals clauses, non-disclosure agreements, and inclusion riders. By understanding these considerations and advocating for their rights, Black artists can work toward building more equitable and sustainable careers in the music industry.

A. USE OF UNIFORM DEFINITIONS

Like a typical contract, this section begins with definitions. The "definition" section is important in contracts for Black artists because it helps establish clarity and consistency in interpreting the contract terms. These sections define key terms and phrases used throughout the contract, which can be critical to ensuring that both parties have a shared understanding of the obligations and expectations set out in the agreement.

---

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

Contract interpretation is the largest single source of contract litigation.[113] It is critical that contract terms are unambiguous. To achieve this goal, many contracts include a "definition" section at the beginning of the agreement or before a relevant provision.[114] Defined terms are given specific definitions in the contract. The term's definition applies in the context of the particular contract, and definitions are generally only applicable to that contract. Defined terms also ensure consistency throughout the agreement. A failure to define terms in a contract often leads to a dispute when two parties have opposing understandings.[115] This has resulted in struggling artists being taken advantage of by the power of the recording industry.

Analogously, it is imperative that artists use the same vocabulary to discuss diversity, equity, and inclusion when drafting contracts and reviewing provisions with the other party. The National Association of Student Personnel Administrators (NASPA) has created a terminology guide to bring together definitions and resources to establish a common language to be used within and across leadership programs, civic engagement and diversity, equity, inclusion, and social justice work.[116] The guide also attempts to harmonize some of the often-misguided interpretations of terminology regarding current political and public discourse. Though this project intended to advance anti-racism and social justice efforts in higher education and student affairs, it lends itself to multiple functional areas addressing inequality. NASPA's guide highlights terminology that could be incorporated in the contract and clearly defines those terms.

A clear definition of Black Individuals of Color, Ethnicity, and Diversity would play a key role in drafting an effective inclusion rider (see Part F). The inclusion rider aims to increase the diversity and inclusion of traditionally underrepresented groups in the entertainment industry. It would be difficult to achieve this goal if we did not have clear guidance for what success would look like. For example, a broad definition of diversity would include all traditionally underrepresented groups, such as women, people of

---

[113] Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010).

[114] M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts*, 5 J. ASS'N LEGAL WRITING DIRS. 79, 94 (2008).

[115] Debra Cassens Weiss, *One Word in a Purchase Agreement Leads to $310M Malpractice Suit Against 2 BigLaw Firms*, ABA J. (Oct. 18, 2021) https://www.abajournal.com/ [https://perma.cc/DK7Z-T469].

[116] Jasmin Collins et al., *SLP-CLDE KC Anti-Racism Terminology Guide 2020-2021*, NASPA (2021), https://diversity.iu.edu [https://perma.cc/YXR6-JB3M].

color, LGBTQ+ individuals, and people with disabilities. Such a broad definition may dilute the talent pool and make it more difficult for Black artists to achieve their specific diversity goals.

Additionally, with the rise in civil unrest in the United States and the series of demonstrations and protests that surround police brutality, such as the killing of George Floyd in May 2020, it would be beneficial to artists to have a clear definition of civil action and have it excluded from their morals clauses (see Part D). For example, NASPA defines Civic Engagement as "Political and non-political behaviors aimed at making a difference in the civic life of communities to which one belongs."[117] If artists value their voice to openly discuss issues affecting their communities, creating a carve-out with a detailed definition would be imperative. These definitions can protect artists by providing the precise language needed to effectuate change. Once everyone is speaking the same language, we can move to addressing the contract terms.

B. COMPENSATION TRANSPARENCY

Transparency in contracting is the solution. Transparency promotes fairness and accountability in contracting by enabling all parties to identify potential issues and negotiate more effectively.[118] For example, if one party has significantly more bargaining power than the other, transparency can help level the playing field by giving the less powerful party the information they need to make informed decisions about the contract's terms. Moreover, transparency can help prevent unethical or illegal behavior by ensuring that all parties are aware of their legal obligations and the consequences of non-compliance.[119] This is particularly important in industries that are prone to exploitation or abuse, such as the entertainment industry, where artists and creators may be vulnerable to exploitation by more powerful entities. Record labels and artists would likely resist fully disclosing artists' salaries and royalty schemes. However, including a range can be a simple way to allow artists to have a better gauge of what their talent is worth. The importance of transparency can be shown through one of America's largest regulators, the Securities Exchange Commission. The federal regulatory agency, founded in 1933, oversees and enforces federal securities laws, which are designed to protect investors and

---

[117] Collins et al., *supra* note 116, at 7.

[118] Matthias Fahn & Giorgio Zanarone, *Transparency in Relational Contracts*, 43 STRATEGIC MGMT. J. 1046, 1057–60 (2022).

[119] Jay Lawrence Westbrook, *Transparency in Corporate Groups*, 13 BROOK. J. CORP. FIN & COM. L. 33, 33–36 (2018).

promote fair, transparent, and efficient markets.[120] The SEC plays a critical role in maintaining confidence in the securities markets and ensuring that companies, brokers, and other market participants comply with legal requirements, thereby promoting investor protection and market stability.[121]

If successful Black artists use their newly acquired social and financial influence as a vehicle to demand transparency from record labels, we could finally establish a clear view of the racial disadvantages in the music industry at scale. Moreover, Black artists across the world would have tangible evidence to advocate for stronger, more equitable, terms in their contracts.

C. PLAIN ENGLISH CONTRACT DRAFTING

Why are contracts so hard to read? Dating back to as early as 1596, contract drafters have chosen to use arcane language to express commonplace ideas—sometimes to their own demise.[122] English lawyers have long taken pride in creating their own language. In 1817, Thomas Jefferson made clear that he and his fellow lawyers were accustomed to "making every other word a 'said' or 'aforesaid,' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means." Thankfully, there has been a movement toward plain language legal writing. Law schools, court rules, and federal agencies have all been transitioning toward clearly written legal language to achieve greater benefits for transacting parties. For example, a motorcycle manufacturer's clearly written warranty can help sell motorcycles, and a clearly written service agreement can reduce the likelihood of costly litigation in the future. The executive branch has already taken a strong stance on plain English writing. In 2010, President Barack Obama signed The Plain Writing Act into law, which requires "government agencies to write clear communication that the public can understand and use."[123] The president's goal was to emphasize transparency—a trait often lost in the entertainment industry.[124]

---

[120] *Mission*, U.S. SEC. & EXCH. COMM'N. (Aug. 29, 2023), https://www.sec.gov/ [https://perma.cc/DMW4-EP2B].

[121] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1199, 1210 n.57 (1999).

[122] RICHARD WYDICK & AMY SLOAN, PLAIN ENGLISH FOR LAWYERS 3 (6th ed. 2019).

[123] Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

[124] *See* Cass Sunstein, *Putting it Plainly*, OBAMA WHITE HOUSE ARCHIVES (Apr. 19, 2011, 11:00 AM), https://obamawhitehouse.archives.gov/ [https://perma.cc/84P2-BLGU].

Reading and understanding a contract shouldn't require a law degree. Frequently, artists are relinquishing significant control over their creative output and personal brand by signing contracts with agents and recording companies. Sometimes, these entertainers' only choice is to accept an unfavorable deal.[125] Furthermore, other artists are manipulated into agreeing to inequitable terms because the agreement is either inadvertently or intentionally long-winded, unclear, or amorphous. For example, a profit-sharing provision from one of Kanye West's above-mentioned contracts reads,

> In connection with the sale or other exploitation of Phonograph Records derived from the Master Recordings recorded during the Initial Period and the Option Period, in lieu of accruing royalties to your account hereunder in accordance with the provisions of Article 7 of the Recording Agreement (which have been incorporated herein), IDJ shall pay to Grantor the Net Proceeds and Net Licensing Proceeds earned in connection therewith.[126]

Effective legal writing does not sound like an attorney wrote it. This is underscored by the fact that more than half (54%) of Americans between the ages of sixteen and seventy-four read below the equivalent of a sixth-grade level, according to a piece published in 2022 by APM Research Lab.[127] Contract language is most effective when it is targeted toward the reading level of the contracting parties.[128] Artist should refuse to sign contracts that are littered with legalese and other unnecessary jargon. Instead, artists should advocate for a mandatory required readability score. Readability refers to the ease at which the reader can understand a passage of text.[129] Many factors affect readability, including sentence structure, delivery, vocabulary, length, and content. When drafters are mindful of writing at a high level of readability, it is far

---

[125] Schwartz, *supra* note 31.

[126] Tyler Sharp, *Kanye West Posts Over 100 Pages Of His Record Label Contracts, Tweet By Tweet*, XXL (Sept. 16, 2020), https://www.xxlmag.com/kanye-west-record-contracts-tweets-docs/ [https://perma.cc/94KK-UZJ2].

[127] Emily Schmidt, *Reading the Numbers: 130 Million American Adults Have Low Literacy Skills, but Funding Differs Drastically by State*, APM RSCH. LAB (Mar. 16, 2022), https://www.apmresearchlab.org/ [https://perma.cc/CP4J-XWLD].

[128] WYDICK & SLOAN, *supra* note 122, at 5.

[129] *Readable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/ [https://perma.cc/MN7X-M2AQ].

more likely that communication is easily understood. The most common way to calculate a readability score is to analyze the number of characters, syllables, words, and sentences. For example, the Flesch Reading Ease Test uses a mathematical formula to determine how easily a text reads. A higher number (90–100) means a text is easier to read; a lower number (0–30) means it is more difficult.[130] The calculation subtracts total syllables from total words, then subtracts that sum from the total sentences minus total words.[131] Artists could require a similar readability rating that would make agreements easier to understand.

Readability is even more important for Black artists because of differences in graduation rates in the United States. White students are 250 percent more likely to graduate than Black students at public universities.[132] According to the National Assessment of Educational Progress (NAEP), eighty-five percent of Black students lack proficiency in reading skills, which is twenty-eight points lower than that of White Students.[133] The industry boasts many famous Black high school and college dropouts, including Jay Z, Lil Wayne, Mary J. Blige, LL Cool J, and Rihanna.

Many plain language statutes address consumer contracts. These statutes protect consumers by requiring a minimum readability score for contracts, which helps them better understand their rights and duties.[134] The motivation for these statutes is the unequal bargaining power between companies and consumers.[135] Plain English contract drafting should be implemented whenever one party is unsophisticated or unrepresented—like many young Black artists.

---

[130] *The Flesch Reading Ease Readability Formula*, READABILITY FORMULAS, https://readabilityformulas.com/ [https://perma.cc/KKC3-69MY].

[131] *Id.*

[132] Olivia Sanchez & Meredith Kolodner, *Why White Students are 250% more likely to Graduate Than Black Students at Public Universities*, HECHINGER REP. (Oct. 10, 2021), https://hechingerreport.org/ [https://perma.cc/CC3P-RVCP].

[133] Armstrong Williams, *Many of America's Black Youths Cannot Read or Do Math — and That Imperils Us All*, THE HILL (Nov. 4, 2021, 9:00 AM), https://thehill.com/ [https://perma.cc/E2KF-4KFB].

[134] Michael Blasie, *The Rise of Plain Language Laws*, 76 U. MIAMI L. REV. 447, 484 (2022) (discussing the requirement of a minimum readability score).

[135] *See id.* at 465–66.

D. REVERSE MORALS CLAUSES

While morals clauses have become popular contract devices, they are typically drafted for the benefit of employers.[136] Often, entertainers are bound by morals clauses that stipulate certain actions or activities, even those undertaken in private life, that may be grounds for termination of the agreement. For example, these contracts may state that at any time, in the sole judgment of the Label, if the Artist has engaged in personal conduct reasonably judged to reflect adversely on the Label, the agreement may be terminated. These provisions can be problematic when there is a large power difference between the parties, as in the entertainment industry. In today's world of social media, it seems difficult for any artist to confine their behavior in a way that would not somehow offend a company.

Cultural differences can have a disproportionate impact on Black artists when it comes to morality clauses because of systemic racism and implicit bias. For example, research has shown that Black people are more likely than White people to be perceived as engaging in immoral or inappropriate behavior, even when they are engaged in identical behavior.[137] A study conducted by the U.S. Sentencing Commission found that Black people received sentences almost ten percent longer than those of White people arrested for the same crime.[138] This same bias can result in Black people being targeted more frequently by morality clauses or facing greater consequences for breaking them.

Cultural differences may also affect the interpretation and enforcement of morality clauses, as some behaviors that are considered acceptable in Black communities may be viewed as inappropriate or immoral by individuals from other cultural backgrounds.[139] This can lead to Black people being held to a different standard than their White counterparts, even if their behavior is consistent with the norms and expectations of their community. Black artists must be aware of these sometimes-

---

[136] *Is it Time for Athletes to Demand Reciprocal Morals Clauses in Their Endorsement Deals?*, MILLER CANFIELD (Feb. 17, 2017), https://www.millercanfield.com/ [https://perma.cc/L5RV-G3QB].

[137] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON., no. 6 1320, 1327 (2014).

[138] *Id.* at 1320.

[139] Robert A. Brown & James Frank, *Race and Officer Decision Making: Examining Differences in Arrest Outcomes Between Black and White Officers*, 23 JUST. Q. 96, 99–100 (2006).

unconscious cultural differences to ensure morality clauses are fair and unbiased.

Though reverse morals clauses—which require the employer to follow the same behavioral standards imposed on entertainers—were created in 1968, they are only now becoming more common.[140] Iconic American entertainer Pat Boone was the first to negotiate a reverse morals contract.[141] Boone had a high-profile, righteous image and did not want it tarnished by signing with a label that permitted images of nudity on album covers.[142] Many entertainers since Boone's negotiation could have benefited from including a strong reverse morals clause. For example, a reverse morals clause in Clippers players' contracts would have given them the opportunity to become free agents when owner Donald Sterling's bigoted statements were made public.[143] The golfer Vijay Singh was caught in a similar situation when Stanford Financial Group was implicated in a Ponzi scheme after he signed a five-year, $8,000,000 endorsement contract with them.[144] Furthermore, Jay-Z faced immense public scrutiny in 2013 for his endorsement ties to Barneys after allegations of racial profiling in the store surfaced.[145] These recent examples demonstrate that it is crucial for entertainers to protect their interests in the now lucrative endorsement market.

Drafting an effective reverse morals clause can be difficult. It is important to consider factors such as the term of the clause, who is included in the clause, and what specific acts trigger the clause. For example, the clause could state that, "During the Term of the Agreement, Company shall always act with due regard to public morals and conventions. If Company shall have committed or shall commit any act or do anything that is or shall be an offense involving moral turpitude under federal, state or local laws, or which brings Artist into public disrepute, contempt, scandal or ridicule, or which insults or offends the community, or which injures the success of Artist or any of Artist's products or services,

---

[140] Porcher L. Taylor III, et al*., The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 79 (2010).

[141] *Id.* at 80.

[142] *Id.*

[143] Cari Grieb, *A 'Sterling' Need for Reverse Morals Clauses in Sports Contacts*, THE SPORTING NEWS (Mar. 9, 2015), https://www.sportingnews.com/ [https://perma.cc/9LTT-TPBM].

[144] Mark DeCambre, *Jailbird Singhs*, N.Y. POST (June 27, 2009, 5:32 AM), https://nypost.com/ [https://perma.cc/9SEG-BC6B].

[145] Jacob Bernstein, *Jay Z's Blueprint Didn't Call for This*, N.Y. TIMES (Nov. 15, 2013), https://www.nytimes.com/ [https://perma.cc/99TN-X65G].

then at the time of any such act or any time after Artist learns of any such act, Artist shall have the right, in addition to its other legal and equitable remedies, including injunctive relief, to terminate this Agreement." Artists should research their record label and search its history of contracting to find any recurring issues or red flags.[146] Artists will want a broadly drafted reverse morals clause that covers any adverse act by the label. Artists should also limit who can invoke the clause by stipulating which corporate entities are bound by it. This prevents labels from intentionally performing acts to trigger the clause or from escaping unpunished when there is a violation.[147]

E. NON-DISCLOSURE AGREEMENTS

A non-disclosure agreement is one of the most common provisions in an artist's contract. Non-disclosure agreements (NDAs) are used in the music industry to preserve confidential information, including songs, vocal arrangements, and other creative artistic matters that have not been performed publicly.[148] Artists often fail to realize the significance of NDAs and sign them as a matter of course. Issues arise because most NDAs over-protect, compromising the rights of musicians. Some demand unconditional injunctive relief and other remedies against artists who breach the terms and conditions. Others may stipulate that artists must pay a penalty every time they disclose information about the labels' practices.

NDAs perpetuate racial injustice by silencing victims of discrimination or harassment and protecting the perpetrators; this is especially true in the entertainment industry where power imbalances and unequal access to resources are prevalent.[149] There have been numerous instances of racial discrimination and harassment in the entertainment industry, particularly against Black

---

[146] Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72, 99 (2015).

[147] *Id.*

[148] Pat Varriale, *The Truth About Non-Disclosure Agreements*, OFF. J. AM. FED'N MUSICIANS U.S & CAN. (May 25, 2020), https://internationalmusician.org/ [https://perma.cc/7FAE-F2ZP].

[149] Alexis Karakas, Non-Disclosure Agreements: The Real Impact of Reality Television, (June 18, 2022) (Humanities Honors Thesis, University of California, Irvine) (eScholarship) ("just as NDAs allow sexual harassment to be a prevalent aspect of the workplace, so does it perpetuate the racism that runs rampant in the Reality Television industry").

artists and performers.[150] Powerful individuals or companies can use NDAs to prevent victims of such misconduct from speaking out about their experiences, enabling the perpetrators to continue their abusive behavior without consequences.[151] This creates a culture of silence and complicity that spreads racial injustice and allows discrimination and harassment to go unchecked.[152] NDAs can be particularly harmful to marginalized communities because they often lack the resources and power to challenge these agreements or to seek legal recourse. This can create a cycle of oppression where powerful entities are able to exploit and discriminate against vulnerable individuals with impunity.[153]

The secrecy in contracting is beginning to have a detrimental effect on the music industry. Brian Message, a partner in Courtyard Management of Radiohead, has openly voiced his concern that continuing these practices will create "value lost to the economic chain."[154] Message explains that the NDA culture now prevalent in artist negotiations is central to the structural failure of the industry.[155] Additionally, this secrecy has wider-reaching implications such as allowing sexual assault in the workplace. Notably, filmmaker and convicted sex criminal Harvey Weinstein used these types of agreements to bind women into not talking to family, friends, or the authorities about alleged assaults.[156] The terms also required the women to adhere to strict parameters that limited their ability to seek therapy.[157]

---

[150] *See* Gregory J. Peterson, *The Rockettes: Out of Step with the Times? An Inquiry into the Legality of Racial Discrimination in Performing Arts*, 9 COLUM.-VLA ART & L. 351, 351 (1984).

[151] Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53, 65 (2018).

[152] *Id.*

[153] Peterson, *supra* note 150, at 367.

[154] Tim Ingham, *Brian Message: NDAs Causing 'Structural Failure' For Music Industry*, MUSIC BUS. WORLDWIDE (Feb. 25, 2015), https://www.musicbusinessworldwide.com/ [https://perma.cc/FGG4-2T89].

[155] *Id.*

[156] Huang, Mushu, *Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection,* LAW SCH. STUDENT SCHOLARSHIP, 2019, at 1023.

[157] *Id.*

The same techniques pervade music industry dealings.[158] Record labels can insist that artists refrain from engaging in certain activities, including sharing company pay structure and discussing alleged unfair terms and conditions with regulatory agencies. Suppressing this type of information is not only harmful to the contracting artists but also to future entertainers entering the industry. However, if artists advocate for limiting or excluding these clauses, they can effect positive change for upcoming artists.

F. INCLUSION RIDER

There is a compelling argument that Black artists would get better contracts if the entertainment industry was more diverse. The Annenberg Inclusion Initiative at the University of Southern California issued a report that found little Black representation on the executive level (that is, vice president level and above), even though African Americans dominate the charts. The Initiative is a leading think tank dedicated to studying diversity and inclusion in entertainment through original research and sponsored projects.[159] It also develops targeted, research-based solutions to tackle inequity.[160] The report analyzed race, ethnicity, and gender in the executive ranks in the music industry, covering 4,060 executives from the vice president to C-Suite roles across 119 companies and six industry categories, including music groups, publishers, labels, streaming, and live music.[161] The goal was to give a comprehensive look at the diversity in music's decision-making roles.[162]

The statistics are bleak. Out of the CEO, chair, and president roles across 70 major and independent music companies, only 13.9% were from underrepresented racial and ethnic groups, 4.2%

---

[158] *See* Ethan Milliman, *The Music Business Hasn't Faced its #MeToo Reckoning. A New Foundation Wants to Change That,* ROLLING STONE (April 21, 2022), https://www.rollingstone.com/ [https://perma.cc/M3TW-RWBE] ("Among the more immediate targets for the foundation is ending the practice of the music industry hiding sexual harassment claims with NDAs, and getting the music companies to allow those who've signed the documents to speak without punishment.").

[159] *Annenberg Inclusion Initiative*, USC ANNENBERG, https://annenberg.usc.edu/ [https://perma.cc/DQ36-GWWX].

[160] *Id.*

[161] STACY L. SMITH, ET AL., INCLUSION IN THE MUSIC BUSINESS: GENDER & RACE/ETHNICITY ACROSS EXECUTIVES, ARTISTS, & TALENT TEAMS 1 (USC Annenberg Inclusion Initiative 2021).

[162] *Id.*

were Black, and 13.9% were women.[163] It is important to remember that 40% of the U.S population identify with an underrepresented group, 14% are Black, and half are women.[164]

The broader statistics are no better for these marginalized groups. Of the more than 4,000 executives at 119 major and independent companies and their subsidiaries, 19.8% of executives at VP-level and higher were underrepresented, 7.5% were Black, and 35.3% were women.[165] Underrepresented and Black executives varied little from the vice president head level of employment to executive vice president, senior vice president, general manager, chief, or president positions.[166]

Additionally, there is an uphill battle for these marginalized groups to be promoted to CEO, chief, or president roles. Record labels were the only category where the percentage of Black executives (14.4%) reached proportional representation with the U.S. population. In every other category, the percentage was less than 10%: 7.4% in streaming, 7.2% in music groups, 6.1% in publishing, 4% in radio, and 3.3% in live music and concert promotion. These figures are upsetting, given that Black artists were 37.7% of all artists on the popular charts in the last nine years. As mentioned above, the music industry's lack of diversity, especially in executive positions, is shocking. Strong contract terms may be the answer. Frances McDormand made a bid at the Oscars for entertainers to take control and demand change in the industry in arguably one of the most influential references to the #MeToo movement. After lauding all the successful women in the audience and prodding the men in the room to help fund these women's future projects, McDormand signed off with a mysterious phrase—inclusion rider.

McDormand was referring to a contract term that entertainers occasionally include in their agreement. The term promotes inclusion by requiring a certain percentage of the cast and crew to be ethnically diverse. If even a few artists began to regularly adopt inclusion riders into their contracts, it would likely make an impactful change. But if a significant number of entertainers, in unrelated contracts, draft in a way to address key social issues, there could be a more substantial change. An inclusion rider, for example, could state its purpose to ensure that diversity and inclusion are

---

[163] *Id.* at 5.

[164] *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/ [https://perma.cc/Z6E7-JBF6].

[165] Smith et al., *supra* note 161, at 2, 8.

[166] *Id.* at 2-3, 5-7.

prioritized throughout an Artist's participation in any project or event. Take the following language:

> To achieve the goals of diversity and inclusion, Company shall ensure the following diversity goals are met: (1) At least 13%[167] of the performers, crew, and staff involved in any project or event must be from Underrepresented Groups, [168] including but not limited to Black people, African American people, and people of color; (2) Artist reserves the right to approve the diversity goals and to adjust them as needed; (3) A diversity and inclusion report must be provided to Artist on a regular basis, detailing the progress made towards the diversity goals; (4) If the diversity goals are not met, Artist reserves the right to terminate their participation in the project or event.

Incorporating inclusion riders into entertainment contracts has the potential to provide impactful change when embraced by individual artists. Further, the prevalence of these clauses would promote a transformative industry-wide shift, creating a more inclusive and representative landscape for all.

As stated by Professor Lobel, director of the Center for Employment and Labor Law, the "aggregation of multiple contracts in a single market has a collusive effect. Each additional contract signed not only binds the parties to the contract, but also affects everyone else in their ability to operate in the market, to compete, and to assert their rights." For example, Black artists can begin the snowball effect by refusing to accept agreements that lack an inclusion rider. They have this power because of their extensive public reach and resources. Black producers, recording engineers, managers, booking agents, composers, etc., could put further pressure on the industry to make standard mandatory inclusion riders.

---

[167] Slightly over the 12.4% of the population that Black or African American's represent. *See* Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/ [https://perma.cc/R9WA-RPQU].

[168] Per the U.S. Census Bureau, the Underrepresented Group includes Black or African American alone, American Indian and Alaska Native alone, Asian alone, Native Hawaiian and Other Pacific Islander alone, and Hispanic or Latino alone. *See Quick Facts*, *supra* note 164.

CONCLUSION

Entertainers interested in addressing the industry's lack of diversity while working for an organization they ethically agree with should not stop advocacy for legislative and judicial change. However, they should consider strong contract terms as a means of achieving their goals. Demanding equitable contract terms in their employment agreements can prompt immediate cultural change. Though contracts may not be the sole answer to protecting Black artists from inequity in the entertainment industry, in the aggregate, these contracts can have an impactful reach. Innovative contract drafting has proven a successful way for an array of industries to ensure compliance with guidelines. If implemented broadly, these same techniques can be used to combat the unfair contracts in the entertainment industry and have a greater far-reaching effect—increasing diversity in entertainment across America.

increasing diversity in entertainment across America.