The Emerging Name, Image, and Likeness Industry and the Perils of Appropriating "Entrepreneurial" Collegiate Athletes' and "Vengeful" Minors' Property Interests—Historical and Empirical Guidance from Courts' Right of Publicity, Misappropriation, and Breach of Contract Decisions, 1830-2023

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From the late-1880s to the early-2020s, universities and the collegiate sports industry exploited millions of "college kids" as well as their parent investors by preventing "entrepreneurial athletes" from monetizing their names, images, and likenesses (NILs). Yet, during the same era, the collegiate-athletics industry—like the movie and music industries—appropriated young people's NILs and pocketed billions of dollars. In 2021, the Supreme Court decided NCAA v. Alston and embraced the Ninth Circuit's ruling in O'Bannon v. NCAA. Ostensibly, these decisions and thirty-plus state NIL statutes terminated the "official" exploitation

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of students. Currently, entrepreneurial students and some parents may commercialize students' NILs. But current NIL statutes do not stop corporate entities, businesses, associations, or universities from surreptitiously exploiting students' property interests. This Article explains why the exploitation will continue. In short, current NIL protections are wanting as numerous statutory defenses, conditions, limitations, and exceptions undermine (intentionally or unintentionally) students' publicity and contractual rights. Comparable state and federal statutes offer significantly more protections for young actors and musicians.

The Article also outlines the results of an empirical study, revealing the historical and statistical influences of legal and extralegal factors on the dispositions of publicity right, misappropriation, and breach of contract actions in state and federal courts. Generally, students, minors, and parents are significantly less likely to win those types of disputes. And state legislatures' failure to enact more enhanced NIL remedies will arguably encourage "business predators" as well as educational institutions to continue exploiting millions of collegiate and high school students. Also, a failure to enact more robust remedies will likely encourage some exploited students, as well as some parents, to apply extralegal remedies instead of seeking redress in courts of law. Optimistically, the findings will provide some legal, historical, and statistical guidance for business entities and state legislators who want to end the exploitation of collegiate students and their "financially strapped" parent investors.

INTRODUCTION

During the early and late twentieth century, two American industries enjoyed long and prosperous periods. The golden age of Hollywood began in the mid-1920s and continued for several decades.[1] The multifaceted and lucrative

[1] *See* Jocelyn Noveck, *Versace Reaches for the Stars with Glittery Hollywood Show*, ASSOCIATED PRESS (Mar. 10, 2023), https://apnews.com/article/versace-fashion-show-hollywood-e4a33da4c0f1a48240c462df02e5e14c; *see also* Matthew Specktor, *A Tale of Golden Age*

"recorded music industry"[2] also had golden ages spanning from the early 1930s to the late 1970s.[3] And, beginning in the late 1880s, an enormously successful collegiate-sports industry evolved and celebrated several golden eras.[4] Those industries generated considerable wealth for investors and others, in part because business-savvy executives used the talents, labor, and the names, images, and likenesses (NILs) of unsophisticated "minors."[5]

Historical evidence reveals that minors[6] were economically exploited during these entertainment industries' "golden eras."[7] Movie and music executives forced minors to sign asymmetrical endorsement and employment contracts.[8] Additionally, the National Collegiate Athletic Association (NCAA) adopted exploitative bylaws to protect its own economic interests to the detriment of student athletes.[9] Universities encouraged student athletes to execute standardized image-authorization contracts, which permitted universities the exclusive right to monetize students' NILs.[10] Additionally, universities and the NCAA forced students to assign their NIL rights in exchange for scholarship eligibility.[11] Simply put, these agreements transferred minors' rights of publicity

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Hollywood, Co-starring Art and Agitprop, N.Y. TIMES (July 26, 2022), https://www.nytimes.com/2022/07/26/books/review/mercury-pictures-presents-anthony-marra.html (reporting that the movie factory flourished in Hollywood's major studios during the 1930s and 1940s).

[2] *See* Seth Ericsson, *The Recorded Music Industry and the Emergence of Online Music Distribution: Innovation in the Absence of Copyright (Reform)*, 79 GEO. WASH. L. REV. 1783, 1786 n.15 (2011) (reporting that the term "recorded music industry" encompasses the major music firms as well as the trade association Recording Industry Association of America, which represents 85 percent of the music firms that produce and sell records in the United States).

[3] Neil Genzlinger, *The Reason Why I Sing: Divining a Music's Roots*, N.Y. TIMES, March 22, 2004, at E2 (reporting that the golden age of gospel music occurred between 1945 and 1955); *see also* Jon Pareles, *Rock Through the Ages: The Glory of Disarray*, N.Y. TIMES, April 3, 1994, at 28 (stressing that rock music has multiple golden ages—"the birth of rock in the mid-1950's, the explosion of creativity in the late 1960's, the punk and hip-hop shakeup of the late 1970's, the video pop bonanza of the early 1980's and the triumph of punk alienation in 1991-92"); *see also* Robert Hilburn, *Home Tech / CD Corner: Dylan Debut Is Icing on Hester's Cake*, L.A. TIMES, April 1, 1994, at F-20 (stating that the 1960s comprised the golden age of American folk music); *see also* David Schiff, *In the 30's, Black Swing Was Golden*, N.Y. TIMES, July 28, 1991, at 23 ("[T]he 30's were . . . a golden age of American music – the age of big-band swing created by black musicians in Harlem, Chicago and Kansas City.").

[4] *See* John T. Holden et al., *Reimagining the Governance of College Sports After Alston*, 74 Fla. L. Rev. 427, 430–31 (2022)*But see* Chris Murray, *Is the Golden Age of College Athletics Officially Over*?, NEVADA SPORTS NET (July 8, 2020), https://nevadasportsnet.com/news/reporters/murray-is-the-golden-age-of-college-athletics-officially-over (reporting that Stanford as well as other universities are cutting numerous sports programs after deciding to "prioritize academics above athletics, as they should").

[5] *See infra* Part I.

[6] *See id.*

[7] *See id.*

[8] *See infra* Part I.A–B.

[9] *See infra* Part I.C.

[10] *Id.*

[11] *See* Ryan Sullivan, *An Athlete's Right of Publicity – An Active Area in Sports Law*, HEITNER LEGAL (June 12, 2015), https://heitnerlegal.com/2015/06/12/an-athletes-right-of-publicity-an-

to executives, corporations, or universities.[12]

Between 2019 and 2023, a majority of states enacted statutes allowing collegiate athletes to monetize their NILs.[13] During the same period, nearly two-thirds of states' high school athletic associations adopted rules permitting minors to do the same.[14] These enactments were apparently swift responses to an untenable situation—the Supreme Court's decision in *National Collegiate Athletic Association v. Alston.*[15] In *Alston,* the Court overturned the NCAA's restrictions on college students' licensing their NILs for a commercial purpose or economic benefit.[16]

In the wake of these developments, a multibillion-dollar "NIL industry" has

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active-area-in-sport-law/ ("The NCAA contends that student-athletes assign their rights of publicity to the colleges or the NCAA, in exchange for a scholarship and the right to play for the school."). *But see Arkansas Student-Athlete Publicity Rights Act*, ARK. CODE ANN. § 4-75-1303(e) (West 2023) ("Earning compensation for the commercial use of a student-athlete's publicity rights shall not affect the student-athlete's scholarship eligibility."); CAL. EDUC. ANN. CODE § 67456(a)(1) (West 2021) ("Earning compensation from the use of a student's name, image, likeness . . . shall not affect the student's scholarship eligibility."); TEX. EDUC. CODE ANN. § 51.9246(e)(1) (West 2021) ("A student athlete . . . may not be disqualified from eligibility for a scholarship . . . [if] the student athlete earns compensation from [using his or her] name, image, or likeness when the student athlete is not engaged in official team activities.").

[12] *See* Sullivan, *supra* note 11.

[13] *See* ARIZ. REV. STAT. ANN. § 15-1892 (2021); Arkansas Student-Athlete Publicity Rights Act, ARK. CODE ANN. § 4-75-1303 (West 2023); CAL. EDUC. CODE ANN. § 67456 (West 2021); COLO. REV. STAT. ANN. § 23-16-301 (West 2021); CONN. GEN. STAT. ANN. § 10a-56 (West 2022); DEL. CODE ANN. tit. 24, § 5402 (West 2023); Uniform College Athlete Name, Image, or Likeness Act, D.C. CODE ANN. § 38-1631.03 (West 2023); FLA. STAT. ANN. § 1006.74 (West 2023); GA. CODE ANN. § 20-3-681 (West 2021); Student-Athlete Endorsement Rights Act, 110 ILL. COMP. STAT. ANN. § 190/15 (West 2022); KY. REV. STAT. ANN. § 164.6943 (West 2022); LA. REV. STAT. ANN. § 17:3703 (2022); MD. CODE ANN. § 15-131 (West 2023); ME. REV. STAT. ANN. § 12972 (West 2022); MICH. COMP. LAWS ANN. § 390.1731 (West 2022); Mississippi Intercollegiate Athletics Compensation Rights Act*,* MISS. CODE ANN. § 37-97-107 (West 2022); MO. ANN. STAT. § 173.280 (West 2023); MONT. CODE ANN. § 20-1-232 (West 2023); Nebraska Fair Pay to Play Act, NEB. REV. ST. § 48-3603 (West 2022); NEV. REV. STAT. ANN. § 398.300 (West 2022); N.J. STAT. ANN. § 18A:3B-87 (West 2020); N.M. STAT. ANN. § 21-31-3 (West 2023); N.Y. EDUC. LAW § 6438-c (Consol. 2023); OHIO REV. CODE ANN. § 3376.02 (West 2021); Student Athlete Name, Image and Likeness Rights Act, OKLA. ST. ANN. tit. 70, § 820.23 (West 2021); OR. REV. STAT. ANN. § 702.200 (West 2021); 5 PA. CONS. STAT. ANN. § 3703 (West 2022); S.C. CODE ANN. § 59-158-20 (2021); TENN. CODE ANN. § 49-7-2802 (West 2022); TEX. EDUC. CODE ANN. § 51.9246 (West 2021); VA. CODE ANN. § 23.1-408.1 (West 2022); *see also* R.I. GEN LAWS ANN. § 9-1-28.1 (West 2021) (Rhode Island enacted a general right-of-privacy statute that covers right of publicity claims).

[14] *See Tracker: High School NIL*, BCS (May 4, 2023), https://businessofcollegesports.com/high-school-nil/ (reporting that twenty-nine states explicitly permit high school athletes to monetize their NILs); Braly Keller, *High School NIL: State-by-state Regulations for Name, Image and Likeness Rights*, OPENDORSE (May 9, 2023), https://biz.opendorse.com/blog/nil-high-school/ (listing the high school associations allowing students to exploit their NILs).

[15] 141 S. Ct. 2141 (2021).

[16] *Id.* at 2156 (finding that the NCAA's restrictions on student-athletes' publicity rights violated antitrust laws and stressing that the prohibition has harmed and can harm collegiate sports competition because "student-athletes have nowhere else to sell their labor").

emerged.[17] And, if financial and market analysts are correct, the booming NIL industry will comprise numerous sub-industries, millions of professionals, and countless small businesses.[18] In addition, auxiliary businesses,[19] eight million high school athletes,[20] a half-million collegiate athletes,[21] and millions of supporting and "financially strain[ed]" parents[22] will help to sustain the projected ninety-plus-billion-dollar NIL industry each year.

As of publication, all types of corporate and business entities are celebrating and "taking advantage" of the new NIL laws, including marketing and public relations agencies, collectives,[23] attorneys, financial service agencies, athlete education providers, auto dealerships, and non-fungible token companies.[24] But

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[17] *See* Joshua M. Frieser, *A Comprehensive Legal Guide for NIL Industry Start-ups*, FRIESER LEGAL BLOG (Nov. 2, 2022), https://frieserlegal.com/a-comprehensive-legal-guide-for-nil-industry-start-ups/ ("[The] NIL industry is booming. And it's not just for high school and collegiate athletes. The billion-dollar industry has created countless jobs and business opportunities. . . . [It also] contains several sub-industries . . . .") ; *see also* John T. Holden, Marc Edelman & Michael McCann, *A Short Treatise on College-athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV 1, 32–35 (2022) (discussing the proliferation in state laws granting NIL rights to NCAA athletes).

[18] *See* Frieser, *supra* note 17.

[19] *Cf.* Shelly Gigante, *Cost of Youth Sports: Dollars and Sense*, MASS MUTUAL (July 5, 2022), https://blog.massmutual.com/planning/cost-youth-sports ("[Parents] must invest in the required equipment . . . . (A high school baseball catcher may [require] $2,500 worth of gear between catcher's mitts, leg guards, bats, shoes, protective undergear, helmets and bags . . . .) [Participation fees] are *hundreds of dollars per child*, *per sport, per season*. Athletes who play for more competitive travel teams can pay . . . $10,000 or more per year . . . . [T]he typical parent spends $693 per year, per child on youth sports . . . . [However, some parents frequently spend $12,000 per year or more] if their children participate in elite programs (particularly in lacrosse, ice hockey, gymnastics, tennis, and skiing/snowboarding) . . . . [Some parents spend more than] $9,000 per year *on one child*. . . . Nationally, visitor spending associated with sports events, which consists primarily of youth and amateur sports tournaments, reached roughly *$92 billion* [in 2021].") (emphasis added).

[20] *See NFHS Releases First High School Sports Participation Survey in Three Years*, NFHS (Oct. 10, 2022), https://www.nfhs.org/articles/nfhs-releases-first-high-school-sports-participation-survey-in-three-years/ (reporting that 7,618,054 students—4,376,582 boys and 3,241,472 girls—participated in high school sports during the 2021-2022 school year).

[21] *See* Media Center, *NCAA Student-athletes Surpass 520,000, Set New Record*, NCAA (Dec. 5, 2022), https://www.ncaa.org/news/2022/12/5/media-center-ncaa-student-athletes-surpass-520-000-set-new-record.aspx ("The number of student-athletes competing in NCAA championship sports in 2021-22 jumped to over 520,000, an all-time high . . . .").

[22] *See* Molly Schiff, *Nearly 60% of Families Say Youth Sports Are a 'Financial Strain'— Three Ways to Budget for Them*, CNBC (Oct. 15, 2022), https://www.cnbc.com/2022/10/15/nearly-60percent-of-families-say-youth-sports-are-a-financial-strain.html (reporting that, as of 2020, "73.4% of kids ages 13 through 17 played a team or individual sport [which caused] 59% of families [to] experience financial strain").

[23] *Understanding How NIL Collectives Work*, ROOTNOTE (Nov. 22, 2023), https://rootnote.co/understanding-how-nil-collectives-work/ (reporting that different NIL collectives exist, and that a donor collective allows members to donate cash to a general pool that can pay athletes for their endorsements).

[24] *See* Frieser, *supra* note17; *NIL Contracts: What You Need to Know and Look For*, SPYRE SPORTS GRP. (May 10, 2022), https://www.spyresports.com/nil-contracts-what-you-need-to-know-and-look-for/ ("Student-athletes and companies all around the country are taking advantage of the still-new name, image, and likeness policy.").

challenging legal *and* extralegal questions have begun to arise. For example, will the emerging NIL industry exploit highly talented collegiate athletes? The overwhelming majority of state legislators say yes. Thus, several states enacted NIL statutes in part to prevent "predatory actors" from appropriating collegiate athletes' property interests for commercial purposes.[25]

Conflicting words and phrases, however, appear among the statutes. Arguably, the statutory provisions are more likely to foster, not curtail, predatory behaviors. For example, college students are frequently referred to as "adults," "adult kids," "college kids," and/or "minors."[26] But who are "students" and "student athletes" under the statutes?[27] Are collegiate students "minors"? The competing definitions have created much confusion. Several statutes grant various rights and provide legal protections depending on whether a "collegiate student" is over or under eighteen years of age.[28]

Furthermore, many NIL statutes contain highly questionable language outlawing clearly legitimate adult and commercial activities. As an example, collegiate athletes may not form NIL contracts or receive NIL compensation if either activity involves the athlete's endorsement or promotion of "sports betting," "gambling," or "adult entertainment."[29] But a commonsensical person

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[25] *See, e.g.*, D.C. Council 445, 24th Council, Comm. of the Whole (D.C. 2021) ("To date, 23 states have passed [NIL] legislation . . . . The District should join these states in enabling reasonable compensation opportunities for student athletes, while . . . protecting student-athletes from predatory actors") (comment of Washington DC Council's members); FLA. STAT. ANN. § 1006.74 (West 2023) ("The Legislature [declares that an] intercollegiate athlete must . . . be protected from unauthorized appropriation and commercial exploitation of her or his right to publicity, including her or his name, image, or likeness."); S. 206, 2019 Leg., Reg. Sess. (Cal. 2019) ("It is the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes.").

[26] *See infra* notes 168–170 and accompanying text.

[27] *See, e.g.*, COLO. REV. STAT. ANN. § 23-16-301(f)–(g) (West 2023) ("'Student' means an individual who is enrolled at an institution. 'Student athlete' means a student who competes in intercollegiate athletics for an institution at which the student is enrolled."); DEL. CODE ANN. tit. 24, § 5402(21) (West 2023) ("'Student athlete' means an individual who is eligible to attend an educational institution and engages in . . . any interscholastic or intercollegiate sport."); MD. CODE ANN. EDUC. § 15-131(a)(3)(i) (West 2023) ("'Student athlete' means a college student who participates in an intercollegiate athletic program at a public institution of higher education."); S.C. CODE ANN. § 59-102-100(E) (2021) ("A student athlete or [a *minor athlete's*] parent or guardian . . . may void an agency contract that does not conform to this section.").

[28] *Compare* MISS. CODE ANN. § 93-19-17(1) (West 2021) ("All persons [who are] eighteen (18) years of age or older . . . or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting the use of their name, image or likeness while participating in intercollegiate sports as student-athletes."), *with* LA. STAT. ANN. § 17:3703(F) (2022) ("A contract for compensation for the use of the name, image, or likeness of an intercollegiate athlete under eighteen years of age shall be executed on the athlete's behalf by the athlete's parent or legal guardian."), *and* TENN. CODE ANN. § 49-7-2802(j) (West 2022) ("Any agreement entered into by an intercollegiate athlete under eighteen (18) years of age for the use of the athlete's name, image, or likeness must be in accordance with [*Tennessee Protection of Minor Performers Act*, § 50-5-203(2)—which reads: "Minor' means any person who has not attained eighteen (18) years of age and has not had the disability of minority removed so as to make this part inapplicable].").

[29] *See, e.g.*, D.C. CODE ANN. § 38-1631.04(g)(2)(F), (G), (I) (West 2023); *see also* KY. REV. STAT. ANN. § 164.6945(4)(a), (d) (West 2022) ("A student-athlete shall not enter into an NIL

might ask, "Why are colleges and universities preventing an entrepreneurial 'young adult' from creating such contractual agreements?" Undoubtedly, a reasonable response would be that allowing collegiate athletes to endorse or promote such "adult activities" or "sins" is "inconsistent with the values . . . of a postsecondary educational institution."[30]

Still, others could argue that Las Vegas is "poised to be a hub for college sports . . . . [Soon, the] NCAA logo will be as ubiquitous on the Las Vegas Strip as [the current casinos and adult-entertainment advertisements]."[31] Even more problematic, the overwhelming majority of NIL statutes give universities the right to monetize student athletes' names and images in "Sin City" and elsewhere, without compensating the students.[32] Yet, student-athletes are still

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agreement to receive compensation . . . relating to the endorsement or promotion of: [s]ports betting . . . [or] [a]dult entertainment . . . ."); N.J. STAT. ANN. § 18A:3B-87(b) (West 2020) (preventing an intercollegiate student athlete from using his or her NIL to earn compensation if the activity involves adult entertainment, casinos, gambling or sports betting).

[30] *See, e.g.*, MISS. CODE ANN. § 37-97-107(13) (West 2022) ("No student-athlete shall enter into a name, image, and likeness agreement or receive compensation . . . for the endorsement or promotion of gambling, sports betting, . . . adult entertainment or any other product or service that is reasonably considered to be inconsistent with the values . . . of a postsecondary educational institution . . . ."); TENN. CODE ANN. § 49-7-2802(g)(1) (West 2022) ("An institution may prohibit an intercollegiate athlete's . . . name, image, and likeness activities that are reasonably considered to be in conflict with the values of the institution.").

[31] *See* Dan Wolken, *With Men's Sweet 16 in Las Vegas, NCAA Finally Embraces Sin City as a Destination*, USA TODAY (Mar. 22, 2023), https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2023/03/22/sweet-16-las-vegas-ncaa-embraces-sin-city-march-madness/11525471002/ (reporting that the NCAA and universities will schedule sports events in Las Vegas, and observing that former NCAA President Mark Emmert challenged the Professional and Amateur Sports Protection Act—which outlawed sports gambling everywhere except Nevada); *see also* Billy Witz, *The N.C.A.A. Once Avoided Las Vegas. Times, and Prospects, Have Changed*, N.Y. TIMES, March 23, 2023, at 1 (reaffirming that Las Vegas is "the country's gambling mecca," and reporting that the "NCAA has planted a flag in Las Vegas"—scheduling the 2023 NCAA West regional semifinals and the 2028 men's Final Four in the "T-Mobile Arena in the heart of the Strip").

[32] *See* CONN. GEN. STAT. ANN. § 10a-56(h) (West 2022) (stating that a student athlete may not receive compensation if a higher education institution uses the student's NIL); GA. CODE ANN. § 20-3-681(f) (West 2021) ("A postsecondary educational institution shall not provide a current or prospective student athlete with compensation for the use of the student athlete's name, image, or likeness."); 110 ILL. COMP. STAT. ANN. § 190/15(e)(2) (West 2022) ("A postsecondary educational institution . . . shall not directly or indirectly: provide a prospective or current student-athlete . . . compensation in relation to the use of the student-athlete's name, image, [or] likeness . . . ."); KY. REV. STAT. ANN. § 164.6945(3)(a) (West 2022) ("An institution . . . shall not: [g]ive or promise compensation for the use of an athlete's name, image, or likeness . . . ."); LA. STAT. ANN. § 17:3703(A)(2) (2022) ("[A] postsecondary education institution . . . shall not provide a current or prospective athlete with compensation for the use of the student athlete's name, image, or likeness."); MICH. COMP. LAWS ANN. § 390.1733(3)(a) (West 2022) ("A postsecondary educational institution . . . shall not [p]rovide a prospective college athlete who will attend a postsecondary educational institution with compensation in relation to the athlete's name, image, or likeness rights."); MISS. CODE ANN. § 37-97-107(5)(a)(i) (West 2022) ("A postsecondary educational institution . . . shall not [make] or offer to [make] a name, image and likeness agreement with a student-athlete."); MO. ANN. STAT. § 173.280(4)(4) (West 2023) ("A postsecondary educational institution . . . shall not compensate a student athlete . . . for the use of such student . . . athlete's name, image, likeness rights, or athletic reputation . . . ."); NEV. REV. STAT. ANN. §

precluded from entering "sinful and immoral" endorsement, marketing, or branding contracts if such agreements conflict with institutional or team contracts.[33] Generally, a "team contract" is a written agreement between a student athlete and a college team that outlines the parties' undertaking as well as their advertising, publicity, and promotion rights.[34] In contrast, an "institutional contract" is an athletic sponsorship agreement between an educational institution and a sponsor that governs the use of the institution's trademarks.[35]

Perhaps, the most challenging legal questions are 1) whether current and pending NIL statutes provide an effective and comprehensive set of remedies to curtail business and professional entities using students' NILs without consent; 2) whether current and pending statutory remedies will deter "predators" who induce unsophisticated "adult kids" to execute exploitative NIL endorsement and employment contracts; and, assuming that NIL legal remedies are ineffective, 3) whether "highly competitive" and exploited collegiate and high school athletes

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398.300(2)(b) (West 2022) ("An institution may . . . [p]rohibit a student athlete from being compensated for the use of the name, image or likeness of the student athlete if the use of the name, image or likeness is related to official activities of the institution . . . ."); N.J. STAT. ANN. § 18A:3B-88 (West 2020) ("[An] institution of higher education . . . shall not compensate [directly or indirectly] a current or prospective student-athlete . . . for use of the student's name, image, or likeness.").

[33] *See* ARIZ. REV. STAT. ANN. § 15-1892(D)(2) (2021) (precluding the students' creating NIL endorsement or compensation contracts if either "conflicts with the student athlete's team contract"); ARK. CODE ANN. § 4-75-1304(a)(1) (West 2023) ("[A] student-athlete shall not [make] a contract . . . if the contract requires the student-athlete to endorse . . . or promote the name, image, logo, product [or] service . . . of any third-party . . . commercial entity during a varsity intercollegiate athletic . . . competition."); CAL. EDUC. CODE § 67456(e)(1) (West 2021) ("A student athlete shall not [make an NIL compensation] contract . . . if a provision . . . conflict[s] with . . . the athlete's team contract."); GA. CODE ANN. § 20-3-681(d)(1) (West 2021) ("A student athlete shall not [make an NIL compensation contract] . . . if a provision . . . conflict[s] with the student athlete's team contract."); LA. STAT. ANN. § 17:3703(H)(1) (2022) (precluding the formation of an intercollegiate athlete's NIL compensation contract if a term conflicts with the athlete's team contract); MD. CODE ANN., EDUC. § 15-131(e)(1) (West 2023) ("A student athlete may not [make an NIL compensation contract] . . . if a provision . . . conflict[s] with a provision [in] the student athlete's athletic-program contract."); MO. ANN. STAT. §§ 173.280(4)(1)–(2) (West 2023) (preventing a student athlete from making an NIL compensation contract if it conflicts with an "institution's current licenses or contracts"); NEV. REV. STAT. ANN. § 398.310(1) (West 2022) ("[A student's NIL] contract . . . may not conflict with any provision of a contract between the student athlete and the institution in which the student athlete is enrolled."); N.J. STAT. ANN. § 18A:3B-89 (b)(1) (West 2020) ("A student-athlete shall not [make an NIL compensation contract] . . . if a provision of the contract conflicts with . . . the student-athlete's team contract"); OKLA. ST. ANN. tit. 70, § 820.25(A) (West 2023) ("A student athlete shall not [make an NIL compensation contract] . . . if a provision . . . [conflicts with an] . . . institution's team contract."); TEX. EDUC. CODE ANN. § 51.9246(g)(2)(A) (West 2023) ("A student athlete . . . may not [make an NIL contract] . . . if any provision of the contract conflicts with . . . the student athlete's team contract [or] an institutional contract.").

[34] *See* N.Y. EDUC. LAW § 6438-c(1)(b) (McKinney 2023); *see also* TEX. EDUC. CODE ANN. § 51.9246(a)(5) (West 2023) (defining a "team contract" as a contract between a student athlete and an institution that outlines the athletic department's or head coach's expectations and the conditions that a student must satisfy before participating in intercollegiate activities).

[35] *See* TEX. EDUC. CODE ANN. § 51.9246(a)(4) (West 2023).

are likely to use social media and other extralegal or "self-help remedies," including vengeful, retaliatory, and aggressive behaviors, to punish allegedly predatory business partners.[36]

The answer to the latter question appears to be yes. As discussed later, empirical evidence reveals that minors and their parents are statistically significantly less likely to prevail in state and federal courts when they commence breach of contract, misappropriation, and right of publicity actions.[37] Consequently, exploited minors and "college kids" would be less likely to file NIL-related lawsuits in those tribunals. Second, national and local sports media generate an enormous amount of revenue by routinely advertising and celebrating high school athletics "revenge matches."[38] Additionally, sports media, pundits, and professional and collegiate teams frequently and cavalierly use the term "revenge" to advertise regular season, playoff, and championship games.[39] Arguably, exploited and entrepreneurial high school and collegiate athletes are exceedingly likely to employ "vengeful" self-help measures to counter an NIL partner's commercial misappropriation.[40]

In light of the questions presented above, this Article has several purposes: 1) to highlight the vast differences among states legislatures' ostensible and actual motivations for enacting NIL statutes, which are arguably "child protection" and "child labor laws,"[41] 2) to critique the debatably inferior NIL remedies and explain why they are significantly more likely to encourage, rather than discourage, business "predators" to appropriate minors and young adults' publicity rights; 3) to identify the legal and extralegal perils that "good faith" business entities are likely to encounter when they wittingly or unwittingly appropriate collegiate and high school athletes' NILs; 4) to share the results of

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[36] *See, e.g.*, Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 866 n.9 (1998) (stressing that "self-help includes any action taken outside the legal system," can be revenge and private punishment, and can occur without targeting or harming the person or persons who appropriated an interest or invaded one's right of privacy); Robert C. Ellickson, *Of Coase And Cattle: Dispute Resolution Among Neighbors In Shasta County*, 38 STAN. L. REV. 623, 679 (1986) (observing that property owners responded to a trespass to property incident by using three self-help remedies—gossip, violence, and destroying the trespasser's chattel); *see also* Doe v. Cahill, 884 A.2d 451, 457 (Del. 2005) ("After obtaining the identity of an anonymous critic . . . a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies [such as] revenge or retribution.").

[37] *See infra* Part VI.D.

[38] *See infra* Part IV.A.

[39] *Cf.* William W. Berry III, *Superstars, Superteams, and the Future of Player Movement*, 13 HARV. J. SPORTS & ENT. L. 199, 210–11 (2022) ("For a number of years, the Detroit Pistons defeated [Michael Jordan's Chicago Bulls teams] and ended their season in the playoffs. Eventually, the Bulls gained a *measure of revenge* and defeated the Pistons in 1991 before winning the championship.") (emphasis added).

[40] *See infra* Part IV.A.

[41] *See infra* Part II.A; *see also* Business and Commercial Law, ARK. CODE ANN. § 4-75-1303; Professions and Occupations Code, DEL. CODE ANN. tit. 24, § 5402(21) (West 2023); Nebraska Fair Pay to Play Act, NEB. REV. ST. ANN. § 48-3603 (West 2022); Occupations and Professions Code, OR. REV. STAT. ANN. § 702.200 (West 2021) (where NIL rights, exceptions, and defenses appear under labor, occupation, and business statutes).

an empirical study that reveals the historical and statistically significant effects of multiple legal and extralegal factors on appellate courts' dispositions of right of publicity, misappropriation, and breach of contract disputes; 5) to explain why some minors and their parents would be significantly more likely to use extralegal or self-help measures, rather than courts, to settle or resolve NIL predatory disputes; and 6) to encourage state legislatures to enact more robust legal remedies that will significantly decrease minors' and/or their parents' likelihoods of employing extralegal remedies to resolve NIL disputes.

Part I presents a short and necessary historical review of how executives exploited young adults' and minors' publicity rights and property interests during the "golden ages" of the movie/television, recorded music, and collegiate sports industries. Executives used these publicity rights without paying any or sufficient consideration. Perhaps an appreciation of those twentieth-century industries' long histories of exploitation will motivate state legislatures to enact more robust NIL remedies to decrease the likelihood of entrepreneurial collegiate athlete exploitation in a post-*Alston* era.

Part II explains the rapid rise of the immensely lucrative NIL industry. As of this writing, an extremely large cadre of highly interested actors—corporations, parents, universities, collectives, boosters, agents, advertisers, legal representatives, and other business entities—have begun to compete to find a successful niche in the projected multibillion-dollar industry. Part II also explores the question of whether NIL laws are more likely to benefit corporate sponsors or entrepreneurial collegiate athletes.

Part III examines whether student athletes are "minors," "adult kids," "college kids" or "adults" under the NIL statutes. Theoretically, states enacted the statutes to create certain rights for student athletes. However, the statutes do not clearly state whether student athletes are "adults" or "minors." This is problematic, since generally under the common law, minors have a right to make contracts.[42] And, barring very few exceptions, minors also have a right to breach contracts without adverse consequences. [43] On the other hand, under NIL statutes, student athletes clearly have a right to form endorsement and employment contracts.[44] But the statutes do not unequivocally state that students have a right to breach those contracts without liability. This issue is likely to generate numerous declaratory judgment lawsuits and conflicting statutory interpretations among state and federal courts.

Part IV outlines and explains the questionably less-familiar extralegal perils that "predatory" business actors are likely to face if they exploit student athletes' publicity rights or property interests. Historical evidence strongly suggests that some emancipated and unemancipated minors, as well as some parents, are likely to use "aggressive" self-help measures if commercial enterprises use students'

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[42] *See infra* note 173 and accompanying text.
[43] *See infra* notes 266–270 and accompanying text.
[44] *See generally supra* note 13 and accompanying text.

NIL without securing parental consent and/or without paying just compensation.

Conversely, Part V discusses some familiar legal perils, both common law and statutory risks, that corporate and professional entities are likely to encounter when they create exploitative NIL contracts or appropriate collegiate athletes' publicity rights. Furthermore, the legal issues outlined in Part V produce conflicting judicial rulings among and between state and federal appellate courts.

Part VI presents the statistically significant findings of an empirical study. More specifically, several clusters of predictors—types of entertainment and sports industries, types of professionals, types of plaintiffs (collegiate or high school), types of corporate and small business defendants, and types of common law and statutory affirmative defenses—were assessed to measure their discrete, shared, and concurrent influences on the dispositions of right of publicity, misappropriation, and breach of contract disputes.

The Article concludes by encouraging state legislatures to weigh the reported historical and empirical findings and enact more robust legal remedies. Arguably, the latter would decrease the likelihood of rampant NIL-related exploitation and lawsuits.

I. THE "GOLDEN AGES" OF THE ENTERTAINMENT INDUSTRIES' COMMERCIALLY EXPLOITING MINORS' PROPERTY INTERESTS

As stated earlier, the commercial exploitation of minors, teens, and young adults has historically occurred in traditional and evolving industries.[45] Such exploitation appears in various forms: forcing minors to work unduly long hours, failing to adequately compensate kids for their labor, and allowing third parties to appropriate minors' wealth or wages, for example.[46] Business "predators" also have appropriated minors' intangible property, privacy, and publicity rights for commercial purposes.[47] This Section focuses on these latter types of exploitation during three entertainment industries' golden years.

A. The Movie Industry's Golden Age of Exploiting Minors' NIL

As of publication, jurists, bloggers, and commentators are using social and

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[45] *See* Naomi Badour, *YouTube Child Stars Deserve Legal Protection, Too*, CHARLATAN (Aug. 4, 2022), https://charlatan.ca/2022/08/04/opinion-youtube-child-stars-deserve-legal-protection-too/ (stressing that (1) the traditional entertainment industry—film and television—is notorious for taking advantage of kids, (2) "YouTube is an entertainment industry," and (3) exploited minors on "social media deserve the same rights and legal protections as minors in the traditional entertainment industry").

[46] *See* Ellen Walker, *Nothing Is Protecting Child Influencers from Exploitation*, WIRED (Aug. 25, 2022), https://www.wired.com/story/child-influencers-exploitation-legal-protection/ (stressing that "the exploitation of child entertainers is [not] a shameful relic of the past," because child entertainers still cannot secure the "rightful ownership" of their property interest and they still work excessively to benefit others).

[47] *See* Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1446 (11th Cir. 1998) (demonstrating courts' struggle to explain the difference between two right-of-privacy theories of liability—the "similar, but not identical" right of publicity theory and the misappropriation theory).

traditional media to comment on the trial judge's controversial ruling in *Whiting v. Paramount Pictures Corporation.*[48] In 1968, Leon Whiting and Oliva Hussey were sixteen and fifteen years old, when they were selected to play the major roles in the motion picture *Romeo and Juliet.*[49] Paramount Pictures Corporation, the movie's producer and distributer, gave the film's director, Franco Zeffirelli, complete discretion to employ or fire the minors as well as absolute authority to determine the content of the film.[50]

In 2022, Whiting and Hussey—now *septuagenarians*—filed a lawsuit against Paramount and asked the court for an award of more than $500 million.[51] They asserted *that* Zeffirelli made two unequivocal promises: 1) the minors would be fully clothed in every movie scene, and 2) each actor would wear "flesh-colored undergarments during the bedroom/love scene."[52] However, Zeffirelli allegedly forced the teen actors to partially undress while filming a love scene.[53] Additionally, Zeffirelli purportedly forced the minors to partially disrobe while stressing that millions of dollars had been invested in the movie, the film would flop if the teens did not comply, and the two would "never work again in any profession" or in Hollywood if they refused.[54] In light of these threats, Whiting and Hussey complied.

Among other theories of recovery, Hussey and Whiting filed a statutory right of publicity action against Paramount. In pertinent part, the California right of publicity statute reads:

> Any person — [who knowingly uses an adult's or a minor's name, photograph, or likeness to advertise or sell services without the adult's consent or without a parent's or legal guardian's consent] — shall be liable for . . . any profits from the unauthorized use . . . . Punitive damages may [be awarded and the prevailing party shall] . . . be entitled to attorney's fees and costs.[55]

Citing the statute, Hussey and Whiting asserted three claims. First, Paramount's agents "secretly filmed" two partially disrobed children without the actors' consent or knowledge.[56] Second, Paramount unlawfully appropriated the minors' publicity rights by intentionally photographing, using, and distributing the partially unclothed minors for a commercial purpose.[57] Third, Paramount's "owners, shareholders, subsidiaries, officers, managing agents and/or their supervisors authorized, condoned and/or ratified" the exploitation of the teen

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[48] Complaint, No. 22SMCV02968, 2022 WL 18142052 (Cal. Super. Ct. Dec. 20, 2022).

[49] *Id.*

[50] Id.

[51] *See* Joseph De Avila, *"Romeo and Juliet" Actors Sue Paramount*, WALL. ST. J., Jan. 5, 2023, at A3.

[52] Complaint, *supra* note 48.

[53] *Id.*

[54] *Id.*

[55] CAL. CIV. CODE ANN. § 3344(a) (West 1971).

[56] Complaint, *supra* note 48.

[57] *Id.*

actors.[58]

In response, Paramount raised two defenses. First, although California had extended the period for filing a child exploitation suit,[59] the movie studio argued that the statute of limitations barred Hussey and Whiting's lawsuit. Second, Paramount stressed that the First Amendment precluded the action, even if the statute of limitations did not.[60] In the end, the judge accepted Paramount's defenses and rejected the plaintiffs' general assertion that "the exploitation . . . of minors [was present] in the film industry."[61] Unfortunately, the judge did not issue a detailed final order explaining why a movie production company's First Amendment right preempts protecting a minor's contractual rights[62] or right of publicity, a key prong of the law of privacy.[63]

Numerous child and adult actors or their representatives have commenced NIL-appropriation actions like those in *Whiting*. Unsurprisingly, the judicial outcomes have been mixed depending on where an action was filed and the actor's legal status. To illustrate the contradictions, actress Shirley MacLaine Parker and *The Blair Witch Project* actors—Heather Donahue and others—commenced mixed misappropriation, right of publicity, and breach of contract actions against film corporations and prevailed.[64] On the other hand, an aged Michael Polydoros, who was a minor in the celebrated *Sandlot* movie, filed a mixed invasion of privacy and commercial misappropriation action; the court dismissed the lawsuit.[65]

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[58] *Id.*

[59] *See* De Avila, *supra* note 51, at A3 ("Ms. Hussey and Mr. Whiting were previously barred from [suing] because the statute of limitations had expired. But in 2019, California passed a law that [extended the statute of limitations for childhood abuse] . . . . That three-year window expired at the end of 2022.").

[60] *See* Gene Maddaus, *Judge Throws Out Lawsuit over 1968 'Romeo and Juliet' Underage Nude Scene*, VARIETY (May 25, 2023), https://variety.com/2023/film/news/romeo-juliet-lawsuit-thrown-out-nude-scene-1235625534/.

[61] *See* Gina Kim, *Paramount Nears 1st Amendment Win in "Romeo & Juliet" Suit*, LAW360 (May 25, 2023), https://www.law360.com/articles/1681661/paramount-nears-1st-amendment-win-in-romeo-juliet-suit.

[62] *Cf.* Duncan Crabtree-Ireland, *Forced Exclusivity Terms in Actor Contracts Add a Dark Side to Hollywood's Golden Age*, VARIETY (Aug. 5, 2022), https://variety.com/2022/tv/news/sag-aftra-duncan-crabtree-ireland-exclusivity-law-act-1235333015/ ("For too long, oppressive studio contracts forcing exclusivity have prevented series regular actors from [earning] a consistent living, especially during extended periods when a show is on hiatus.").

[63] *See infra* Part V.B.

[64] Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 693–94 (Cal. 1970) (embracing actress Shirley MacLaine Parker's argument and rejecting the movie studio's defense that the actor had duty to mitigate breach of contract damages by accepting substituted, different, and inferior employment); Donahue v. Artisian Entertainment, Inc., 2002 WL 523407, at *6 (S.D.N.Y. Apr. 8, 2002) (embracing *The Blair Witch Project* actors' breach of contract claims and declaring that Artisan Pictures appropriated the actors' names, images and likenesses to make a sequel, *Blair Witch 2: Book of Shadows*).

[65] Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. App. 4th 318, 322–24 (1997) (dismissing former child star Michael Polydoros's invasion of privacy and commercial misappropriation claims and declaring that the First Amendment protects 20th Century Fox's right to use the name, image, and likeness of "Squint," Polydoros's character in The Sandlot).

In addition, more inconsistent judicial rulings have been issued depending on whether the claims were litigated in state or federal courts. For example, in California state courts, the owner of Clint Eastwood's NIL, Gene Kelly's adult children, and Dick Clark filed right of publicity actions against various defendants and won procedurally or on the merits.[66] Conversely, Johnny Carson and the Estate of Princess Diana of Wales litigated right of publicity claims in the Sixth and Ninth Circuits Courts of Appeals; both lost.[67] Are these mixed outcomes simply random judicial events? Are certain legal and extralegal factors producing these conflicting rulings?

B. The Recorded Music Industry's Golden Eras of Exploiting Unsophisticated Minors

Between 2015 and 2023, major news outlets researched the recorded music industry's golden ages and reported a consistent finding: historically, music executives fashioned contracts that allowed record companies to perpetually exploit highly talented but legally unsophisticated "kids" and young adults.[68] Under industry-wide and asymmetrical contracts, artists had to transfer all master recordings or property rights to the companies if the artists wanted to work in the

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[66] Garrapata, LLC v. Norok Innovation, Inc., CV 21-00356-CJC (PDx), 2022 WL 4099471, at *2 (C.D. Cal. June 24, 2022) (finding that the plaintiff owned Clint Eastwood's name, image, likeness, persona, and celebrity and declaring that defendants violated the owner's statutory right of publicity by using Eastwood's name, likeness, and celebrity to promote and sell cannabidiol on the Internet); Novick v. Kelly, No. B307908, 2022 WL 176349, at *3 (Cal. App. Ct. Jan. 20, 2022) (embracing Gene Kelly's adult children's claim that Mrs. Kelly—the trustee of the Gene Kelly's trust—breached her various duties and depreciated the value of the trust); Clark v. America Online Inc., No. CV–98–5650 CAS (CWX), 2000 WL 33535712, at *7 (C.D. Cal. Nov. 30, 2000) (allowing Dick Clark and his licensee's California statutory and common law right of publicity claims to proceed against AOL and AARP).

[67] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (rejecting Johnny Carson's claims that defendants violated Carson's right of privacy, right of publicity, and other property rights by using the phrase "Here's Johnny"); Cairns v. Franklin Mint Co., 292 F.3d 1139, 1155 (9th Cir. 2002) (rejecting the Estate of Princess Diana of Wales's statutory right of publicity claim and allowing the mint to sell Princess Diana memorabilia).

[68] *See, e.g.*, Ben Sisario & Joe Coscarelli, *Taylor Swift, and Artists' Fight to Own Their Work*, N.Y. TIMES, July 2, 2019, at C1 ("It is one of the oldest and hardest lessons of the music industry: No matter how successful artists may be, chances are someone else owns their work.); Nick Messitte, *Five Truly Terrible Record Deals Compiled for Your Convenience*, FORBES (April 30, 2015), https://www.forbes.com/sites/nickmessitte/2015/04/30/five-truly-terrible-record-deals-compiled-for-your-convenience/ (reporting that the record industry has a "long track history" of offering terrible record contracts and fashioning "egregious transactions"; for example, Sony Records required a "child metal band"—Unlocking the Truth—to sign a contract that promised $1.7 million only if the kids sold 250,000 records, and at the inception of the contract, the band was technically "$60k in debt to Sony"); Drew Schwartz, *Black Artists Are Still Getting Ripped Off the Way Little Richard Was*, VICE (Oct. 21, 2020), https://www.vice.com/en/article/z3vb5j/little-richard-made-millions-it-all-went-to-his-label ("Three years before Little Richard signed [a] record deal . . . . his father was murdered. Richard had twelve brothers and sisters [and]it fell on him to provide for his siblings and his mother. . . . [M]ajor labels prey on young, poor Black artists, offering them lopsided record deals in which the company owns their music in perpetuity.").

industry and receive any form of compensation.[69]

Thus, the "owner of a master controls all rights to exploit" minors' or young artists' music and holds the right to use the musician's name, likeness, and talents.[70] In *Columbia Broadcasting System, Inc. v. Custom Recording Company*,[71] Columbia Records unapologetically detailed the company's authority and property rights under a traditional, standardized, and non-negotiable contract. Columbia stressed:

> [For many years, Columbia has manufactured and sold] phonographic recordings in the form of disks and magnetic tapes. In the course of [their] business, [they have formed] contracts with various well-known performing artists and groups who [transferred to Columbia] the *exclusive right to manufacture, reproduce*, and *sell* phonographic recordings . . . . Under these contracts, [Columbia owns *solely* and *exclusively* the] phonographic recordings [as well as] the *sole and exclusive right* to use the [artists'] *name and likeness* [for commercial purposes].[72]

Some knowledgeable music critics claim recorded music companies have a long and verifiable history of poorly compensating young artists. They stress that pitiless exploitation occurs because recording contracts give companies the right to appropriate artists' assigned property rights without having to pay reasonable consideration. For instance, the "infamous" Chess Records unashamedly exploited the "Godparents of Rock 'n' Roll," Chuck Berry, Muddy Waters, Howlin' Wolf, Etta James, and others.[73] In particular, "when Chuck Berry recorded his first 45 songs in the mid-1950s, the Chess brothers forced him to share songwriting credits—right on the label—with a prominent disk jockey as well as with the company's landlord."[74] And Chess "almost never [distributed] royalty statements."[75]

Certainly, disgruntled artists and persons beyond the music industry have filed right of-privacy, right of publicity, and breach of contract actions against recorded music companies and other business entities. Again, some plaintiffs

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[69] *See* Anne Steele, *Music Dispute Sounds Familiar*, WALL ST. J., July 2, 2019, at B3 (reporting that artists historically assigned intellectual property rights attached to their "master recordings in exchange for an upfront payment and royalties"); Ben Sisario & Joe Coscarelli, *supra* note 68 ("Historically, record companies have retained rights to masters in exchange for the financial risks [associated with underwriting an artist].").

[70] *See* Ben Sisario & Joe Coscarelli, *supra* note 68 ("The artist still earns royalties [after the artist covers costs and upfront expenditures] but controlling the master could bring greater income, as well as a level of protection over how the work is used in the future.").

[71] 189 S.E.2d 305 (S.C. 1972).

[72] *Id.* at 306 (emphasis added).

[73] *See* Nick Messitte, *supra* note 68 ("Chess Records now holds its rightful place in rock history, thanks largely to films such as *Cadillac Records*.").

[74] Eli Attie, *Did the Beatles Get Screwed?*, SLATE (March 4, 2013), https://slate.com/culture/2013/03/the-beatles-start-northern-songs-was-it-really-a-slave-contract.html.

[75] Nick Messitte, *supra* note 68.

prevailed, and some did not. For example, several artists and others—Steve Perry of Journey, Curtis Jackson (a.k.a 50 Cent), Elvis Presley's licensees, Rosa Parks, Freddy King's daughter, Cher, and Shawn Carter (a.k.a. Jay-Z)—filed right of publicity causes of action in federal courts and won.[76] In contrast, licensees of the Rolling Stones, Tupac, Willie Nelson, the estate of jazz artist Jimmy Oscar Smith, and the soul duo, Samuel "Sam" Moore and David "Dave" Prater, did not prevail in federal court.[77]

State and federal courts are seemingly more inclined to issue favorable rulings when plaintiffs commence tortious interference and breach of contract claims. In *Chaquico v. Freiberg*, a founding member of the Jefferson Airplane Band successfully litigated a tortious interference with prospective economic advantage action after forming the Jefferson Starship Band.[78] In *Estate of Lennon v. Screen Creations, Ltd*., after terminating a name and signature license with a clothing manufacturer, the executor of John Lennon's estate successfully defended against a tortious interference with contract claim.[79] Finally, in *Then v. Navarro,*[80] two "talented, young and vocal musicians" signed exclusive recording and management contracts when they were minors.[81] After reaching the age of majority, they filed a preliminary injunction and won, preventing a

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[76] *See* Perry v. Brown, No. CV 18-9543-JFW (SSx), 2019 WL 1452911, at *12 (C.D. Cal. Mar. 13, 2019) (denying defendant's motion to strike Steve Perry's—singer of Journey's "Who's Crying Now" vocalist—right of publicity action), *aff'd* 791 F. App'x 643, 646 (9th Cir. 2019); Jackson v. Odenat, 9 F. Supp. 3d 342, 353 (S.D.N.Y. Mar. 24, 2014) (concluding that website owner violated rap artist 50 Cent's right of publicity); Factors Etc., Inc. v. Pro Arts, Inc., 701 F.2d 11, 12 (2d Cir. 1983) (granting an injunction to prevent abuse of the allegedly exclusive right to merchandise the name and image of Elvis Presley); Parks v. LaFace Records, 329 F.3d 437, 461 (6th Cir. 2003) (finding that civil rights icon Rosa Parks established a viable right of publicity action against LaFace Records); King v. Ames, 179 F.3d 370, 375–77 (5th Cir. 1999) (concluding that Freddy King's daughter established that the record producer misappropriated her deceased father-musician's "intangible property interest" and breached a licensing contract); Cher v. Forum Int'l, Ltd., 692 F.2d 634, 639–40 (9th Cir. 1982) (finding that the magazine appropriated Cher's right of publicity by falsely indicating that she disclosed confidential information); Carter v. Mannion, No. CV 21-04848 PA (KSx), 2021 WL 6752256, at *6 (C.D. Cal. Sep. 8, 2021) (refusing to dismiss Jay-Z's common law and statutory rights of publicity actions against a photographer who resold images and used Jay-Z's name, likeness, identity, and persona).

[77] *See* City Gear, LLC v. Bravado Int'l Grp. Merch. Servs., Inc., No. 2:21-CV-00459-AMM, 2022 WL 828933, at *6 (N.D. Ala. Mar. 18, 2022) (finding no right of jurisdiction and dismissing the action of exclusive licensees who retained the publicity and/or trademark rights of Bob Marley, Tupac Shakur, the Rolling Stones, Nas, Willie Nelson, and many others); Estate of Smith v. Cash Money Records, Inc., 253 F. Supp. 3d 737, 752 (S.D.N.Y. 2017) (declaring that "fair use" under the Copyright Right Act allowed the rapper Drake's music company to use Jimmy Oscar Smith's property interest); Moore v. Weinstein Co., LLC, 545 F. App'x 405, 405–10 (6th Cir. 2013) (concluding that defendants did not violate musicians Sam & Dave's right of publicity by using the phrase "Soul Men" in a movie).

[78] No. 17-cv-02423-MEJ, 2018 WL 3368733, *4 (N.D. Cal. July 10, 2018) (denying a motion to dismiss an action for the intentional interference with one's prospective economic advantage in connection with the allegedly "Fake Jefferson Starship Band").

[79] 939 F. Supp. 287, 293 (S.D.N.Y. Sep. 9, 1996).

[80] No. 652373/2014, 2015 WL 4135604, *1 (N.Y. Sup. Ct., Apr. 17, 2015).

[81] *Id.* at *3.

music company from enforcing the exclusivity portions in the contracts.[82]

Chaquico and *Estate of Lennon* were litigated in federal courts, and a New York state court decided the dispute in *Navarro.* Again, without knowing more, both legal and extralegal variables are producing these conflicting breach of contract and right of publicity outcomes.

C. The Collegiate Sports Industry's Golden Era of Exploiting Talented "College Kids"

Many jurists and commentators have researched and discussed the history of the NCAA and college sport while documenting and critiquing the collegiate sports industry's long "golden era" of exploiting students' labor and property interests.[83] Such exploitations have taken a variety of forms, including not paying for long-term sports-related injuries, disabilities, or death benefits while refusing to participate in workers' compensation programs which would cover students' injuries and reduce the institution's exposure to tort liability lawsuits.[84]

Certainly, universities paid some compensation in the form of scholarships. But those funds could only be used to cover the costs of enrolling in classes.[85] Yet, during the same "golden era," the NCAA's and universities' revenues grew exorbitantly, generating billions of dollars per year. To achieve this, the NCAA, university presidents, coaches, and other affiliates brazenly appropriated young students' labor and NILs for commercial purposes, without compensation.[86]

It is questionable whether the NCAA and universities were "commercial predators" before the *Alston* decision, as prospective student athletes "voluntarily" signed a National Letter of Intent (NLI), a scholarship agreement, or a student athlete image authorization agreement.[87] Each is a binding and enforceable contract.[88] Thus, under the common law, students "expressly" gave universities and colleges an unambiguous legal right and unbridled discretion to use their NILs for a commercial purpose. For instance, consider the Student-Athlete Image Authorization Form which appears in *Lightbourne v. Printroom*

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[82] *Id.*

[83] *See, e.g.*, Holden et al., *supra* note 17.

[84] See, e.g., id.

[85] See, e.g., id.

[86] See, e.g., id.

[87] *See About the National Letter of Intent*, COLLEGIATE COMM'R ASS'N, http://www.nationalletter.org/aboutTheNli/index.html ("The NLI is a binding agreement between a prospective student-athlete and an NLI member institution. A prospective student-athlete agrees to attend the institution full-time for one academic year . . . . [And, the] institution agrees to provide athletics financial aid for one academic year . . . .") (last visited Apr. 5, 2024); Marc Edelman, *University of Connecticut Could Face Lawsuit for Not Honoring Verbal Football Scholarship*, FORBES (Jan. 1, 2017), https://www.forbes.com/sites/marcedelman/2017/01/24/university-of-connecticut-could-face-lawsuit-for-not-honoring-verbal-football-scholarship/?sh=4b61d8753aaa (emphasizing that under general doctrines of contract law, NLIs are contracts between college athletes and their universities).

[88] *See About the National Letter of Intent*, *supra* note 87.

Inc.[89] In pertinent part, the contract reads:

> I, [named student], hereby authorize the University of Texas at El Paso (UTEP) or its agents to make . . . copies of, use, sell and distribute—directly or through a third party—any photographic or other images taken in connection with my participation on a UTEP intercollegiate athletic team. [90]

Still, one could argue that unconscionable and exploitative appropriation did occur when the NCAA and universities used students' NILs to generate profits. This forced powerless students to protect a university's contractual right and punished the students for failing to do so. Consider the NCAA Bylaws § 12.5.2.2, Use of a Student-Athlete's Name or Picture Without Knowledge or Permission. It provides, "If a student-athlete's name or picture appears on commercial items . . . or is used to promote a commercial product . . . the student-athlete . . . is required . . . to stop [the] activity in order [for the student to] retain his or her eligibility for intercollegiate athletics."[91]

Moreover, universities cannot pay for student athletes' meal plans under NCAA guidelines.[92] Educational institutions demand extensive periods of high performance from "college kids"—without providing proper nutrition for each athlete.[93] Young athletes' caloric requirements are exceedingly higher than the average person, and these athletes may struggle to secure the food necessary to support their growth and development.[94] In fact, the NCAA has punished and humiliated hungry "kids" who violated the NCAA's rules in order to secure enough nourishment.[95]

To be sure, the NCAA and universities have been retaliatory and, arguably,

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[89] 122 F. Supp. 3d 942 (E.D. Cal. 2015).

[90] *Id.* at 944.

[91] *Id.* at 945.

[92] *See, e.g.*, Holden et al., *supra* note 17.

[93] *See, e.g.*, Scooby Axson, *Ole Miss QB Bo Wallace Says Athletes Go to Bed Hungry*, SPORT ILLUSTRATED (July 18, 2014), https://www.si.com/college/2014/07/18/ole-miss-bo-wallace-unlimited-meals-stipend ("A lot of guys go to bed hungry . . . . We need more compensation just to be able to survive. . . .").

[94] *See* Ryan Parr, *Are You Eating Enough? If You're a Teen Athlete, the Answer's Probably No*, STACK (Aug. 27, 2021) https://www.stack.com/a/are-you-eating-enough-if-youre-a-teen-athlete-the-answers-probably-no/ ("According to the Food and Nutrition Board of the Institute of Medicine, male high-school athletes need between 3,000 and 6,000 calories a day, and female high school athletes need between 2,200 and 4,000 calories a day."); Jenifer Reader, Barbara Gordon & Natalie Christensen, *Food Insecurity Among a Cohort of Division I Student-Athletes*, NUTRIENTS, November 2022, at 5 ("More than half (51%) of the Division I student-athletes reported eating less often than they should because there was not access to enough food.").

[95] *See* Nathan Fenno, *Three Oklahoma Athletes Penalized by University for Eating Pasta*, L.A. TIMES (Feb. 19, 2014), https://www.latimes.com/sports/la-xpm-2014-feb-19-la-sp-sn-three-oklahoma-athletes-penalized-over-pasta-20140219-story.html (reporting that after three University of Oklahoma athletes ate "too much pasta" at a graduation banquet—violating an NCAA rule—each athlete had to donate $3.83 (the cost of the pasta) to charity to restore their eligibility, and the school reported the situation to the NCAA).

"vengeful."[96] But some have argued that the Supreme Court's *Alston* decision ended the collegiate sports industry's "golden years" of exploiting talented "collegiate kids."[97]

II. THE EMERGING NIL INDUSTRY AND THE "ENTREPRENEURIAL COLLEGIATE ATHLETE"

In 2015, the Ninth Circuit decided in *O'Bannon* that the NCAA's NIL rules violated the Sherman Antitrust Act.[98] It was not until the *Alston* ruling in 2021 that the NCAA embraced *O'Bannon*, which purportedly stopped the collegiate sports industry from "officially" exploiting students' NILs for commercial purpose.[99] As of publication, thirty-two states have since enacted NIL statutes.[100] However, the NCAA has not fully embraced any state NIL statute, concluding that it would be impossible to comply with or challenge every statute.[101]

Instead, beginning in 2021, the NCAA, postsecondary educational institutions, and their supporters began lobbying members of Congress to enact a uniform, federal NIL statute.[102] Ostensibly, a federal statute would harmonize conflicting rights and obligations under the state statutes. However, as of

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[96] *See id.*; *see also* Jackson Bakich, *Florida CFO Accuses NCAA President, Former FSU AD of Retaliation After NIL Punishment*, SPORTS ILLUSTRATED (Jan. 12, 2024), https://www.si.com/college/fsu/football/florida-cfo-jimmy-patronis-accuses-ncaa-president-former-fsu-ad-of-retaliation-after-fsu-handed-nil-violation-punishment (reporting that Florida Chief Financial Officer Jimmy Patronis accused the NCAA President of "petty attacks" against Florida State University—appearing to believe these were acts of "retaliation" and a "need to enact revenge"—for allegedly violating NIL rules in 2022).

[97] *See, e.g.*, Alex Shephard, *The NCAA Is Screwed*, NEW REPUBLIC (June 21, 2021), https://newrepublic.com/article/162807/ncaa-alston-college-sports-kavanaugh.

[98] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074 (9th Cir. 2015).

[99] *See* Theresa Loscalzo & Monica Matias, *Update on Key Developments in Name, Image, & Likeness (NIL) Legislative Efforts*, JD SUPRA (Oct. 11, 2022), https://www.jdsupra.com/legalnews/update-on-key-developments-in-name-7716671/ ("In 2021, the world of college athletics was forever changed when the NCAA introduced its interim policy allowing college athletes to commercialize their name, image, and likeness . . . ."); Martin Edel, Ling Kong & Karin Rivard, *The New Name, Image and Likeness Playing Field for Colleges and Universities –What You Need to Know*, JD SUPRA (Oct. 15, 2020), https://www.jdsupra.com/legalnews/the-new-name-image-and-likeness-playing-71376/; *see generally* Justin Auh, *Leveling the Playing Field: How to Get International Student-Athletes Paid Under Name, Image, and Likeness*, 43 NW. J. INT'L L. & BUS. 347, 351–61 (2023) (presenting a history of *O'Bannon* and *Alston*, as well as the motivation behind state NIL laws); John Y. Doty, *Rock the Cash-Bah! How Alston Presents a New Challenge to the Amateurism Justification and Ways the NCAA Can Modernize to Remain Afloat*, 29 U. MIAMI BUS. L. REV. 70, 79–89 (2020) (presenting and explaining the procedural histories of *O'Bannon I* and *Alston I*); Grant House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 811–14 (N.D. Cal. June 24, 2021) (presenting and explaining the procedural histories of *O'Bannon II* and *Alston II*).

[100] *See supra* note 13 and accompanying text.

[101] *See* Edel, Kong & Rivard, *supra* note 99, JD SUPRA (Oct. 15, 2020), https://www.jdsupra.com/legalnews/the-new-name-image-and-likeness-playing-71376/ ("Rather than battle 50 states or try to comply with the laws of 50 different states, in April 2020, the NCAA Board of Governors issued a Final Report . . . .").

[102] *See id.* ("[The NCAA] endorses the adoption of uniform federal legislation that would . . . preempt individual state laws [and] would exempt NCAA rules from the antitrust laws.").

November 2023, Congress has not passed a uniform right of publicity statute.[103] Even more importantly, current NIL statutes serve the dual purpose of protecting the rights and interests of both student athletes and their institutions. Consequently, a considerable amount of ambiguity has arisen about whose rights are superior under the statutes.

A. NIL Statutes and the Rights of Entrepreneurial "College Kids"

Consider the names of seven NIL statutes: Arkansas Student-Athlete Publicity Rights Act; California Student Athlete Bill of Rights; District of Columbia Uniform College Athlete Name, Image, or Likeness Act; Illinois Student-Athlete Endorsement Rights Act; Mississippi Intercollegiate Athletics Compensation Rights Act; Nebraska Fair Pay to Play Act; and Oklahoma Student Athlete Name, Image and Likeness Rights Act.[104] Without knowing more, a casual reader could sensibly conclude that these acts were enacted to solely protect the rights of collegiate students.

Support for this view is widely distributed on the internet about the "growing number of NIL deals" between commercial entities and collegiate and high school athletes.[105] However, a careful reading of the acts reveals that, wittingly or unwittingly, NIL statutes have dual purposes—protecting the rights and property interests of both collegiate students and postsecondary educational institutions.

In theory, the budding entrepreneurial collegiate athletes have three statutory rights: 1) they may form "totally integrated" NIL endorsement[106] and/or

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[103] *See* Theresa Loscalzo & Monica Matias, *supra* note 99 (reporting that "at least eight NIL bills have been introduced in Congress," the bills are designed to "create uniformity" among NIL state laws, and "none of the proposed bills has garnered enough support to move through the legislative process").

[104] ARK. CODE ANN. § 4-75-1303 (West 2023); CAL. EDUC. CODE ANN. § 67456 (West 2021); D.C. CODE ANN. § 38-1631.03 (West 2023); 110 ILL. COMP. STAT. ANN. § 190/15 (West 2022); MISS. CODE ANN. § 37-97-107 (West 2022); NEB. REV. ST. § 48-3603 (West 2022); OKLA. ST. ANN. Tit. 70, § 820.23 (West 2021).

[105] *See, e.g.*, Patrick Coffee, *More Big Brands Brave the Rocky Terrain of Endorsement Deals with College Athletes*, WALL ST. J. (March 4, 2023), https://www.wsj.com/articles/more-big-brands-brave-the-rocky-terrain-of-endorsement-deals-with-college-athletes-b70b24c5 ("Spending on NIL deals with college athletes is expected to hit $1.14 billion from July of last year through June 2023, up from $917 million in the previous 12 months . . . ."); Erika Wheless, *How A Possible TikTok Ban Could Impact NIL Deals*, AD AGE (Apr., 2023), https://adage.com/article/digital-marketing-ad-tech-news/how-possible-tiktok-ban-could-impact-nil-deals/2482141#:~:text=Instagram%20accounts%20for%2075%25%20of,shift%20more%20focus%20to%20Instagram ("[Nearly two years after] the NCAA's NIL policy went into effect in July 1, 2021, student-athlete deals have exploded. The overall number of NIL deals increased by 146% from 2021 to 2022.").

[106] *See* CONN. GEN. STAT. ANN. § 10a-56 (b) (West 2022) ("Any student athlete who is enrolled at [an] institution of higher education may earn compensation through an endorsement contract or employment in an activity that is unrelated to any intercollegiate athletic program and obtain the legal or professional representation of an attorney . . . provided such student athlete complies with the . . . policies adopted by his or her institution of higher education regarding student athlete endorsement contracts and employment activities."); DEL. CODE ANN. Tit. 24, § 5402 (5) (West

employment[107] contracts with third-party entities;[108] 2) they retain their eligibility to receive scholarships after deciding to monetize their NILs for a commercial purpose;[109] and 3) they retain their eligibility to participate in intercollegiate sports after deciding to monetize their NILs for a commercial purpose.[110]

Why do NIL statutes arguably create two unequivocable eligibility rights? A plausible explanation appears in *Ward v. Tennessee Secondary School Athletic Association*, which was decided shortly after *Alston*.[111] In *Ward*, Jordan Ward and Jordan Irving were minors and athletes at Melrose High School.[112] Jordan Ward, in particular, was a "three-star recruit" and had offers to play football at four major universities. The two were subject to the regulations of the Tennessee Secondary School Athletic Association (TSSAA), who fashioned governing rules for athletic competitions as well as students' eligibility to participate in sports.[113] In the course of events, the minors transferred from Melrose High School to St. Benedict at Auburndale, a private school. However, given a misrepresentation about the minors' new residences, the TSSAA withdrew their eligibility to participate in high school sports.[114]

The minors' parents filed an injunction action against TSSAA in the District

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2023) ("'Endorsement contract' means an agreement under which a student athlete is employed or receives consideration to use on behalf of the other party any value that the athlete may have because of publicity, reputation, following, or fame obtained because of athletic ability or performance."); S.C. CODE ANN. § 59-102-20(6) (2022) ("'Endorsement contract' means an agreement under which a student athlete is employed or receives consideration to use on behalf of another party any value the student athlete has because of publicity, reputation, following, or fame obtained from athletic ability or performance.").

[107] *See* CONN. GEN. STAT. ANN. § 10a-56(b) (West 2022).

[108] *See, e.g.*, CAL. EDUC. CODE ANN. § 67456(a)(1) (West 2021) ("A postsecondary educational institution shall not . . . [prevent a student] from earning compensation [by using] the student's name, image, likeness, or athletic reputation. Earning compensation from the use of a student's name, image, likeness, or athletic reputation shall not affect the student's scholarship eligibility"); D.C. CODE ANN. § 38-1631.03(b)(1)(A) (West 2023) ("An institution . . . may not prevent or restrict a college athlete from receiving name, image, or likeness compensation, [or] entering into a name, image, or likeness agreement . . . ."); 110 ILL. COMP. STAT. ANN. § 190/15(a) (West 2022) ("[A]postsecondary educational institution shall not [enforce] any contract [or] rule . . . that prevents a student-athlete . . . from earning compensation [by using] . . . the student-athlete's name, image, likeness, or voice . . . .").

[109] *See, e.g.*, ARK. CODE ANN. § 4-75-1303(c) (West 2023) ("Earning compensation for the commercial use of a student-athlete's publicity rights shall not affect the student-athlete's scholarship eligibility."); CAL. EDUC. CODE ANN. § 67456(a)(1) (West 2021) (same); OKLA. STAT. ANN. Tit. 70, § 820.23(A) (West 2023) (same).

[110] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1892(B) (2021) (stating that a student athlete may not lose his eligibility to participate in intercollegiate athletics if the student uses his or her name, image or likeness to generate income); FLA. STAT. ANN. § 1006.74 (West 2023) ("[P]articipation in intercollegiate athletics should not infringe upon an intercollegiate athlete's ability to earn compensation for her or his name, image or likeness."); MICH. COMP. LAWS ANN. § 390.1731(2) (West 2022) (same); TEX. EDUC. CODE ANN. § 51.9246 (c)(1)(A) (West 2023) (same).

[111] No. 2:22-cv-02626-JPM-tmp, 2022 WL 5236834 (W.D. Tenn. Oct. 5, 2022).

[112] *Id.* at *1.

[113] *Id.*

[114] *Id.* at *2.

Court for Western Tennessee. In their injunction, the parents claimed that minors have "a property interest in playing football," because opportunities exist for minors to monetize their NILs.[115] Citing the Fourteenth Amendment, they further argued that TSSAA's eligibility procedures precluded parental input, which violated parents' fundamental right to raise and educate their children.[116]

The district court acknowledged that under the Fourteenth Amendment's due process of law provision, parents have a "fundamental right to raise and educate [their] children."[117] However, citing several rulings in the Sixth Circuit, the court declared that the parents were unlikely to prevail under a Fourteenth Amendment analysis.[118] The court reasoned that the Fourteenth Amendment prevents state actors from taking or interfering with individuals' property rights without due process of law,[119] and that interscholastic athletic associations—like the TSSAA—are state actors;[120] but minors only have an expectancy of participation rather than a constitutional right to participate in interscholastic athletics.[121]

The *Ward* plaintiffs further contended that the Supreme Court's *Alston* decision created a property interest and a constitutional right for students to participate in collegiate and high school sports.[122] Although the court admitted that *Alston* may have "altered in some small way" Tennessee students' "mere expectancy" to participate in high school sports,[123] it insisted that *Alston* does not create a property interest.[124] Instead, the court reasoned, *Alston* precludes the

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[115] *Id.*

[116] *Id.*

[117] *Id.* at *3 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) and Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

[118] *Id.* (citing Seger v. Ky. High Sch. Athletic Ass'n, 453 F. App'x 630, 634 (6th Cir. 2011) (concluding that the athletic association's bylaws regarding athletics do not to implicate the right to raise one's children); Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) (reaffirming that "students do not have a general constitutional right to participate in extracurricular athletics"); Z.H. v. Ky. High Sch. Athletic Ass'n, 359 F. Supp. 3d 514, 522 (W.D. Ky. 2019) (declaring that parental rights to rear and educate a child do not create a minor's right to participate in high school athletics without restriction)).

[119] *'Id.*, at *3 (citing Bd. Of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

[120] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 304–305 (2001) (employing an entwinement theory and finding state action).

[121] *Ward*, 2022 WL 5236834, at *4 (citing Tenn. Secondary Sch. Athletic Ass'n v. Cox, 425 S.W.2d 597, 602 (Tenn. 1968) (describing participation in high school athletics in Tennessee as "a mere privilege"); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980) (declaring that minors have no constitutional right to participate in high school sports); Hamilton v. Tenn. Secondary Sch. Athletic Ass'n, 552 F.2d 681, 682 (6th Cir. 1976) (holding that a minor has no due process right to participate in interscholastic athletics); Brindisi v. Regano, 20 F.. App'x 508, 510 (6th Cir. 2001) (holding that a minor has "neither a liberty nor a property interest under the 14th Amendment to participate in interscholastic athletics); Albach v. Odle, 531 F.2d 983, 984–85 (10th Cir. 1976) ("Participation in interscholastic athletics is not a constitutionally protected civil right.")).

[122] *Id*.

[123] *Id.*

[124] *Id.*

NCAA from engaging in anticompetitive practices under antitrust laws,[125] and allows states to protect collegiate students' right to monetize their NILs.[126] Still, as of publication, the majority of states' NIL eligibility statutes only allow "current" entrepreneurial collegiate students to participate in sports while marketing their NIL.[127]

B. NIL Statutes and the Rights of Collegiate Institutions

Unquestionably, states' NIL statutes provide substantially more rights and protections for colleges and universities than for collegiate athletes. For example, institutions may use students' NILs for a commercial purpose without securing students' or parental consent,[128] and universities may exploit athletes' names and images without compensating students.[129] But collegiate athletes and third-party business entities are precluded from using any "institutional marks," meaning any "name, logo, trademarks, mascot, unique colors, copyrights and other defining insignia."[130] Further, intercollegiate athletes are prohibited from using an institution's facilities or uniforms to promote the athletes' NIL activities, and from expressly or impliedly representing that an institution endorses or is affiliated with the athletes' NIL activities, before receiving the institution's express permission.[131] Moreover, a university may force an athlete to waive or transfer their right of publicity to the institution, if the student's NIL activity promotes, displays, broadcasts, or rebroadcasts an intercollegiate sports event.[132]

Most NIL statutes also provide two added protections for colleges and universities, one of which is exceedingly more likely to ignite numerous tortious interference and right of publicity lawsuits. But first, consider a "universal" protection: collegiate athletes must disclose all executed and proposed NIL contracts to university officials.[133] However, this arguably problematic rule generates several pressing questions: When is the disclosure required? Which institutional official must be informed? Must the disclosure be written?

Depending on the state, NIL statutes provide varying answers to these questions and an array of disclosure requirements, ranging from the most stringent to the most lenient. Consider the language in a few statutes. Mississippi instructs a student athlete to disclose "any NIL agreement" to a designated institutional official before exercising a publicity right. [134] Under Texas's NIL

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[125] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, at 2157.

[126] *Ward*, 2022 WL 5236834, at *4.

[127] *See generally supra* note 13 and accompanying text.

[128] *See infra* notes 155-156 and accompanying text.

[129] *See infra* notes 155-156 and accompanying text.

[130] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 10a-56(a)(7), (d)(8) (West 2022).

[131] *See, e.g.*, LA. REV. STAT. ANN. § 17:3703(C)(3) (2022); D.C. CODE ANN. § 38-1631.04(c) (West 2023).

[132] *See, e.g.*, D.C. CODE ANN. § 38-1631.04(f) (West 2023).

[133] *See supra* notes 134–137 and accompanying text.

[134] *See* MISS. CODE ANN. § 37-97-107(10) (West 2022).

statute, a collegiate athlete must disclose "any proposed contract."[135] Colorado's NIL statute orders an athlete to disclose an executed contract to an "athletic director . . . within seventy-two hours" after entering the contract or before participating in "the next scheduled athletic event."[136] And in Georgia, a student athlete must disclose an NIL endorsement or employment contract to an appropriate institutional official—presumably any time after executing the contract.[137]

Arguably, the most controversial and egregious institutional right allows universities to "veto" a student's proposed NIL contract. For example, in some states, educational institutions have a right to prevent the formation of endorsement and employment contracts if a provision in an executed or proposed NIL contract "causes a conflict" [138] or a university concludes that a term in a proposed NIL contract "conflicts" with a term in an "institutional contract" or in a "collegiate team contract."[139] An "institutional contract" is an athletics sponsorship agreement that governs the use of an institution's trademarks,[140] or "any agreement [under which an] institution of higher education is a party."[141] On the other hand, a "collegiate team contract" is between a student athlete and their team.[142]

Hence, the question arises: what is a conflict? Most statutes identify various conflicts.[143] Consider New York's NIL statute, which presents a representative sample of plausible conflicts. It states that a conflict may arise if:

> [A] proposed contract would cause the student-athlete to violate the team contract . . . the college's student handbook or code of conduct; or the proposed contract would conflict with an existing [institutional] contract or sponsorship . . . or the proposed contract [could] reasonably

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[135] *See* TEX. EDUC. CODE ANN. § 51.9246(g)(1) (West 2021).

[136] *See, e.g.*, COLO. REV. STAT. ANN. § 23-16-301 (West 2021).

[137] *See* GA. CODE ANN. § 20-3-681(d)(2) (West 2021).

[138] *See* N.Y. EDUCATION LAW § 6438-c(6)(a) (McKinney 2023).

[139] *See, e.g.*, 5 PA. STAT. AND CONS. STAT. ANN. § 3706(c)(1) (West 2022) ("An institution of higher education may prohibit a college student athlete's [NIL contract] . . . that conflict[s] with existing institutional sponsorship [contracts]"); CAL. EDUC. ANN. CODE § 67456(c)(1) (West 2021) (stating that a student athlete shall not form an NIL contract if the latter contract conflicts with the athlete's "team contract"); COLO. REV. STAT. ANN. § 23-16-301(3)(a) (West 2023) (same).

[140] *See* TEX. EDUC. CODE ANN. § 51.9246(a)(4) (West 2023).

[141] *See* CONN. GEN. STAT. ANN. § 10a-56(c)(2) (West 2022).

[142] *See* N.Y. EDUCATION LAW § 6438-c(1)(b) (McKinney 2023); *see also* TEX. EDUC. CODE ANN. § 51.9246(a)(5) (West 2023) (defining a "team contract" as a contract between a student athlete and an institution that outlines the athletic department's or head coach's expectations, as well as the conditions that a student must satisfy before participating in intercollegiate activities).

[143] *See, e.g.*, OKLA. ST. ANN. Tit. 70, § 820.25(B) (West 2023) ("A student athlete shall not [form an NIL] agreement . . . that conflicts with a written policy of the postsecondary institution . . . ."); OR. REV. STAT. ANN. § 702.200(3)(a) (West 2021) (precluding the formation of an NIL contract, if its terms conflict with an institution's and third party's contract); TEX. EDUC. CODE ANN. § 51.9246(g)(2)(A) (West 2023) (precluding the formation of an NIL contract if any provision conflicts with an institutional contract, a collegiate team contract, an athletic department's policy, or a provision in an institution's honor code).

> . . . [injure the college's financial status or reputation]; or the proposed contract [requires a student-athlete to perform] during team activities . . . or during scheduled classes; or the proposed contract [requires a student to use the] college's name, brand, copywritten materials, trademarks, service marks, symbols, nicknames, trade dress, insignia, mascot, uniform styles, colors, imagery, campus landmarks, or any other intellectual property . . . or the proposed contract [requires] the student-athlete to display a sponsor's product, logo, brand . . . [or] advertise for a sponsor, during official team activities; or the proposed contract [requires] the student-athlete to display a sponsor's product, logo, brand or other indicia . . . [when the athlete's sponsor competes with a college's sponsor].[144]

This raises a final and difficult question: does an institution's statutory right to void a student athlete's allegedly "conflicting" NIL contract violate common law principles of contract? Why is this timely question so compelling? Assume that your friends' "college kids" or collegiate athletes attend Dartmouth College, the University of Minnesota, and the University of Vermont. Briefly put, those "kids" have a common law right to form totally integrated contracts with companies like private developers[145] or property insurers.[146] Therefore, in light of state supreme courts' privity of contract decisions, your friends' "college kids" are not required to contact any university official or any third party to disclose or discuss the contractual relationships.[147]

In fact, a collegiate student is not prohibited from crafting a wholly integrated contract with a landlord or an insurer, even if the student's college executes separate and totally integrated contracts with the same landlord and property insurer.[148] Furthermore, the student is not precluded from establishing

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[144] N.Y. EDUC. LAW § 6438-c(6)(d)(i)–(ix) (McKinney 2023).

[145] *Cf.* Strategic Communications*, UVM Enters Joint Venture to Build Housing*, UVM TODAY (Sep. 6, 2022), https://www.uvm.edu/news/story/uvm-enters-joint-venture-build-housing (reporting that the University of Vermont formed a joint venture contract with a private housing developer to build much needed housing for UVM students, investing approximately $22 million, earning a return on its investment and recouping its initial equity payment after ten years).

[146] *Cf.* Ro v. Factory Mut. Insurance Co., 260 A.3d 811, 814–15 (N.H. 2021) (noting that students may—but are not required to—purchase property insurance contracts to cover dormitory rooms, stressing that both Dartmouth and the students had insurable interests in Morton Hall dormitory, and comparing the students' contractual possessory interest to that of a tenant who rents a residential complex); Skarsten v. Dairyland Ins. Co., 381 N.W.2d 16, 17–18 (Minn. Ct. App. 1986) (finding that the twenty-four-year-old college student lived "just off campus" while attending the University of Minnesota, the student's auto insurance contract covered her car, and declaring that her injured passenger father was an insured under the insurance contract).

[147] *Cf.* Citizens Nat. Bank v. Kennedy & Coe, 441 N.W.2d 180, 182 (Neb. 1989) (declaring that barring fraud or other extraordinary facts, lawyers and accountants are liable only to their clients—with whom they are in privity of contract—and not to third parties); Martin vs. Hibernia Bank & Trust Co., 53 So. 572, 575 (La. 1910) (declaring that privity of contract was absent between the depositor and the subagent bank).

[148] *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-1106 (2018) ("Any person of competent legal capacity may contract for insurance. Any minor of the age of 15 years or more . . . [may contract for insurance on his or her own property] . . . ."); FLA. STAT. ANN. § 627.406 (West 2023) ("Any

a contract with a property insurer—even if the student and university are co-insureds and they have conflicting or unrelated insurable interests under the same master property insurance contract.[149]

Common law allows collegiate students to create contractual relationships, if the proposed contracts are not tainted with illegality, fraud, duress, or unconscionability[150] and the agreements do not violate an unambiguous "public policy."[151] Nevertheless, reasonable jurists could argue that, as a matter of law, any "conflict" between a student's NIL contract and any educational institution's contract violates an NIL-related "statutory public policy."[152] Under this interpretation, though, the slightest "conflict" would automatically void a student's endorsement contract, making the current NIL laws arguably "worthless," "meaningless," or "illusory." Thus, the NCAA and universities can continue to exploit collegiate students' talents and property interests.

Consider the student's right of publicity provision in Illinois's Student-Athlete Endorsement Rights Act. It provides that a "postsecondary educational institution shall not [make] any contract" or fashion other requirements that prevent a student-athlete from using his name, image, likeness, or voice to earn compensation.[153] Now consider the following chilling exception:

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person of competent legal capacity may contract for insurance. Any minor of the age of 15 years or more . . . [may contract for insurance on his or her own property] . . . ."); *see also* Erik Martin & Laura Longero, *Can a 17-year-old Get Their Own Car Insurance?*, CAR INSURANCE (Jan. 10, 2024), https://www.carinsurance.com/can-17-year-old-get-car-insurance.aspx (reporting that seventeen-year-olds can get their own insurance policy if they are emancipated minors); *cf.* Ro, 260 A.3d at 814–15 (noting that students may—but are not required to—purchase property insurance contracts to cover dormitory rooms, stressing that both Dartmouth and the students had insurable interests in Morton Hall dormitory, and comparing the students' contractual possessory interest to that of a tenant who rents a residential complex). For more information on integrated contracts, see Esbensen v. Userware Int'l, Inc., 11 Cal. App. 4th 631, 636–37 (1992) (reaffirming that a contract is "fully" or "completely" integrated if the parties intend for the writing to be the "complete and exclusive statement of the agreement and its terms") (citations omitted)..

[149] *Cf.* Waters Edge Living, LLC v. RSUI Indem. Co., 355 F. App'x 318, 320–21 (11th Cir. 2009) (finding that the co-insured's separate insurable interests—commercial properties—were covered under the same master property insurance contract); Moss v. Univ. of Akron, No. 2002–06189–AD, 2002 WL 31955458, at *2 (Ohio Ct. Cl. Oct. 2, 2002) (finding that plaintiff's car was parked car in a designated parking space on campus adjacent to the student services building, a ladder damaged the car, and the plaintiff had an auto insurance contract, but forcing the university to cover plaintiff's loss).

[150] *See* Rider v. Rider, 669 N.E.2d 160,162 (Ind. 1996) (reaffirming that contracts are valid as long as they are formed without fraud, duress or misrepresentation, and are not unconscionable).

[151] *See, e.g.*, Terrien v. Zwit, 467 Mich. 56, 66–69 (2002) (stressing that a clear "public policy" must come from objective sources, rather than from individual judges' subjective views before rescinding otherwise valid contract). *But see* Woodman v. Kera LLC, 486 Mich. 228, 245–46 (2010) (stressing that a legislature is "ideally" rather than factually the best source of an unambiguous public policy).

[152] *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878–79 (Ill. 1981) (acknowledging that a precise definition of "public policy" does not exist but stating that the concept generally comprises just and fair policies which collectively affect citizens of a state). *But see* Cloutier v. Great Atl. & Pac. Tea Co., Inc., 121 N.H. 915, 923 (1981) (reaffirming that a statutory public policy is embedded in a statute).

[153] 110 ILL. COMP. STAT. ANN. § 190/15(a) (West 2022).

> A student-athlete may not enter into a publicity rights agreement or otherwise receive compensation for that student-athlete's name, image, likeness, or voice for services . . . while that student-athlete [participates in a postsecondary educational institution's sanctioned activities] . . . if such services or performance . . . would conflict with a provision in a contract . . . of the postsecondary educational institution.[154]

Yet, Illinois's purported "student rights act" also states shamelessly, "A postsecondary educational institution . . . shall not directly or indirectly. . . provide a prospective or current student-athlete or the student-athlete's family compensation in relation to the use of the student athlete's name, image, likeness, or voice."[155] This exception is highly problematic because it presumptively allows a university to license a student's NIL—without the student's or family's consent—and generate large profits. Even more importantly, Illinois's statute is adamantly clear regarding the appropriation of a university's property interests:

> A student-athlete may not receive [compensation or execute an NIL contract] . . . that also uses [a postsecondary educational institution's] registered or licensed marks, logos, verbiage, name, or designs . . . unless the . . . institution [gives] permission [before the] execution of the contract or [before] compensation. If permission is granted to the student-athlete, the postsecondary educational institution . . . may be compensated for the use in a manner consistent with market rates.[156]

Still, a question remains: does Illinois's NIL statute creates rights and protections for collegiate athletes? Stated simply, yes. Universities in Illinois, as well as those in other states, have an express or implied right to use a student's name, image, likeness, and voice without compensating the student.[157] Moreover, universities in Illinois have sole authority to decide whether students' proposed NIL contracts "conflict" with "institution contracts."[158] And, if conflicts are "discovered," universities may prevent or "interfere" with the formation of such NIL agreements.[159]

The statutes also constrict students' filing legal actions against universities. To prove the point, consider the "no action" provision or anti-student language in Illinois's Student-Athlete Endorsement Rights Act:

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[154] *Id.* § 190/20(d).

[155] *Id.* § 190/15(e)(2).

[156] *Id.* § 190/15(c).

[157] *See, e.g.*, GA. CODE ANN. § 20-3-681(f) (West 2021) ("A postsecondary educational institution . . . shall not [compensate] a current or prospective student athlete [for using] the student athlete's name, image, or likeness"); KY. REV. STAT. ANN. § 164.6945(3)(a) (West 2022) ("An institution . . . shall not give . . . compensation for [using] an athlete's name, image, or likeness."); MO. ANN. STAT. § 173.280(4)(4) (West 2023) ("A postsecondary educational institution . . . shall not compensate a student athlete . . . or the family . . . [for using the] student athlete's name, image, likeness rights, or athletic reputation.").

[158] 110 ILL. COMP. STAT. ANN. § 190/20(d) (West 2022).

[159] *Id.* § 190/15 (e)(2).

> No postsecondary educational institution shall be [sued] for damages of any kind under this Act, [involving] but not limited to— a claim for unfair trade or competition or tortious interference. No postsecondary educational institution shall be [sued for adopting, implementing, or enforcing] any contract . . . or other requirement in compliance with this Act. This Act . . . shall not waive or diminish any applicable defenses and immunities, including, but not limited to, sovereign immunity applicable to postsecondary educational institutions.[160]

Thus, in the end, institutions may exercise their powers with impunity and student athletes in Illinois and elsewhere are left with only "illusory" or "meaningless" rights.[161]

III. JURISDICTIONAL CONFLICT: WHETHER NIL STATUTES AND HIGH SCHOOL ATHLETICS NIL BYLAWS CONCURRENTLY REGULATE MINOR, PROSPECTIVE COLLEGE STUDENTS' ACTIVITIES

Shortly after the Supreme Court decided *Alston*, both collegiate and high school athletes began competing to monetize their NILs. Most state statutes allow "current and prospective" collegiate athletes to form NIL endorsement and employment agreements.[162] Additionally, a fairly large number of high school athletic associations (HSAAs) amended their bylaws to permit high school athletes to enter into NIL deals.[163]

Similar to how universities have broad authority to regulate their current students' NIL activities, HSAAs have authority to regulate the NIL activities of high school athletes, typically between fourteen and eighteen years old.[164] However, a major jurisdictional question has emerged regarding whether collegiate institutions and HSAAs have concurrent authority to regulate the NIL activities of minor high school students who are prospective collegiate student athletes.[165] To help explain the origin and essence of this dispute, we must

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[160] *Id.* § 190/35.

[161] *See, e.g.*, FLA. STAT. ANN. § 1006.74(3) (West 2023) ("A postsecondary educational institution . . . is not liable for any damages [arising from the institution's interfering with an athlete's efforts] to earn compensation [by using] her or his name, image, or likeness."); LA. REV. STAT. ANN. § 17:3703(L) (2022) ("[A] postsecondary institution . . . shall [not] be liable for any damages to an intercollegiate athlete's ability to earn compensation [by monetizing his or her] name, image, or likeness."); *see also* Thomas v. Color Cnty. Mgm't, 84 P.3d 1201, 1213 (Utah 2004) (stressing that Utah's appellate courts refuse to impose, upon innocent litigants, a statutory interpretation that grants a "meaningless" or "illusory" right, and refusing to interpret a subsistence-payment statute that renders rights "worthless," "meaningless," or "illusory").

[162] *See generally supra* Part I.

[163] *See generally infra* note 165 and accompanying discussion.

[164] *See What Are the U.S. Education Levels?* USAHELLO, https://usahello.org/education/children/grade-levels/#gref (last visited June 25, 2023); Lan Kennedy-Davis, *Let's Make a NIL Deal Part II: High School Student-athletes Look to Get into the NIL Game*, JD SUPRA (Mar. 11, 2022), https://www.jdsupra.com/legalnews/let-s-make-a-nil-deal-part-ii-high-7720859/.

[165] *See* Marquis Ward, *An Analysis of NIL Governance in High School Sports*, FRIESER LEGAL BLOG (Oct. 13, 2022), https://frieserlegal.com/an-analysis-of-nil-governance-in-high-school-

address the legal status of enrolled and prospective college students—are they minors or adults?

A. Competing Statutory Rules: Whether Current and Prospective Collegiate Athletes Are "College Kids," "Young Adults," or "Minors"

Generally, under the common law, "adults" and "minors" have a right to form "valid" contractual relationships with third parties without having to satisfy any condition precedent.[166] However, NIL statutes create conditions that current and prospective college students must satisfy before securing a right to form third-party endorsement and employment contracts.[167]

Thus, once more, assume that your friends' three children, between eighteen and twenty-three years old, attend Dartmouth College, the University of Texas at Austin, and the University of Georgia, respectively. Now, consider whether those children are "adults," "emancipated minors," "unemancipated minors," "kids," "adult kids," "young adults," or "college kids." In 2018, Ralph K. M. Haurwitz, a highly experienced sports reporter, raised a similar question. He penned:

> When the University of Texas football team qualified for a bowl game . . . [the] head coach declared: "We've got confident kids in that locker room." . . . [The University of Georgia's head coach] discussed his team's ability to bounce back emotionally after losing [and stressed that his kids recover faster than one might think] . . . . Kids? College athletes in nearly all cases are at least 18 years old. That's old enough to fight in wars and vote. Some [athletes are] over 6 feet and weigh more than 300 pounds. And yet, college coaches across the nation routinely refer to them as kids. Why? . . . [T]hese athletes provide the labor [which allows] a multibillion-dollar industry of advertisers, TV networks, sports gear companies and gambling entities to profit.[168]

To be sure, scholars offer various theories to explain why eighteen- to twenty-three-year-old students are viewed as "kids," "college kids," or "minors"

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sports/ (stressing that collegiate NIL statutes do not automatically create a right of publicity for high school athletes and do not override state high school athletic association's NIL rules); Kennedy-Davis, *supra note* 164 (discussing jurisdictional divides between and among HSAA rules and NIL statutes).

[166] *See* RESTATEMENT (SECOND) OF AGENCY § 320 (AM. L. INST. 1958) ("Unless otherwise agreed, a person's making or purporting to make a contract with another agent for a disclosed principal does not become a party to the contract."); *cf.* Latch v. Gratty, Inc., 107 S.W.3d 543, 546 (Tex. 2003) (citing First Nat'l Bank of Wichita Falls v. Fite, 115 S.W.2d 1105, 1109–10 (Tex. 1938)) (reaffirming that an agent may make a contract for an undisclosed principal in his own name, and the principal may sue or be sued on the contract).

[167] *See supra* Part II.B.

[168] *See* Ralph K. M. Haurwitz*, Scholars' Thoughts on Why College Coaches Call Their Athletes 'Kids'*, AUSTIN-AMERICAN STATESMAN (Dec. 26, 2018), https://www.statesman.com/story/news/education/campus/2018/12/26/thoughts-on-why-college-coaches-call-their-athletes-kids/6553403007/.

rather than "adults."[169] On the other hand, a patchwork of competing legal definitions probably explains the confusion. Barring a few exceptions, the age of majority (or adulthood) in most states is eighteen years old.[170] This is when an individual legally becomes an adult.[171] Generally, a person is a minor until they reach the age of majority. When this happens, the person becomes a "young adult" and acquires various legal obligations and a right to participate in "adult-only" activities.[172]

Still, the confusion does not completely dissipate as state statutes and common law rules create various classes of adults and minors—emancipated and unemancipated—who have unique rights and obligations. Consider, for example, the reasonably informative language in a series of Wyoming's statutes. First, the Age of Majority statute provides:

> Upon becoming eighteen (18) years of age, an individual reaches the age of majority [or] an adult [and] acquires all rights and responsibilities [which are] granted or imposed by statute or common law . . . . Any competent adult may enter into a binding contract and shall be legally responsible.[173]

Wyoming's Emancipation of Minors law states that a "minor" is an individual whose chronological age is less than the age of majority, eighteen years old.[174] But, more relevant, the statute also defines an "emancipated minor" as a minor who is married, serves in the military, or receives a declaration of emancipation.[175] A court may issue a declaration of emancipation if:

> [A] minor is at least seventeen (17) years of age and the court finds emancipation is in the best interests of the minor. [Before issuing a decree], the court shall [determine] if 1) the minor's parents [approved] the proposed emancipation, 2) the minor is living or is willing to live apart from his parents . . . 3) [the minor's level of maturity and ability] to manage his personal affairs, and 4) [the minor's legal source of income].[176]

In part, these competing definitions and categories explain why some twenty- to twenty-six-year-old university students are called "college kids,"[177]

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[169] *Id.*

[170] *See Age of Majority by State*, WISEVOTER, https://wisevoter.com/state-rankings/age-of-majority-by-state/ (visited last on June 22, 2023).

[171] Elissa Suh, *The Age of Majority (and the UTMA Account Distribution Age) in Every State*, POLICYGENIUS (Dec. 1, 2021), https://www.policygenius.com/estate-planning/age-of-majority-by-state/.

[172] *See id.*

[173] WYO. STAT. ANN. § 14-1-101(a)–(d) (West 1977).

[174] *Id.* § 14-1-201(a).

[175] *Id.*.

[176] *Id.* § 14-1-203(a)–(d) (West 1977).

[177] *Cf.* Marshall v. BNSF Railway Co., No. 18-cv-2385-JWL, 2019 WL 5209159, at *2 (D. Kan. October 16, 2019) (describing a potential employee as "any 26-years-old new hire" or a "college kid").

and some sixteen- or seventeen-year-olds in high schools are called "emancipated adults" or "young adults."[178]

B. An Evolving Jurisdictional Conflict: Whether NIL Statutes and High Schools' Bylaws Concurrently Govern Prospective College Students' Publicity Rights

Again, as of publication, about twenty-five HSAAs have adopted or amended bylaws which allow students to monetize their NILs.[179] However, many NIL statutes also govern "prospective" students' publicity right. [180] Thus, from the perspectives of high school students and their parents, a two-prong jurisdictional question has emerged: 1) whether the term "prospective" athletes includes emancipated and unemancipated minors who are enrolled in high schools, and, if so, 2) whether NIL statutes and HSAA bylaws concurrently govern "prospective" collegiate students' publicity rights while they are still in high school. A conservative reading of the "prospective student" language in numerous NIL statutes suggests that the answer to each question is yes.

As an illustration, Arizona's and Delaware's NIL statutes govern persons, including high school athletes, who "may be eligible to attend [collegiate institutions] in the future."[181] Michigan's NIL statute regulates the activities of all prospective students "who will attend" college and universities within the state.[182] And Texas's NIL statute unequivocally governs all "prospective" students before they enroll in an institution of higher education. [183]

So, what is the concurrent jurisdiction problem? In Louisiana and Tennessee, NIL statutes regulate the formation of prospective collegiate athletes' or emancipated and unemancipated high school minors' NIL deals.[184] But the

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[178] *See* Ireland v. Ireland, 855 P.2d 40, 43 (Idaho 1993) (finding that a 16-year-old high school student was an emancipated minor); *see also* Elissa Suh, *supra* note 171 (stressing that an individual's age of majority differs from 1) the nearly universal twenty-one-year-old drinking age, 2) a twenty-six-years-old termination of coverage age under a parent's health insurance contract, and 3) the usually sixteen- to seventeen-year-old age of emancipation or young adult age).

[179] *See* Braly Keller, *High School NIL: State-by-state Regulations for Name, Image and Likeness Rights*, *supra* note 14.

[180] *See, e.g.*, MONT. CODE ANN. § 20-1-232 (4) (West 2023) ("A postsecondary institution . . . may not provide to a prospective or current student-athlete compensation for use of the student-athlete's name, image, or likeness.").

[181] *See* ARIZ. REV. STAT. ANN. §§ 15-1892(C) (West 2021), 15-1762(9) (West 2017) ("'Student athlete'" means an individual who . . . may be eligible in the future to engage in any intercollegiate sport."); DEL. CODE ANN. Tit. 24, § 5402(21) (West 2023) (same).

[182] *See* MICH. COMP. LAWS ANN. § 390.1733(3)(a) (West 2022) (prohibiting a postsecondary educational institution from compensating a prospective college athlete who will attend the institution for using the student's name, image, or likeness).

[183] *See* TEX. EDUC. CODE ANN. § 51.9246(j)(1) (West 2023) ("No individual, corporate entity, or other organization may . . . enter into any [NIL] arrangement with a prospective student athlete . . . prior to [the student's enrolling] in an institution of higher education.").

[184] *See* LA. REV. STAT. ANN. § 17:3703(A)(2) (2022) ("[T]o maintain a clear separation between amateur . . . and professional sports, a postsecondary education institution . . . shall not [compensate] a current or prospective athlete . . . for [using the athlete's] name, image, or

HSAA bylaws in those two states also prescribe certain conditions that fourteen- to eighteen-year-old athletes must satisfy before forming enforceable NIL endorsement and employment contracts.[185]

To obtain a clearer understanding of the concurrent jurisdiction issue and the legal problems that some legally unsophisticated minors and "college kids" will encounter, consider and compare Oregon's statutes and bylaws. Oregon School Activities Association (OSAA) issued NIL Guidance for High School Students, Parents, and Member Schools, which presents a detailed outline of students' rights, obligations, and restrictions:

> A student may earn compensation [by using her or his] name, image, and likeness . . . [if] the compensation is not an inducement to attend a particular member school . . . [and] the student discloses any proposed agreement/contract to the member school [where] the student is enrolled . . . . [When attempting to generate NIL compensation, the high school] student shall not use [OSAA's or member schools'] marks, logos, insignias . . . the student shall not wear apparel or [use] equipment which [displays OSAA's or member schools'] markers and/or logos . . . the student shall not use a member school's . . . facilities and/or equipment . . . and, the student shall not promote any services and/or products during team activities. [Additionally,] the student shall not promote activities, services, or products associated with, but not limited to, adult entertainment products or services . . . any product [that is] illegal for people under 18 years old, gambling . . . sports betting, the lottery, and betting in connection with video games, online games and mobile devices . . . . [High school students] and their family are encouraged to seek legal counsel . . . when considering NIL activity, along with guidance from their member school.[186]

Now, consider the simple language in one provision of Oregon's NIL statute: a post-secondary institution of education may not prohibit a student athlete from receiving necessaries "from a third party as compensation for [using] the

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likeness."); OR. REV. STAT. ANN. § 702.200(4) (West 2021) (regulating the NIL activity of "a prospective or current student athlete"); TENN. CODE ANN. § 49-7-2802(b)(1) (West 2022) ("An institution . . . shall not compensate a current or prospective intercollegiate athlete for [using her or his] name, image, or likeness.").

[185] *See* LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION, LHSAA 2023-2024 HANDBOOK 196, https://online.flippingbook.com/view/73641460/ (last visited Feb. 27, 2024) ("[NIL activities] "will not jeopardize a student athlete's amateur status if the student athlete complies with LHSAA Bylaw 1.25 on "Maintaining Amateur Status" as well as all LHSAA Bylaws, policies, and regulations."); TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, TSSAA 2022-2023 HANDBOOK § 18 (Feb. 17, 2023), https://cms-files.tssaa.org/documents/tssaa/2022-23/handbook/2022-23TSSAABylaws.pdf ("Students may receive payment for activities not related to performance, provided that [the activities do] suggest the endorsement or sponsorship of the TSSAA school. The student's [compensated] activities . . . may not include an image or likeness of the student in a uniform . . . or gear depicting the name or logo of the TSSAA member school.").

[186] OREGON SCHOOL ACTIVITIES ASSOCIATION, OSAA 2022-2023 HANDBOOK § 8.4.4 (Jan. 11, 2023), https://www.osaa.org/docs/handbooks/osaahandbook.pdf.

student's name, image or likeness."[187] Additional provisions read:

> A student athlete may not [make an NIL] contract [if the contract and athletic team's rules conflict] . . . . A student athlete who [makes an NIL] contract . . . shall disclose the contract to an official of the post-secondary institution . . . . [Additionally,] a post-secondary institution . . . may not [compensate] a prospective or current student athlete [for using] the student athlete's name, image or likeness.[188]

Which set of NIL rules is superior: Oregon's NIL statute or OSAA's NIL Guidance? As of publication, neither Oregon's legislature nor the University of Oregon's General Counsel Office has addressed this question.

Oregon's law is decidedly more "pro-student."[189] Yet simultaneously, the OSAA places the burden on financially strapped, legally unsophisticated—and presumably motivated—entrepreneurial athletes to hire legal counsel to decipher inconsistent NIL statutes and bylaws.

In this way, prospective and enrolled collegiate athletes have experienced more than a century of commercial exploitation. And although state legislatures and educational institutions have enacted NIL statutes and policies that purport to protect student athletes, these rules remain unclear and ineffective.

IV. THE NIL INDUSTRY'S EXTRALEGAL PERILS OF APPROPRIATING ENTREPRENEURIAL COLLEGIATE AND HIGH SCHOOL ATHLETES' PROPERTY INTERESTS

In 2021, the number of collegiate athletes in the United States exceeded 460,000 with many of them entering into NIL agreements with businesses.[190] In addition, various corporate entities crafted endorsement contracts with high school athletes and even preschoolers.[191] Put simply, entrepreneurial high school

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[187] OR. REV. STAT. ANN. § 702.200(2)(c) (West 2021); *see also* Saunders Glover Co. v. Ott., 12 S.C.L. 572, 572 (S.C.L. 1822) (holding "what are necessaries for an infant is a question of law"; Wiggins Est. Co. v. Jefferey, 24 Ala. 183, 188–89 (Ala. 1944) (reaffirming that a court must determine as a matter of law whether certain services or goods fall within the general classes of necessaries for minors or infants).

[188] OR. REV. STAT. ANN. § 702.200 (3)–(4) (West 2021).

[189] Bryan Dearinger, *Name, Image, and Likeness: The New Rules*, OFFICE OF THE GEN. COUNS.—UNIV. OF OR., https://generalcounsel.uoregon.edu/name-image-and-likeness-new-rules (visited last on June 26, 2023).

[190] *See* Dan Whateley & Colin Salao, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money,* BUSINESS INSIDER (Apr. 2, 2024), https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12; *see also NIL Insights, Compensation and Activity Trends from the NIL Era of College Sports, July 1, 2021 – November 30, 2022*, OPENDORSE, https://opendorse.com/nil-insights/ (last visited June 27, 2023) (reporting that tens of thousands of college athletes received and disclosed NIL deals in the billion-dollar NIL industry).

[191] *See, e.g.*, *High School Athletes Are Getting Major Endorsement Deals Following State Law Changes,* CBS NEWS (Nov. 30, 2022), https://www.cbsnews.com/news/high-school-athletes-nil-deals-name-image-likeness-six-figures/; Jordan Hart, *Popeyes Meme Kid from Viral GIFs Inks College Football NIL Deal with the Fast-Food Chain*, INSIDER (Jan. 13, 2023), https://www.businessinsider.com/popeyes-meme-kid-inks-college-football-nil-deal-with-chain-

and collegiate athletes can be excellent advertisers or "influencers" who use a mixture of traditional and social media to promote companies' goods and services.[192] Most significantly, the estimated annual total expenditure for "influencer marketing" will exceed $4 billion.[193]

Nevertheless, commentators' cautionary guidance is worth repeating: "all businesses in the NIL industry must understand the industry's legal challenges."[194] Stated slightly differently, there are numerous legal and extralegal risks that businesses must acknowledge and weigh before entering into mutually beneficial or highly exploitative and substantively unconscionable NIL contracts with college kids or minors. This Section identifies and discusses the extralegal risks that prove to be more challenging than the legal risks.

A. "Revenge Marketing" and Collegiate Athletes Employing Non-Violent Means to Resolve NIL Commercial Disputes

Before *Alston*, business entities and universities cooperatively exploited collegiate athletes' intellectual property interests without paying market rates or worrying about the reactions of helpless or frustrated students.[195] As previously explained, collegiate athletes routinely assigned their publicity rights in exchange for athletic scholarships, thereby extinguishing any rightful expectancy of compensation.[196]

However, in a post-*Alston* era, student athletes are not required to assign their property interest for any reason. Quite simply, they may retain their publicity right and earn NIL income by using one or a combination of strategies. Student athletes can form partnerships to promote national and international brands, participate in photoshoots, autograph signings, or local events on behalf of small businesses, or use social media to advertise products and services of corporate or professional entities.[197]

Nevertheless, businesses and agents must acknowledge an uncomfortable truth: extralegal risks may accompany some NIL-related contractual relationships with college kids, young adults, or emancipated minors.

2023-1; *Six-Year-Old Golf Phenom Signs Youngest NIL Deal in History with Sunday Golf*, GOLF WIRE (Dec. 19, 2022), https://thegolfwire.com/patton-green-nil-golf/.

[192] *See* Whateley & Salao, *supra* note 190 (reporting that "a mad rush of student-athletes, small businesses, national brands, and startups" are forming NIL deals; some athletes execute deals that are worth five or six figures; and unlike professional influencers, college athletes are "micro" or "nano" influencers— because they generally have less than 100,000 and 10,000 subscribers, respectively, on social media).

[193] *NIL Contracts: What You Need to Know and Look For*, *supra* note 24.

[194] Frieser, *supra* note 17.

[195] *See* Ryan Sullivan, *An Athlete's Right of Publicity, supra* note 11 ("Student-athletes assign their rights of publicity to the colleges or the NCAA, in exchange for a scholarship and the right to play for the school.").

[196] *Id.*

[197] *See generally NIL Insights, Compensation and Activity Trends from the NIL Era of College Sports*, *supra* note 190.

Additionally, prospective and current collegiate students can create both ordinary and extraordinary risks, which, if ignored, are likely to cause intangible and tangible losses.

The admonition is presented in part because ten states enacted fairly similar statutory provisions that contain surprising and curious terms. For example, Oregon's NIL statute reads: "[A] post-secondary institution of education or an athletic association . . . may not . . . [p]enalize or retaliate against a student athlete for exercising the student's rights."[198] Why would legislatures use such confrontational terms like "retaliate" and "penalize"? Without knowing more, there is a plausible and chilling answer: some high school and collegiate students are likely to respond to such retaliatory or punitive behavior by employing "extremely vengeful," extralegal means rather legal means.[199]

Consider several surprising findings. Marketing experts encourage businesses to use "revenge" advertising to sell goods and services.[200] The movie, television, and videogames industries,[201] as well as some social media influencers, habitually use and promote "revenge" when advertising products and services to young children and teens.[202] One finding, however, is not surprising: to defeat an opponent, high school, collegiate, and professional sports coaches celebrate and encourage kids,[203] college kids,[204] and young adults[205] to

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[198] OR. REV. STAT. ANN. § 702.200(2)(b) (West 2021). For more examples, see ARK. CODE ANN. § 4-75-1303(f)(2) (West 2023); GA. CODE ANN. § 20-3-681(h) (West 2021); KY. REV. STAT. ANN. § 164.6943(3) (West 2022); MICH. COMP. LAWS ANN. § 390.1731(2)(b) (West 2022); MISS. CODE ANN. § 37-97-107(4) (West 2022); MONT. CODE ANN. § 20-1-232(2)(b) (West 2023). '.

[199] *See infra* notes 200–206 and accompanying discussions.

[200] *See, e.g.*, Graeme Newell, *Using the Power of Revenge Marketing*, PROMAX (Apr.22, 2013), https://brief.promax.org/article/using-the-power-of-revenge-marketing ("Sometimes the best way to bond with customers is to appeal to their dark side . . . [S]ome of the world's most successful brands build customer loyalty using negative marketing and the payback fantasy.").

[201] *See, e.g.*, Devon Forward, *27 Essential Revenge Movies Best Served Cold*, COLLIDER (Aug. 22, 2021), https://collider.com/best-revenge-movies/ ("[R]evenge stories stretch across all genres [and most movies about] getting vengeance [are] violent . . . ."); Jordan Crucchiola, *Here Are 20 Teen Vengeance Movies for Your Petty Heart*, VULTURE LISTS (Mar. 9, 2018), https://www.vulture.com/2018/03/here-are-20-teen-vengeance-movies-for-your-petty-heart.html.

[202] *See* Jennifer Waters, *Social Media Offers Sweet Revenge for Bad Service*, MARKETWATCH (May 11, 2012), https://www.marketwatch.com/story/social-media-offers-sweet-revenge-for-bad-service-2012-05-11 ("If you're tired of being treated poorly by retailers, airlines and other service-industry types, take revenge via social media. You will [be] heard and get action.").

[203] *See, e.g.*, Ben Cohen, *The Revenge of the High-School Coach*, WALL ST. J. (Sept. 21, 2012), https://www.wsj.com/articles/SB10000872396390444620104578008590551287874.

[204] *See, e.g.*, Jason Gay, *A Final Four Revenge Twist''*, WALL. ST. J., Mar. 29, 2022, at A1; Darren Everson, *The Revenge of the Curry Brothers'*, WALL ST. J. (Mar. 12, 2009), https://www.wsj.com/articles/SB123681216980401339; Carl Bialik & Jason Fry, *Ohio State Seeks Sweet Revenge in Title Game Against Florida*, WALL ST. J. (Apr. 2, 2007), https://www.wsj.com/articles/SB117552356668456827.

[205] *See generally* Amanda Christovich & Andrew Beaton, *U.S. Gets Shot at Revenge*, WALL ST. J., June 22, 2019, at A1 (discussing a scheduled World Cup revenge match); Zolan Kanno-Youngs, *Giants Get Revenge on Dallas*, WALL ST. J., Oct. 26, 2015, at A2; Daniel Barbarisi, *Discarded Yankee Returns and Exacts His Revenge*, WALL ST. J., Aug. 16, 2013, at A21; David Biderman, *The Revenge of the Right-Handed Batter*, WALL ST. J., Sept. 21, 2010, at D8.

use "controlled aggression" or "controlled vengeance."[206] And, to be sure, vengeful acts and physical aggression are extralegal means that some allegedly exploited athletes may use to secure a satisfactory remedy.[207]

In this post-*Alston* era, some highly vindictive or vengeance-prone athletes might employ a variety of extralegal means to retaliate against businesses as well as against their professional advisors or agents, including attorneys, accountants, and financial advisors, who allegedly violated students' NIL rights.[208] Such extralegal retaliation can include refusing to perform NIL-related services; breaching or voiding NIL contracts; performing a service below the reasonable expectation of a sponsor; "foot dragging" or delaying a timely performance of a task; intentionally and temporarily damaging their own intellectual property interests—reputation, name, image, or voice; encouraging other social media influencers or subscribers to boycott sponsors' goods or services; and using social media to excoriate allegedly exploitative sponsors.[209]

B. "Sports Parents" and the Application of "Aggressive" and "Vengeful" Means to Protect Minors' and Collegiate Athletes' Property Interests

The common law is clear: a parent is not a contractual party if an emancipated or unemancipated minor forms a goods and services or an employment contract with a third party.[210] Additionally, a parent and a third party are not contractual parties, even if the parent and minor entered into an agency

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[206] *See, e.g.*, Stephen D. Eule, *The Right Football,* WALL ST. J., June 7, 2002, at A10 ("The best players combine fitness, skill, balance, and power with controlled aggression."); Ron Higgins, *Coming Back Even Stronger Suspension Doesn't Halt Georgia's Green*, COMMERCIAL APPEAL-TENNESSEE, Dec. 30, 2010, at D1 ("[Following an] NCAA suspension, Green played with a controlled vengeance that lifted the Bulldogs . . . to a 6-6 record and a chance for a winning season.").

[207] *See* Karen Stabiner, *The 21st-Century Shakedown of Restaurants*, N.Y. TIMES, July 27, 2023, at A22 (explaining how "entrepreneurial influencers" can exploit, undermine profits or take advantage of a business); Sarah Little, *Influencer Marketing: The Good, the Bad and the Ugly*, FORBES (April 13, 2023), https://www.forbes.com/sites/forbescommunicationscouncil/2023/04/13/influencer-marketing-the-good-the-bad-and-the-ugly/ (stressing that businesses must be "willing to accept the potential drawbacks of [a] relationship with an influencer").

[208] *Id.*

[209] *Cf.* Bryan Finck, *Five Things Companies Should Know About NIL*, DREAMFIELD (Nov. 25, 2021), https://www.dreamfield.co/resources/what-companies-should-know-about-nil; Tim Sullivan, *NCAA Is Giving Ground to College Athletes, but Also Making Sure It's on Its Own Terms*, LOUISVILLE COURIER J. (Oct. 30, 2019), https://www.courier-journal.com/story/sports/2019/10/30/ncaa-nil-board-allows-names-image-likeness-rules-its-terms/4095866002/ ("The NCAA embraces change as if it were a cactus. . . . [The organization's] foot-dragging continues to frustrate measures that properly belong on the fast track. . . . In short, the NCAA is ceding control only slightly, while establishing parameters and a process for bylaw revision sure to spawn . . . additional delay.").

[210] *Cf.* Spear v. Cummings, 40 Mass. 224, 225 (Mass. 1839) (finding that the town and schoolmaster had a compensation contract and declaring that the pupils' parents had no privity of contract with the schoolmaster).

contract.[211] Simply, a parent agent and a third party have no privity of contract. On the other hand, a parent agent may negotiate with a third party and execute an NIL agency, endorsement, or employment contract on behalf of a minor.[212]

Delaware, Louisiana, South Carolina, and Tennessee unambiguously allow parents to negotiate and execute NIL contracts if their student athletes are under the age of eighteen.[213] However, those statutes have spawned two questions: 1) whether parents may employ extralegal tactics to enforce a minor's and a third party's NIL endorsement, employment, or agency contract; and 2) whether parents may use any necessary self-help measure to prevent allegedly "predatory" third-party entities from appropriating minors' NIL property interests without providing sufficient consideration.

The questions are relevant for an unsettling reason. As reported, thousands of current and prospective collegiate athletes and their parents seek lucrative NIL deals and effective legal representation.[214] However, as of publication, when third parties slightly interfere with young children's present or future interests, many parents retaliate using highly aggressive tactics.[215]

Why are some sports parents more likely to use extralegal and aggressive means to retaliate and settle sports-related disputes? A prevailing theory posits that "aggressive" sports parents spend an enormous amount of money on youth sports, viewing it as a portal to secure athletic scholarships or professional contracts for their children.[216] Thus, these parents are likely to seek revenge and

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[211] *Id.*

[212] *Cf.* Sharon v. City of Newton, 769 N.E.2d 738, 746–47 (Mass. 2002) (declaring expressly that parents may execute a binding release on behalf of their minor child).

[213] *See* DEL. CODE ANN. Tit. 24,§ 5402(16) (allowing a parent to serve as a "recruiting or soliciting" agent for a student-athlete if the latter is a minor); LA. REV. STAT. ANN. § 17:3703(F) (stating that only a parent agent may execute a student athlete NIL-compensation contract if the student is "under eighteen years of age"); S.C. CODE ANN. 1976 § 59-102-100(C) ("[If] a student athlete . . . is a minor, the parent . . . may void an agency contract that does not conform to this section. If the contract is voided, any consideration received from the . . . agent [may be kept]"); TENN. CODE ANN. § 49-7-2802(h)(2) (allowing parents to be a minor's unlicensed agent and secure compensation from a third party who uses "the intercollegiate athlete's name, image, or likeness").

[214] *See NIL Insights, Compensation and Activity Trends from the NIL Era of College Sports*, *supra* note 190 and accompanying text.

[215] *See* Charlie Tygard, *Aggressively Rude Parents Are Driving Out Children's Sports Referees*, TENNESSEAN ONLINE (Apr. 22, 2023), https://www.tennessean.com/story/opinion/contributors/2023/04/22/aggressively-rude-parents-are-driving-out-childrens-sports-referees/70108910007/; Emilie Le Beau Lucchesi, *Parents Behaving Badly, by the Numbers*, N.Y. TIMES, Nov. 1, 2018, at SP2 (reporting that sports parents' aggressive "behavior covers a wide continuum"—increasingly threatening and physically assaulting coaches, referees, players, or other parents—and citing several reasons. Among the top reasons, aggressive parents invest a lot of time and financial resources on youth sports, expecting "a significant return on their investment . . . a college scholarship or [a] professional sports contract"); Bill Pennington, *Fighting the Epidemic of Parents Behaving Badly*, N.Y. TIMES, July 22, 2018, at SP1 (reporting that parents in Tulsa, Oklahoma—who attended 8-year-old children's basketball and soccer games—verbally and physically abused referees and game officials, and stressing that "more than 70 percent of new referees in all sports quit the job within three years, given the "pervasive abuse from parents and coaches").

[216] *See* Jason Gay, *Why Did the Umpire Quit Little League? Nasty Parents*, WALL ST. J., May

employ extralegal means when a third party interferes with a child's and/or parent's expectations.[217]

But there is an even more disquieting reality—some high school and collegiate athletes are more likely to become vengeful and use extralegal strategies to settled sports-related conflicts. Several studies reveal that some young people who "participate in aggressive sports" are more likely to celebrate and exhibit aggressive behavior than non-athletes or persons who participate in non-aggressive sports.[218] However, other researchers have also discovered that across all classes of people, many high school, collegiate, and professional athletes use or seriously contemplate using vengeful acts against actual or imaginary tortfeasors.[219]

5, 2023, at A12 (reporting that parents' physical and verbal abuse and other "antisocial behaviors" are forcing sports officials for little league programs in New Jersey and elsewhere to quit, noting that "[p]arents who pay more may expect more," and stressing that the antisocial parents are more likely to view "youth sports as a portal to potential scholarship opportunities"); Fox Butterfield, *A Fatality, Parental Violence and Youth Sports*, N. Y. TIMES, July 11, 2000, at A14 (suggesting that the causes of parental violence are more parental involvement in children's sports and greater pressure to see minors "win athletic scholarships or big-money professional contracts").

[217] *See* Fox Butterfield, *supra* note 216, at A14 (reporting that a suburban Boston father was charged with manslaughter after fatally beating another father over an incident of rough play at a youth hockey game, emphasizing that the incident reflects "a rapid growth in parents' violent acts at children's athletic events"); Richard Fausset & Nedra Rhone, *Father Gets 45 Days in Jail for Attacking Son's Coach*, L.A. TIMES, Jan. 26, 2001, at B1 ("The father of a Northridge Little League player was sentenced to 45 days in jail . . . for attacking and threatening to kill his son's coach because the boy played only three innings.").

[218] Erik Vance, *Channel All That Rage into Your Workout*, N.Y. TIMES (Aug. 11, 2021), https://www.nytimes.com/2021/08/11/well/move/workout-stress-fear.html?smid=url-share; *see also* Pat Harriman, *Payback or Pay Back? Children Understand Revenge Before Reciprocity, Study Says*, UNIV. OF CAL. (Jan. 9, 2020), https://www.universityofcalifornia.edu/news/payback-or-pay-back-children-understand-revenge-reciprocity-study-says (reporting that experimental researchers at Yale University and other major universities discovered that preschool-aged "[c]hildren [are] eager to retaliate" but show "almost no awareness that they should repay favors"); Ubah Ali, *10-Year-Old Boy Kills Mother Because She Wouldn't' Buy Virtual Reality Headset, Police Say*, ABC NEWS – WTMJ (Dec. 2, 2022), https://abc7chicago.com/10-year-old-boy-kills-mother-virtual-reality-headset-milwaukee-wisconsin-news/12516592/ (reporting that the angry minor secured a gun because "his mom [woke] him up at 6 in the morning" and refused to let him "order a virtual reality headset from Amazon"); *Teen Violence: Do You Have an Angry Teen?*, SHEPHERD'S' HILL ACAD., https://www.shepherdshillacademy.org/common-teen-issues/teen-violence-do-you-have-an-angry-teen/ (last visited July 3, 2023) (outlining numerous theories to explain teens' violence and suggesting that physically or emotionally bullied teens "may become enraged and seek revenge").

[219] *See generally* Susan Montoya Bryan & Glen Rosales, *Police: Revenge Prompted Deadly New Mexico Campus Shooting*, AP NEWS (Nov. 22, 2022), https://apnews.com/article/college-football-sports-new-mexico-albuquerque-7399b2cf5ce6f23b67d4976a32d9aad4 (reporting that a pair of University of New Mexico students faced charges of aggravated battery and conspiracy after fashioning "a plot to enact revenge," causing the death of one student and injuring a basketball player); Brian Knowlton, *'Revenge' Cited as Motive of 2 Outcast Students; Experts Check for Bombs : Slayings of 15 at School Shock America*, N.Y. TIMES (Apr. 22, 1999), https://www.nytimes.com/1999/04/22/news/revenge-cited-as-motive-of-2-outcast-students-experts-check-for-bombs.html (reporting that Eric Harris and Dylan Klebold killed multiple students, apparently seeking "revenge" against student-athletes); Virgil Villanueva, *"I Drove Through the Streets Plotting the Man's Murder" — When Former Los Angeles Lakers Forward*

There are many examples of retaliatory behavior, which, although not relating to compensation, demonstrate a potentially dangerous side of athletes. For example, in 2018, Christopher Darnell Jones Jr.—"an ambitious but sometimes angry student"—graduated from Petersburg High School.[220] Later that year, he enrolled at the University of Virginia and joined the football team.[221] Two years later, Jones was charged with second-degree murder after killing three teammates.[222] Undeniably, the devastating loss of lives require an appropriate legal remedy. But consider a surviving player's comment after confronting his "own feelings of grief [and] devastation" after the deaths: "I was very angry and had many bad thoughts of revenge."[223]

Still, corporate entities and professional agents should make NIL deals with entrepreneurial collegiate athletes. But businesses should also understand and appreciate that unlike professional adults or corporate executives, current and prospective collegiate athletes are likely to use extralegal means against alleged predators who appropriated or exploited the students' property rights without paying adequate compensation.[224]

Should parents use excessively aggressive means to protect their children's property interests? Should parents even get involved? Some legal experts answer both questions with a resounding "no."[225] Instead, experts encourage parents to hire attorneys or advisors to protect their children's interests.[226] They also stress that parent investors must accept two general rules: 1) a student's licensed agents—lawyers, financial advisors, and accountants—only have a contractual obligation to represent the student and not the parent; and 2) parents have no legal right to make NIL decisions for students who are not minors.[227]

However, legal experts are strongly encouraged to read common law agency

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Spencer Haywood Almost Killed Head Coach Paul Westhead, BASKETBALL NETWORK (Oct. 22, 2022), https://www.basketballnetwork.net/old-school/when-former-los-angeles-lakers-forward-spencer-haywood-almost-killed-head-coach-paul-westhead (reporting that Haywood clashed with opposing team members during the NBA Finals and the coach suspended him indefinitely, triggering "dark thoughts against Westhead"); Dave D'Alessandro', *NJ Nets' Courtney Lee Says Chip on Shoulder Is 'A Little Heavier' Against Orlando Magic*, STAR-LEDGER (Oct. 31, 2009), https://www.nj.com/nets/2009/10/nj_nets_courtney_lee_says_chip.html (reporting that professional athlete Courtney Lee uses "revenge" and violence to overcome poor performance).

[220] *See* Jacey Fortin, *The Suspect in the Shooting Was a University Student*, *Officials Say*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/live/2022/11/14/us/uva-shooting/the-gunman-was-identified-as-a-student-at-the-university?smid=url-share.

[221] *Id.*

[222] *Id.*

[223] *See* Andrea Adelson, *Inside a Week of Mourning and Celebration with Virginia Football*, ESPN (Nov. 21, 2022), https://www.espn.com/college-football/story/_/id/35076799/week-mourning-celebration-virginia-football-shooting-victims?platform=amp.

[224] *Id.*

[225] *See, e.g.*, Jordan C. Butler, Geoffrey S. Kunkler, and Kwame O. Christian, *NIL: The Role of Student-Athletes' Parents,* CARLILE PATCHEN & MURPHY LLP (July 12, 2021), https://www.cpmlaw.com/the-role-of-student-athlete-parents-and-advising-nil-rights/.

[226] *Id.*

[227] *Id.*

rules as well as all NIL statutes extremely carefully. We have learned that some NIL statutes give parents an express right to negotiate and make NIL deals on behalf of their children, if the children are younger than eighteen years old. Even more importantly, corporate entities, small businesses, lawyers, and other agents are also encouraged to consider that some parents, acting on behalf of their allegedly exploited students athletes, are extremely likely to use extralegal and aggressive means to get revenge.[228] And, among other reasons, some sports parents are likely to retaliate because they are exceedingly less likely to prevail when they file misappropriation, breach of contract, and right of publicity actions in state and federal courts.[229]

V. THE LEGAL PERILS OF CRAFTING EXPLOITATIVE NIL DEALS WITH MINORS AND COLLEGIATE ATHLETES

Assume that a business forms a valid NIL contract with a current collegiate athlete or with the parents of an underage prospective athlete. Also assume that the above-mentioned extralegal and aggressive risks are not present. Still, a non-exploitative and "good faith" business entity might encounter some legal risks. For example, a careful reading of the NIL statutes reveals two conclusive presumptions. First, current and prospective collegiate athletes above the age of eighteen wholly own and have an unbridled right to sell, market, manage, exploit, or assign their property interests. Second, a prospective athlete under the age of eighteen owns their NIL, but the minor's parent has a right to sell, market, or manage the property on behalf of the minor.[230]

However, before fashioning NIL deals, corporate entities and parents are strongly encouraged to face a potentially challenging legal question: whether an unemancipated minor has an exclusive property interest in their personal name or shares a joint property interest with their parent(s). Generally, courts agree that adults and young adults have property or private interests in their personal names.[231] On the other hand, courts are divided over whether a minor's personal name or surname creates an indestructible property interest.[232]

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[228] *See, e.g.*, Rick Morrissey, *Slay It Ain't So: Yappy Charles Barkley Now Talking Murder*, CHI. SUN-TIMES (Aug. 28, 2015), https://chicago.suntimes.com/2015/8/28/18453690/slay-it-ain-t-so-yappy-charles-barkley-now-talking-murder (reporting that Charles Barkley—a well-known sports analyst and NBA Hall of Famer—disclosed that "he would kill his former agent if he ever saw him again.")

[229] *See infra* Part VI and the accompanying discussion.

[230] *See supra* note 225 and the accompanying discussion.

[231] *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (197) (declaring that a "teacher's good name" is a property interest or private interest that merits procedural due process protection); JA Apparel Corp. v. Abboud, 568 F.3d 390, 408 (2d Cir. 2009) (reaffirming that property interests are imbued in adults' personal names).

[232] *Compare* Wright v. Buttercase ex rel. Buttercase, 244 S.W.3d 174, 176–78 (Mo. App. W.D. 2007) (applying the best interests of the child standard and permitting the minor to assume the father's surname and abandon the mother's surname), *and* Cobb by Webb v. Cobb, 844 S.W.2d 7, 9 (Mo. App. W.D. 1992) (ignoring the mother's challenge, applying the best interests of the child test and allowing the father to change his minor child's name), *with* C.R.F. *ex rel.* C.R.C. v. B.M.F.,

Among other explanations, the split exists because courts generally apply the "best interest of the child" test to determine if a personal name creates an economic benefit or a tax liability for a minor.[233] And, the test requires a consideration of " unique facts and circumstances" surrounding each dispute as well as the influence and "relative importance" of other so-called "non-exclusive" factors.[234] Consequently, conflicting judicial analyses and rulings are likely to arise. Nevertheless, assuming that a minor has an unquestionable ownership right in his personal name, there are other legal perils which can prompt an NIL dispute. Moreover, some legal factors are statistically and significantly more likely to influence businesses', collegiate athletes', and parents' likelihood of prevailing in an NIL-related lawsuit.[235] Some of the most challenging legal perils are discussed below.

A. Judicial Perils Accompanying a Breach of Contract Action

In June 2023, the Northern District Court of California decided a dispute in *The Brandr Group, LLC v. Electronic Arts, Inc*.[236] Although unresolved, the underlying NIL legal dispute in the case is highly relevant and instructional. Stated simply, based upon "a statement against interest" in a court document, one party allegedly fraudulently induced unsophisticated collegiate athletes to execute an exploitative NIL assignment contract.[237]

The underlying and relevant are simple. Electronic Arts (EA) is "the second largest stand-alone videogame publisher" in the United States, generating over $7 billion annually.[238] More than three billion people, including many sports enthusiasts, purchase and play EA's videogames.[239] The Brandr Group, LLC (Brandr) is "a brand management, marketing, and licensing business." [240]

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174 S.W.3d 90, 92 (Mo. App. E.D. 2005) (applying the best interests of the child test and preventing the father from changing his minor son's surname), *and* Blechle v. Poirrier, 110 S.W.3d 853, 855 (Mo. App. E.D. 2003) (same).

[233] *Cf.* Doxey v. Comm'n of Internal Revenue, 1991 T.C.M. (CCH) 2326 (T.C. 1991), *aff'd*, 979 F.2d 1534 (5th Cir. 1992) (finding that the children's names and signatures appeared on certificates of deposits, but declaring that the parents had a tax liability on interest income which was earned on certificates and reaffirming that 1) the ownership and enjoyment of property rather than the title determines an owner's identity, and 2) the substance of a transaction— rather than its form— determines one's tax consequences).

[234] *See* Anderson v. Dainard, 78 S.W.3d 147, 151 (Tex. App. 2015) (identifying six nonexclusive factors); *In re* T.W., No. 13–14–00318–CV, 2014 WL 6792467, at *6 (Tex. App. 2014) (stressing that proving or a failure to prove any set of unique factors has no bearing on one's ability to establish the best interests of a minor).

[235] *See infra* Part VI and the accompanying discussion.

[236] No. 23-CV-02994-HSG, 2023 WL 4297571 (N.D. Cal. June 20, 2023).

[237] *See infra* notes 252–246 and the accompanying discussion.

[238] Dan Gallagher, *EA Shows Mobile Games Are a Minefield*, WALL ST. J., Feb. 2, 2023, at B12.

[239] Sarah E. Needleman, *Videogame Buyers Hit Pause — Sales Growth Slows as Stay-Home Habits Change Number of Big-hit Releases Drops*, WALL ST. J., Aug. 10, 2022, at B4 ("[T]he number of people who play videogames worldwide is expected to grow 4.6% this year to reach 3.2 billion . . . .").

[240] Complaint, The Brandr Group, LLC v. Electronic Arts, Inc., No. 23-Civ-02715 ¶¶ 8, 19–20,

Purportedly, Brandr has "exclusive group-rights licensing agreements" with sixty-five colleges and universities, as well as with thousands of student athletes who attend those institutions.[241] Significantly, the colleges and universities are located across thirty-two states.[242]

On February 2, 2021, EA issued a press release disclosing that millions of passionate fans had encouraged the company to produce collegiate sports videogames.[243] In response, EA Sports formed a partnership with the Collegiate Licensing Committee (CLC), a collegiate trademark licensing company.[244] CLC has licenses to use and exercises control over "nearly 100 Football Bowl Subdivision (FBS) schools' intellectual property interests — logos, stadiums, mascots, and fight songs." [245] On May 17, 2023, EA announced that the company had executed a contract with OneTeam Partners to develop opportunities allowing all eligible FBS players to be participants in videogames.[246]

Subsequently, Brandr accused EA of tortiously interfering with the NIL group contracts. Brandr asserted that: 1) EA planned to negotiate with each student rather that with Brandr,[247] and 2) EA did not receive Brandr's express consent to use the students' NILs in combination with the educational institutions' brands, logos, stadiums, mascots, or fight songs.[248]

Brandr asked the Northern District Court of California to issue a temporary restraining order (TRO), alleging that EA was "pressuring" schools to accept the offer to appear in the videogame before June 30, 2023, while "misleading schools and students about their contractual obligations."[249] The court denied the TRO application, concluding that Brandr failed to establish that "extraordinary relief" was warranted."[250]

As of publication, Brandr's underlying legal claims have not been resolved.[251] Yet, the TRO dispute has uncovered some highly questionable

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27–48 (Cal. Super. Ct. June 16, 2023) [hereinafter Brandr Complaint].

[241] *Id.* ¶ 8.

[242] *Id.* ¶¶ 85–87, ex. 8.

[243] *Id.* ¶¶ 59–61.

[244] *Id.*

[245] *Id.*

[246] *Id.* ¶¶ 72–73.

[247] *See, e.g.*, Sara Tidwell, *MSU Athletics Teams Up With The Brandr Group to Bring NIL Licensing Opportunities to Student-athletes*, STATE NEWS (Aug. 27, 2021), https://statenews.com/article/2021/08/msu-to-allow-athletes-to-use-logos-and-licensing (reporting that Michigan State's Athletics and Brandr fashioned an agreement requiring Brandr to "create, activate and manage a Group Licensing Program on behalf of student-athletes" and allowing students to combine their NILs with Michigan State's trademarks and logos).

[248] Brandr Complaint, *supra* note 240, ¶¶ 27–48, 61, 86, 91, 141–42, 148–49, 155–56, 176.

[249] The Brandr Group v. Electronic Arts, No. 23-CV-02994-HSG, 2023 WL 4297571, at *1 (N.D. Cal. June 20, 2023).

[250] *Id*. at *8.

[251] *See* Cody Nagel, *EA Sports Prevails as Court Denies The Brandr Group's Temporary Restraining Order Request*, 247 SPORTS (July 1, 2023), https://247sports.com/Article/EA-Sports-prevails-as-court-denies-The-Brandr-Groups-temporary-restraining-order-request-212327828/ (reporting that as of Friday, July 1, 2023, the lawsuit is still not settled).

conduct. Even more importantly, the unwitting disclosure has increased the likelihood of some FBS students' filing NIL lawsuits against Brandr and their educational institutions. In Brandr's TRO application, the company stated repeatedly that it has exclusive "contractual rights with thousands" of students at FBS schools.[252] And, to underscore the assertion, Brandr filed a tortious interference of contract action against EA.[253]

Brandr's standardized NIL group licensing contract—the Current Student-Athlete Group Licensing Authorization & Assignment Agreement (GLA)—provides:

> [The FBS Institution] and The Brandr Group (TBG) will work on behalf of current Athletes to create . . . licensing or sponsorship programs . . . . [The latter will allow collegiate licensees or sponsors to use] "Athlete Attributes" . . . in combination with [the Institution's] trademarks and logos . . . . The undersigned Athlete . . . assigns to [TBG and its licensees and sponsors] the right to use all or any combination of the "Athlete Attributes"— name, nickname, initials, autograph, facsimile, voice, caricature, photograph, portrait, picture, image, likeness, jersey number, statistics, data, biographical information or any other identifiable feature . . . .
>
> Athletes shall receive 80% of the royalties [if] licensees and sponsors use the Athlete Attributes . . . . [If the attributes appear in] videogames . . . Athletes shall receive 70% of the royalties . . . . TBG shall retain 20% and 30% of [the] royalties, respectively. [The revenues shall be apportioned] . . . on a pro rata basis [or] divided equally . . . . [Athletes may terminate] this Agreement on the anniversary of date of its execution . . . . [A written notice of termination is required] least 15 days prior to that anniversary date. Use of Athlete Attributes —before a player provides a notice of termination . . . [will] continue until the expiration of [the] programs.[254]

Now, consider The Brandr Group Rights Collaboration Agreement (GRC) between Brandr and Michigan State University:

> Whereas, the State of Michigan . . . enacted an NIL statute, and whereas Michigan State University (MSU) [will create] a group licensing program for its current student athletes [MSU agrees to work with TBG — encouraging any interested [athletes] to voluntarily execute the GROUP LICENSING AUTHORIZATION & ASSIGNMENT AGREEMENT . . . . [MSU will also allow its] official marks, logos, verbiage, or designs [to be used] in the program at market rates . . . . This Agreement shall commence on the effective date and expire on July 31, 2024 . . . . Upon

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[252] Brandr Complaint, *supra* note 240, ¶ 13 (emphasis omitted).

[253] *Id.* ¶¶ 129–136.

[254] *Id.* ¶¶ 27–31, ex. 1 ("TBG separately contracts with individual student-athletes at . . . Partner Schools — [executing GLAs under which] participating [student athletes assign to TBG, licensees, and sponsors] the right to use the [student athletes' NILs] for co-branded opportunities.").

> expiration or termination of the Agreement, TBG will be entitled to its percentage of royalty payments . . . for a period of two (2) years.[255]

Questionably, the italicized terms and conditions in the GLA and GRC contracts strongly suggest that Brandr and MSU, intentionally or unintentionally, crafted an exploitative contract that induces each FBS athlete to assign their publicity rights in exchange for inferior royalties. Assume that EA is one of Brandr's licensees. Also assume that the athletes and Brandr receive 70 percent and 30 percent of the royalties**,** respectively. Who pays the 12 percent market rate for using MSU's "official marks, logos, verbiage, or designs"?[256] Based on EA's and the CLC's independent analyses, the FBS students' royalty percentage would be reduced significantly to compensate MSU.[257]

In addition, Michigan's NIL statute is exceedingly clear, stating that if an educational institution "identifies a conflict between [a] student's. . . [NIL] contract and *any* existing [institutional] agreements. . . . [the] institution shall communicate that conflict to the student."[258] Has MSU Athletics violated the state's NIL statute? Did MSU and Brandr intentionally create a conflict of interest and fail to resolve it? Furthermore, why does Brandr have a contractual right to assign a student's NIL to an extremely profitable company licensee—like Electronic Arts—and continue to collect royalties "for a period of two (2) years" after the contract terminates?

Finally, assume that EA ultimately executes Brandr's collaboration contract. And, two years later, numerous disgruntled students and their parent investors commence lawsuits, alleging that the group licensing contract is procedurally unconscionable, demanding an immediate termination of the GLA, and requesting a reimbursement of allegedly misappropriated NIL royalties. Could EA successfully circumvent several known legal hurdles and prevail against each student? The answer depends on whether some student athletes are minors who file an equitable disaffirmance action, and whether the students or their parents file a rescission of contract action.[259]

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[255] *Id.* ¶¶ 38–42, ex. 2.

[256] *See Licensees Apply for License*, MICH. STATE UNIV., https://licensing.msu.edu/licensees/apply-for-license.html (visited last on July 12, 2023).

[257] *Cf.* A.J. Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETICDIRECTORU, https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes/ (last visited July 12, 2023) (estimating that in 2014, EA's payments to student athletes averaged around $1,200 per person, but without the licensing fee costs, the value of the game was about $7,200 per student athlete); Tom Farrey, *Players, Game Makers Settle For $40M*, ESPN (May 30, 2014), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

[258] MICH. COMP. LAWS ANN. § 390.1737(7)(2) (West 2022).

[259] *See, e.g.*, Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980) (reaffirming a minor's absolute right to disaffirm a contract for the purchase of items which are not necessities); Berryman v. Highway Trailer Co., 30 N.E.2d 761, 762 (Ill. Ct. App. 1940) (reaffirming that "a minor may rescind a contract. . . and recover moneys paid by him on the contract"); *see also* Coughenour v. Del Taco, LLC, 57 Cal. App. 5th 740, 744–45 (Cal. Ct. App.2020) (stressing that Family Code section 6710 gives minors a "right of disaffirmance"— "allowing

Very likely, unemancipated minors and their parent investors would prevail. The court would likely disaffirm the licensing contract. The infancy doctrine is clear: a contractual relationship with a minor is generally voidable, allowing the minor to disaffirm the contract within a reasonable amount of time after becoming an adult.[260] There is an exception to the rule, though, stating that a minor may not void a contract for goods or services which are necessary for the minor's health and sustenance.[261] However, at publication, federal and state courts are divided over the question of whether minors may disaffirm employment or performance-based contracts.[262] Conceivably, a disagreement could arise between collegiate athletes and Brandr over whether the FBS athletes' marketable NIL attributes—jersey number, photographs, autographs, or voice—are associated with the students' required performances or labor. If so, the outcome of the disaffirmance action would be uncertain.

Now, assume that FBS students commence a rescission of contract action—alleging that Brandr, MSU, and EA collaborated and fraudulently induced them to execute an exploitative contract. A rescission claim arises when an offending party's fraudulent representation fosters the creation of a contract.[263] But, EA's likelihood of success would depend on whether the students filed a legal or an equitable rescission action.[264]

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minors to disaffirm a contract before reaching majority age or within a reasonable time afterward").

[260] *See* Michaelis v. Schori, 24 Cal. Rptr. 2d 380, 381 (1993) ("[T]he law shields minors from their lack of judgment and experience and—under certain conditions—vests in them the right to disaffirm their contracts . . . [Additionally, the law protects] a minor against . . . his immaturity as well as against the machinations of other people."); Dodson v. Shrader, 824 S.W.2d 545, 547 (Tenn. 1992) ("[T]he purpose of the infancy doctrine . . . is to protect minors . . . from squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."); Prudential Building & Loan Ass'n v. Shaw, 26 S.W. 2d 168, 171 (Tex. 1930) **(**declaring that a contract with a minor is generally voidable).

[261] *See* Schmidt v. Prince George's Hosp., 784 A.2d 1112, 1116 (Md. 2001) (reaffirming that persons under the age of twenty-one years are not contractually bound, except for necessaries); Creech v. Melnik, 556 S.E.2d 587, 590–91 (N.C. Ct. App. 2001) (stressing that a minor may not disaffirm necessaries contracts, which provide goods or services for the minor's health and sustenance); Muller v. CES Credit Union, 832 N.E.2d 80, 85 n.4 (Ohio Ct. App. 2005) (reaffirming that contracts for the purchase of necessities—food, medicine, clothes, shelter or personal services—may not be disaffirmed because those are benefits reasonably essential for the "preservation and enjoyment of life").

[262] *Compare* Stroupes v. Finish Line, Inc., No. 1:04-cv-133, 2005 WL 5610231, at *5 (E.D. Tenn. Mar. 16, 2005) (declaring that minors may disaffirm employment contracts, including arbitration agreements), *and In re* Mexican Rests., Inc., Nos. 11-04-00154-CV, 11-04-00155-CV, 2004 WL 2850151, at *2 (Tex. Ct. App. Dec. 2, 2004) (allowing the minors to disaffirm their employment contracts), *with* Sheller *ex rel.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (concluding that the minor's employment contracts were not voidable under the infancy doctrine), *and* Douglass v. Pflueger Haw., Inc., 135 P.3d 129, 138 (Haw. 2006) (holding that the infancy doctrine does not allow minors to disaffirm employment contracts").

[263] *See* Robinson v. Perpetual Servs. Corp., 412 N.W.2d 562, 568 (Iowa 1987).

[264] Legal and equitable actions were merged only for procedural purposes. The merger did not abolish the distinctions between common law and equitable actions. *See* Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 908 S.W.2d 104, 108 (Ky. 1995). The inherent distinctions between legal and equitable principles and forms of relief remain. In equitable actions, a court has "the inherent power

Generally, under the doctrine of equitable rescission, a court sitting in equity may: 1) declare whether a contract or any instrument adversely affects a petitioner's rights and/or liabilities, 2) cancel, annul, or set aside an invalid contract, and 3) award an equitable remedy to restore the petitioner to their original position. [265] However, to prevail in an action, the petitioner must establish that the offending party made a false and material representation causing the petitioner's detrimental reliance and inducing the petitioner to form the contract.[266]

Before a court rescinds a valid contract, the allegedly injured party must prove: 1) the essence of the parties' characters or relationship, 2) the formation of a valid contract, 3) the legal grounds for rescission, 4) the plaintiff gave a timely notification of their intent to rescind the contract, 5) the plaintiff offered to restore or return any contractual benefits, and 6) other common law and adequate remedies are not available.[267] If the plaintiff is successful, the court will terminate the contract, restore the plaintiff to their original condition, and award damages or another remedy.[268]

Again, EA's probability of winning a hypothetical rescission of contract dispute would depend on whether the action was filed in a Michigan state or federal court, and whether the action sounds in law or in equity.[269] However, the uncertainty might be mitigated if Michigan and other states enact an NIL remedies provision that is substantially equivalent to Arkansas's NIL statute. Arkansas's statute reads:

> A student-athlete may rescind a publicity rights contract with a third-party licensee . . . without being held liable for breach of contract and with no obligation to return payments received before giving notice of rescission, if the student-athlete is no longer eligible to participate in any varsity intercollegiate athletics program at an institution of higher education.[270]

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to adjust equity between the parties without rigid adherence to any determined form and may shape the remedy to meet the demands of justice." *See* Estate of Cantonia v. Sindel, 684 S.W.2d 592, 595 (Mo. Ct. App. 1985). Also, when legal and equitable actions are filed in a single lawsuit, each action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *See* Corley v. Ott, 485 S.E.2d 97, 99 (S.C. 1997).

[265] *See* E.I. Du Pont de Nemours & Co. v. HEM Research, Inc., Civ. A. No. 10747, 1989 WL 122053, at *3 (Del. Ch., Oct. 13, 1989).

[266] *See* Hyler v. Garner, 548 N.W.2d 864, 872 (Iowa 1996) (reaffirming that the doctrine of equitable rescission requires a plaintiff to prove five elements before voiding a contract: a representation, falsity, materiality, inducement, and justifiable reliance).

[267] *See, e.g.*, SureTec Ins. Co. v. Nat'l Concrete Structures, Inc., No. 12-60051-CIV-SCOLA/ROSENBAUM, 2012 WL 12860161, at *4 (S.D. Fla. 2012).

[268] *See* E.I. Du Pont de Nemours & Co., 1989 WL 122053, at *3.

[269] *See* Catamaran Acquisition Corp. v. Spherion Corp., No. Civ. A. 00C-09-180JRS, 2001 WL 755387, *1 (Del. Super. Ct. May 31, 2001) ("The court [has the] often difficult task of determining whether . . . a complaint sounds in law or equity. The distinction . . . is critical, [because it determines whether a court has] jurisdiction over a controversy.").

[270] ARK. CODE ANN. § 4-75-1305(c) (West 2023).

A liberal reading of Arkansas's NIL statute suggests that a presumptive legally unsophisticated collegiate athlete may easily terminate an arguably fraudulent, unconscionable, or grossly asymmetrical contract in a court of equity. But, more importantly, the statute prevents an arguably more powerful and sophisticated contractual party from retaliating by commencing a cause of action against the student athlete.

B. The Perils Associated with Common Law and Statutory Right of Publicity Actions

In *The Brandr Group*, the group licensing agency cited California's law—filing statutory and common law, right of publicity actions against Electronic Arts.[271] But the Northern District Court of California declared: even if Brandr could establish that EA interfered with its "dubious" NIL-related publicity rights, Brandr could not establish a significant "likelihood of success on the merits."[272] Ironically, Brandr's decision to file publicity rights actions against EA will probably motivate disgruntled student athletes to commence similar statutory and common law actions against Brandr, given the debatably exploitative language in the group licensing and assignment contract. MSU's contract defines collegiate group licensing and assignment as:

> [L]icensing or sponsorship programs in which a collegiate licensee or . . . sponsor uses the Athlete Attributes of three (3) or more current [MSU's] athletes from one sport or six (6) or more from multiple sports, in combination with University trademarks and logos . . . . Barring [Brandr's] breach . . . this Agreement shall expire automatically one year after the conclusion of the [collegiate] athlete's . . . eligibility . . . . [However, the] use of the Athlete Attributes . . . [may] continue until the expiration of those specific programs.[273]

In light of the terms, several questions are apparent: 1) why does Brandr have a contractual right to exploit a student's NIL property right and receive a 20 or 30 percent royalty fee until a licensing program terminates on an indeterminate date?; 2) why does Brandr have a contractual right to receive a 20 or 30 percent royalty fee for two years after the group collaboration contract terminates?; 3) why must students' royalties stop immediately after students' eligibility periods end?; and 4) under Michigan's and other states' NIL statutes, may current and prospective collegiate athletes commence a right of publicity action against Brandr and other group licensing companies?

Regarding the last question, the District of Columbia, Colorado, Mississippi, Missouri, Nebraska, and Virginia's NIL statutes give students an unambiguous right to file right of publicity and equitable actions against educational

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[271] No. 23-CV-02994-HSG, 2023 WL 4297571 (N.D. Cal. June 20, 2023).
[272] *Id.* at *6.
[273] Brandr Complaint, *supra* note 240, ex. 1 at ¶¶ 3, 7.

institutions, licensees, and sponsors.[274] However, Michigan's NIL statute is ambiguous, as it appears to encourage settlements rather than lawsuits.[275] The majority of NIL statutes, however, are silent regarding this question. Still, many states have embraced and codified the common law, right of publicity doctrine.[276] Thus, across the country, student athletes and their parent investors can file a right of publicity action.[277]

Common law misappropriation and right of publicity actions "sound in tort"—protecting a student athlete's property interest.[278] Thus, a successful action prevents a defendant from exploiting a student's property interests for a commercial purpose.[279] Nevertheless, states' publicity rights laws vary considerably. In *Lightbourne v. Printroom Inc*., the Central District Court of California presented a synopsis of the risks accompanying inconsistent right of publicity procedural and substantive rules:

> [The] fifty states' right of publicity laws vary significantly . . . . [M]ost states recognize [a] right of publicity . . . . [Of] those [states' recognizing] a right of publicity, some [defendants are liable] for all commercial uses of a plaintiff's likeness, while others [are liable only for using] a plaintiff's likeness in connection with an advertisement or solicitation . . . . Statutes of limitations [and right of publicity actions' accrual dates] vary significantly . . . . [Moreover,] the measures of damages . . . . differ greatly. [Some states allow a plaintiff to receive only actual damages] plus punitive damages if applicable . . . . [O]ther

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[274] *See* COLO. REV. STAT. ANN. § 23-16-301(6)(b) (West 2021) ("[An aggrieved] student athlete . . . may bring an action for injunctive relief."); D.C. CODE ANN. § 47-2889.04(b)(c) (West 2023) (stating that a college athlete has a cause of action only if the athlete was a student when an act or omission occurred, and "a prevailing plaintiff may recover actual damages, reasonable attorney's fees, and court costs"); MISS. CODE ANN. § 93-19-17(2) (West 2021) ("In any [NIL] legal action . . . a person eighteen (18) years of age or older . . . may sue in his or her own name as an adult . . . ."); MO. ANN. STAT. § 173.280(8)(1) (West 2023) ("Any student athlete may bring a civil action . . . [for] injunctive relief or actual damages . . . . and the court shall award damages and court costs to a prevailing plaintiff."); NEB. REV. ST. §§ 48-3608(1)–(2) (West 2022) (stating that a student athlete may bring a civil action, and a prevailing plaintiff shall receive actual damages, equitable relief and/or reasonable attorney's fees); VA. CODE ANN. § 23.1-408.1(K) (West 2022) ("Any [aggrieved] student-athlete . . . may bring an action for injunctive relief.").

[275] *See* MICH. COMP. LAWS ANN. § 390.1738(8) (West 2022) ("A legal settlement arising under this act shall not permit noncompliance with this act.").

[276] *See In re* Hearst Communications State Right of Publicity Statute Cases, 632 F. Supp. 3d 616, 619 at n.4 (S.D.N.Y. December 19, 2022) (reporting that many states recognize a common law right of publicity action and some jurisdictions allow a statutory right of action).

[277] *See* Battaglieri v. Mackinac Ctr. for Pub. Pol'y, 680 N.W.2d 915, 919 (Mich. App. Ct. 2004) (stressing that the common law right to privacy encompasses four types of invasion of privacy torts: 1) an intrusion upon a person's private affairs, 2) publicly disclosing embarrassing private facts about the person, 3) spreading falsehoods—false light—about an individual which would be objectionable for the average and reasonable person, and 4) commercially appropriating a person's name or likeness—right of publicity—or exploiting a person's property right without consent and without paying compensation).

[278] *See* Ruffin–Steinback v. DePasse*,* 82 F. Supp. 2d 723, 728–29 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001).

[279] *See also Battaglieri*, 680 N.W.2d at 919.

> states only allow a prevailing plaintiff to receive the] greater of actual damages or $750 in statutory damages) . . . . [Still, other jurisdictions, permit a successful plaintiff to receive the] greater of actual damages or $2,500 to $10,000 plus punitive damages . . . .[280]

Additionally, there is considerable divergence among the types and numbers of elements required to prove common law and statutory violations. To win a common law misappropriation dispute in Michigan, a plaintiff must prove two elements: 1) the aggrieved party has had "a pecuniary interest or significant commercial value in his identity," and 2) the defendant "commercially exploited" the plaintiff's identity.[281] In California, a complaint must plead and prove more: 1) the defendant used the plaintiff's identity—name or likeness—for a commercial purpose; 2) the defendant received a benefit after appropriating the plaintiff's identity; 3) the defendant did not have consent to use the plaintiff's identity; and 4) the appropriation caused a financial injury.[282]

California also has a statutory misappropriation action, which "complements rather than codifies" its common law misappropriation action.[283] Under California's civil statute, a plaintiff must prove that a violator "knowingly" used his or her property interests—name, photograph, or likeness—to advertise, sell, or solicit goods or services without the plaintiff's consent.[284] On the other hand, New York has not adopted a common law right of publicity action that arises from an alleged misappropriation of a plaintiff's property right.[285] In New York, a plaintiff's remedy is exclusively statutory. The state's statute provides that "any person whose name, portrait, picture or voice" is used for advertising or trade purposes in New York State, without their written consent, "may maintain an equitable action."[286]

Undoubtably, national companies like Brandr and EA may raise numerous substantive defenses that can defeat an NIL right of publicity action. Those doctrines are the predominant use test,[287] the *Roger* Test, [288] the fair use test,[289]

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[280] 307 F.R.D. 593, 597–98 (C.D. Cal. 2015).

[281] *See* Arnold v. Treadwell, No. 2007–080617–CZ, 2009 WL 2136909, at *4 (Mich. Ct. App. July 16, 2009).

[282] *See* Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983).

[283] Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (1995).

[284] CAL. CIV. CODE ANN. § 3344 (a) (West 1971); *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 443 n.23 (Cal. 1979) (noting that the "invasion of privacy" statute allows an award of minimum damages when an offending party commercially misappropriates an individual's identity and reinforcing the common law protection of an individual's right of publicity).

[285] *See* Stephano v. News Grp. Publs., 474 N.E.2d 580, 584 (N.Y. 1984).

[286] N.Y. CIV. RIGHTS L. §§ 50–51; *see also* Myskina v. Conde Nast Publ'ns, Inc., 386 F. Supp. 2d 409, 414 (S.D.N.Y. 2005).

[287] *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (explaining that the predominant use test prevents a product that predominantly exploits the commercial value of an individual's identity from violating the individual's right of publicity).

[288] *See* Roger v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989) (fashioning the *Roger* test and declaring that a right of publicity does not bar a person from using a celebrity's name, unless the use is "simply a disguised commercial advertisement for the sale of goods or services").

[289] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (declaring that a "fair

the transformative use test,[290] the incidental use doctrine,[291] and a First Amendment defense.[292] In *Harts v. Electronic Arts*, the Third Circuit Court of Appeals presented a lengthy explanation of the origin and application of each defense or exception.[293] Therefore, an elaborate review does not appear here. Nevertheless, as discussed in Part VI, some of these defenses, among other factors, statistically and significantly influence the dispositions of right of publicity and misappropriation actions in state and federal courts.

VI. AN EMPIRICAL STUDY: STATE AND FEDERAL COURTS' DISPOSITIONS OF PUBLICITY RIGHT, MISAPPROPRIATION AND BREACH OF CONTRACT DISPUTES, 1830-2023

Many of the provisions in the thirty-two NIL statutes are lengthy and obstruse, requiring multiple and careful readings. Again, there is one exceedingly clear and extraordinarily curious provision in each statute: an institution of higher education "shall not prevent or penalize a student-athlete" for retaining a "licensed professional representative."[294] Ostensibly, attorneys may represent

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use" inquiry is made to determine "whether a "new work" merely "supersedes the objects" of an original [work] or [whether] it adds. . . a different character, . . . expression, meaning, or message").

[290] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804–11 (Cal. 2001) (importing the concept of "transformative" use from copyright law into a right of publicity theory and concluding that a defendant's use of a celebrity plaintiff's work violates the plaintiff's right of publicity if the work has no significant transformative or creative contribution and the work's marketability and economic value are derived primarily from the plaintiff's work, fame, or status).

[291] *See* Aligo v. Time-Life Books, Inc., No. C 94–20707 JW, 1994 WL 715605, at *2 (N.D. Cal. 1994) (stressing that an incidental use has no commercial value, and outlining numerous factors to determine whether an unauthorized use of a person's name or likeness is incidental); Vinci v. American Can Co., 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (applying the incidental use doctrine and declaring that the defendant's use of an Olympic athlete's name and likeness on disposable drinking cups for a historical purpose was a merely incidental use); *see also* THE RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 ("The name, likeness, and other indicia of a person's identity are used [for trade] . . . if they are used [to advertise] goods or services . . . . However, [a use] does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, . . . or in advertising that is *incidental* to such uses.") (emphasis added).

[292] *Compare* New Kids on the Block v. News Am. Publ'g, Inc., 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) (reaffirming that the First Amendment protects a "communicative use"—allowing a defendant to use a person's name, image, or likeness for "informative or cultural" purposes, and immunizing the defendant from liability), *aff'd,* 971 F.2d 302 (9th Cir. 1992), *with* United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (reaffirming that "commercial speech . . . proposes a commercial transaction), Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983) (stressing that commercial speech does not retain its commercial character when it is *inextricably intertwined* with fully protected speech) (emphasis added), *and* Knapke v. PeopleConnect, Inc., 553 F. Supp. 3d 865, 879 (W.D. Wash. 2021) (finding that the company's use of a student's photo to advertise a yearbook was not inextricably intertwined with fully protected speech, and preventing the company from commercially exploiting the student).

[293] *See* 717 F.3d 141, 151–70 (3d Cir. 2013).

[294] *See, e.g.*, ARK. CODE ANN. § 4-75-1305(b) (West 2023) ("An institution of higher education . . . shall not prevent or . . . penalize a student-athlete . . . for obtaining professional representation . . . ."); COLO. REV. STAT. ANN. § 23-16-301(5) (West 2021) ("[A]n institution shall not revoke a student athlete's scholarship because the student athlete . . . obtains professional or legal representation . . . ."); GA. CODE ANN. § 20-3-682(a) (West 2021) ("A postsecondary educational

students' interests and prevent the commercial appropriation of the students' property, contract, and publicity rights. But the provision has generated the question: why collegiate athletic programs would penalize or retaliate against student athletes who decide to commercialize their NILs? As of publication, a persuasive answer has not been uncovered.

Social and traditional media are replete with NIL-related articles, which strongly encourage parents and students to secure legal representation before fashioning an NIL deal.[295] Indeed, if a student wants to prevail in an NIL-related lawsuit, a competent attorney's representation and guidance are indispensable. Briefly put, without an attorney's expertise, an allegedly exploited student athlete and/or a sports parent cannot successfully circumnavigate the numerous procedural and substantive defenses in a court of law.[296]

Moreover, even when plaintiffs retain competent attorneys to file right of publicity, misappropriation, and breach of contract actions, legal and extralegal factors often adversely affect plaintiffs' likelihoods of prevailing. Thus, in light of the massive national attention that states' NIL statutes have engendered, [297]

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institution . . . shall not prevent a student athlete from obtaining professional representation."); 110 ILL. COMP. STAT. ANN. § 190/15(f) (West 2022) ("A postsecondary educational institution . . . shall not prevent a student-athlete from obtaining professional representation . . . to secure a publicity rights agreement . . . ."); MISS. CODE ANN. § 37-97-107(6) (West 2022) ("A postsecondary educational institution . . . shall not prevent a student-athlete from obtaining professional representation in relation to publicity rights, or to secure a name, image and likeness agreement . . . .").

[295] *Cf.* Eric Sondheimer, *Transfer's Saga Tip of NIL Abuse*, L.A. TIMES, Sept. 19, 2022, at D1 (reporting that "the NIL world has led to a mad scramble . . . creating opportunities for people to exploit and manipulate" sports parents and their "kids," and encouraging parents to execute background checks and get advice from reliable and proven professionals); Laine Higgins, *New NCAA Rules Might Present a Tax Headache,* WALL ST. J., Apr. 15, 2022, at A1 (quoting an attorney who disclosed that NIL opportunities will come with risks, requiring college athletes to secure professional guidance to help navigate federal tax and NCAA compliance rules); Lan Kennedy-Davis, *Let's Make a NIL Deal Part II: High School Student-athletes Look to Get into the NIL Game*, JD SUPRA (March 11, 2022), https://www.jdsupra.com/legalnews/let-s-make-a-nil-deal-part-ii-high-7720859/ (encouraging NIL parties to retain lawyers who can provide guidance and helping parties understand NIL-related laws, policies, and regulations).

[296] *See, e.g.*, Moore v. Nat'l Collegiate Athletic Ass'n, No. 1:21-cv-01447 (RDA/JFA)2022 WL 2306761, at *2–3 (E.D. Va. June 27, 2022) (liberally construing the *pro se* student athlete's complaint, finding that Virginia's statute of limitations barred the student's NIL misappropriation claim, concluding that the student failed to prove his breach of contract claim, and dismissing his complaint with prejudice); *see also* Loren Galloway, *Statute of Limitations Dooms Former College Athlete's NIL-related Claim,* SPORTS LITIG. ALERT (Oct. 7, 2022), https://sportslitigationalert.com/statute-of-limitations-dooms-former-college-athletes-nil-related-claim/ (reporting that a federal judge dismissed a homeless, disabled, and former student athlete's handwritten complaint because his complaint failed to clearly articulate his allegations and the statute of limitations had passed).

[297] *Cf.* Derin B. Dickerson & Trenton Hafley, *The NIL Paradox for NCAA Athletes—Enforce or Recruit?*, BLOOMBERG LAW (June 27, 2022), https://news.bloomberglaw.com/us-law-week/the-nil-paradox-for-ncaa-athletes-enforce-or-recruit (reporting that after states began enacting laws to allow student athletes monetize their NILs, football coach Nick Saban asserted that Texas A&M used NIL deals to recruit players, drawing "national attention"). Significantly more "unwanted" national attention has focused on a multibillion-dollar company, an agent, and Texas Tech

the author of this Article decided to conduct a legal and empirical study. In particular, the study was designed to investigate how state and federal courts have handled right of publicity, misappropriation, and breach of contract disputes, particularly in the exploitative "golden ages" of the movie, recorded music, and collegiate sports industries.

A. Data Source, Sampling, and Litigant Characteristics

Employing a widely used research methodology, the author crafted a simple null hypothesis: no statistically significant differences exist among plaintiffs' probabilities of winning right of publicity, misappropriation, and breach of contract disputes in state and federal courts. A substitute hypothesis states: "extralegal influences" are exceedingly more likely to explain any statistically significant differences among litigants' comparative likelihoods of prevailing in state and federal courts.

To select a sample of cases, the author executed several research queries on the Westlaw and LexisNexis platforms.298 The queries retrieved 164 "mixed claims" cases, comprising largely of right of publicity claims, some misappropriation claims, and a few right of privacy and breach of contract claims. Additionally, the author has sampled, coded, and analyzed hundreds of

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University after the entities fashioned a purportedly "exploitative" NIL deal for female athletes without disclosing the terms of the deal and without receiving the students' consent. *See* Natalie Faulkenberry, *Lady Raiders Make History with NIL Deal Paying $25K per Player*, KCDB-11 (Aug. 3, 2022), https://www.kcbd.com/2022/08/04/lady-raiders-make-history-with-nil-deal-paying-25k-per-player/ (reporting Level-13 agency signed a team-wide NIL deal that pays each Lady Raider $25,000 to use their names, images, and likenesses); Steven McAvoy, *Texas Tech Women's Basketball Partners with Level-13, Players Will Make $25K*, NIL DEAL (July 29, 2022), https://www.nildealnow.com/texas-tech-womens-basketball-partners-level13-players-will-make-25k/ (reporting that Texas Tech Women's Basketball and Level-13 signed a team-wide NIL partnership with Kirk Noles the co-owner and CEO of Level-13); McDougal Companies, *About Marc McDougal*, MCDOUGAL COMPANIES, https://www.mcdougal.com/mcdougal (visited last on July 21, 2023) (reporting that the CEO has "listed or sold more than $5 billion in real estate" and "developed or built more than $1 billion in commercial and residential property").

298 On November 26 and 29, 2022, the queries below were executed in Westlaw's "State Court Cases" database:

((name image /2 image likeness) /s student sports athlete! child children artist! musician!) % (crime police custody) (N = 603)

((name image /2 image likeness) /s student sports athlete! artist! musician!) % crime police custody porn! (N = 182)

On December 10, 2022, the query below was executed in Westlaw's "Federal Appellate Court Cases" database:

((name image /2 misappropriat! image likeness "right #of publicity") /p student teen! sport! athlete! artist! movie! college media musician!)

% (crime illegal sex! criminal porn! education family child marry marriage) (N = 259)

And, on December 17, 2022, the query below was executed in Westlaw's "Federal District Court Cases" database:

((name image /2 misappropriat! image likeness "right #of publicity") /p student teen! sport! athlete! artist! movie! college media musician!)

% (crime illegal sex! criminal porn! education family child marry marriage) (N =100)

common law and statutory disputes spanning more than one hundred years. 299 Most of the breach of contract cases (2,508) were already in the author's database. Thus, for the present study, the total sample size is N=2,672.300

To analyze the effects of litigants' background information as well as legal theories and defenses on courts' decisions, the author performed a "content analysis."301 Multiple binary, or "dummy," variables were constructed.302 Using Stata statistical software, the binary data were inserted into a large matrix. Ultimately, a variety of statistical procedures were used to assess the effects of multiple legal and extralegal factors on the dispositions of decisions. Below, the statistical findings are displayed in four tables.

B. Litigant Attributes, Theories of Recovery, and Affirmative Defenses in State and Federal Courts

Table 1 shows seven clusters of probative information about plaintiffs and defendants who litigated right of publicity, misappropriation, breach of contract and other actions in state and federal courts. The categories are courts' geographic locations, alleged owners of the disputed property interests, plaintiffs of record, types of legal actions, defendants of record, selected affirmative defenses, and outcomes for plaintiffs.

First, litigants' geographic locations influence whether actions are filed in state or federal courts. In the East, Southwest, and West, state courts are statistically and substantially more likely to decide litigants' controversies. The percentages are 55.6%, 61.0% and 57.5%, respectively.

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[299] *See* Willy E. Rice, *Abolishing the Communications Decency Act Might Sanitize "Politically Biased," "Digitally Polluted," and "Dangerously Toxic" Social Media?--Judicial and Statistical Guidance from Federal-preemption, Safe-harbor and Rights-preservation Decisions,* 24 SMU SCI. & TECH. L. REV. 257, 299 n.297 (2021).

[300] Here, limited space precludes a listing of the 2,672 state and federal court cases' names and citations. Nevertheless, a large EXCEL file—comprising the sampled cases, their citations as well as numerous STATA-PROGRAM working files, executed equations, tables and statistics—are stored at the author's location and/or with this law journal's office.

[301] *See generally* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions,* 96 CALIF. L. REV. 63, 77, 88, 90–91 nn.58, 103, 111–12 (2008) (discussing Professor Rice's published content analysis studies, involving the outcomes of various common law and statutory claims in state and federal courts); Daniel T. Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010–13 (2013) (applying and discussing content analysis); Robert E. Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967).

[302] Briefly, each subcategory is an independent binary (0, 1) or "dummy" variable. *See* WILLIAM H. GREENE, Econometric Analysis 116–18 (5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis); Claudia M. Landeo & Kathryn E. Spier, *Irreconcilable Differences: Judicial Resolution of Business Deadlock*, 81 U. CHI. L. REV. 203, 223 n.54 (2014) (discussing probit analysis and "dummy variables (0,1)").

TABLE 1. LITIGANTS' ATTRIBUTES, COMMON LAW AND STATUTORY THEORIES OF LIABILITY, AND VARIOUS AFFIRMATIVE DEFENSES IN STATE AND FEDERAL COURTS

"Probative, Incontrovertible or Relevant" Predictors or Facts	**State Courts (N = 1,490)**	**Federal Courts (N = 1,182)**	**(N = 2,672)**
Courts' Geographic Locations:			
East	55.6	44.4	(N = 606)
Midwest	54.7	45.3 *	(N = 698)
South	50.0	50.0 *	(N = 407)
Southwest	61.0 *	39.0	(N = 439)
West	57.5 *	42.5	(N = 522)
Alleged Owners of the Disputed Property Interests:			
Minors & Parents	80.5 ***	19.5	(N = 87)
Students, Generally	51.9 ***	48.1	(N = 27)
NCAA Students Athletes	33.3	66.7 ***	(N = 9)
Professional Sports Athletes	33.3	66.7 ***	(N = 18)
Recording Industry Musicians	45.5	54.5 ***	(N = 22)
Movie-TV-Media Celebrities	54.2 ***	45.8	(N = 59)
Other Persons & Corporate Entities	55.3	44.7	(N = 2450)
Plaintiffs of Record:			
Corporations	41.0	59.0 ***	(N = 217)
Professionals	43.0	57.0 ***	(N = 128)
Minors or "Adult Kids"	59.1 ***	40.9	(N = 127)
Parents or Guardians	82.6 ***	17.4	(N = 92)
College or High School Students	44.1	55.9 ***	(N = 34)
Other Persons & Entities	56.9	43.1	(N = 2074)
Types of Legal Actions:			
Breach of Contract, Only	56.4 ***	43.6	(N = 2508)
Mixed Name, Image & Likeness (NIL)†	42.0	58.0 ***	(N = 164)
Defendants of Record:			
Corporations	42.6	57.4 ***	(N = 782)
Individuals	58.8 ***	41.2	(N = 660)
Small Businesses	69.8 ***	30.2	(N = 262)
Professionals	37.1	62.9 ***	(N = 89)
Partnerships	47.5	52.5 ***	(N = 40)
Employers	51.3	48.7	(N = 39)
Public Officials	52.3 ***	47.7	(N = 109)
Other Persons & Entities	66.1 ***	33.9	(N = 691)
Selected Affirmative Defenses:			
Federal Preemption	29.2	70.2 ***	(N = 48)
No Cognizable Claim	61.6 ***	38.4	(N = 172)
Consent	23.1	76.9 ***	(N = 13)
Fair Use	41.4	58.6 ***	(N = 70)
Others	56.5	43.5	(N = 2369)
Outcomes For Plaintiffs Before Controlling for Various Factors:			
Favorable Outcomes	59.2 **	53.7	
Unfavorable Outcomes	40.8	46.3 **	

Chi-square statistical levels of significance: *** $p \leq .0001$ ** $p \leq .01$ * $p \leq .05$

† Mixed or a combination of disputes—common law and statutory misappropriation actions, right of publicity, right of privacy, and breach of contract claims—appeared among a few NIL cases

Even more thought-provoking findings appear in the "Alleged Owners of the Disputed Property Interests" category. Generally, minors and parents, as well as general students and movie/TV celebrities, are more likely to file property interest claims in state courts. The percentages are 80.5%, 51.9%, and 54.2%, respectively. Conversely, similar disputes involving NCAA student athletes, professional athletes, and recording industry musicians are more likely to be decided in federal courts. The respective percentages are 66.7%, 66.7%, and 54.5%.

Now, consider the variable "Plaintiffs of Record." The findings reveal that corporations, professionals, and college and high school students are significantly more likely to be plaintiffs in federal courts, at 59.0%, 57.0%, and 55.9%. On the other hand, "adult kids" and minors, as well as parents and guardians, are considerably more likely to be plaintiffs in state courts, at 59.1% and 82.6%, respectively.

Perhaps, the most surprising and informative finding appears among types of legal actions. Generally, right of publicity claims, or NIL disputes, are more likely (58.0%) to commence in federal courts. But, as discussed earlier, publicity right and misappropriation actions can be both statutory and common law, tort-based claims. A breach of contract claim also evolves the common law. However, the results show that state and federal courts resolved respectively 56.4% and 43.6% of the contract disputes.

Although the findings under "Defendants of Record" are statistically significant, they are not surprising. In state courts, defendants are more likely to be an individuals, small businesses, or employers—58.5%, 69.8%, and 51.3%, respectively. Conversely, federal court defendants are more likely to be corporations, professionals, and partnerships—57.4%, 62.9%, and 52.5%, respectively. The findings under "Selected Affirmative Defenses" are also statistically significant, to be discussed later.

Finally, Table 1 shows the outcomes of publicity right, misappropriation, and breach of contract actions. Generally, before controlling for any factors and viewed from plaintiffs' perspectives, state courts are statistically and significantly more likely to rule in favor of plaintiffs than federal courts, 59.2% to 53.7%.

C. Bivariate Relationships Between Predictors and the Dispositions of Name, Image, and Likeness Claims in State and Federal Courts

Statisticians and seasoned researchers generally accept that large samples are double-edged swords. They are less likely to produce random errors.[303] But, they can produce statistically significant findings which are virtually

[303] *See* Amy Gallo, *A Refresher on Statistical Significance*, HARV. BUS. REV. (Feb. 16, 2016), https://hbr.org/2016/02/a-refresher-on-statistical-significance (noting that a finding which is derived from a large sample "may have utility even if a finding is not statistically significant").

worthless.[304] Therefore, appreciating the importance of these two principles, the author decided to perform an initial statistical analysis of a relatively smaller subset of cases (N =164) before analyzing the outcomes of disputes in the entire sample. Consider the findings in Table 2, which illustrates the bivariate relationships between various predictors and the dispositions of "NIL disputes in all trial and appellate courts."

In reviewing the columns under "Dispositions of NIL Disputes in State Trial and Federal District Courts," surprisingly, some extralegal factors are statistically and significantly more likely to influence plaintiffs' likelihood of winning an NIL dispute. For instance, complainants are more likely to prevail in state trial and federal district courts in the East and Southwest. The percentages for success are 53.1% and 83.3%, respectively. Meanwhile, plaintiffs are statistically and substantially less likely to win in trial and district courts in the Midwest, South, and West. Only 24.0%, 29.2%, and 45.0% prevailed on their claims.

The statistically significant effect of one's gender was also unexpected. In trial and in district courts, when only female or both male and female complainants commence an NIL action, they are statistically and substantially less likely to prevail, with failure rates of 60.4% and 61.8%. Contrarily, male-only complainants are statistically and substantially more likely to prevail in trial and district courts, with a failure rate of only 22.2%.

Earlier, we learned that numerous NIL statutes allow or encourage dissatisfied student athletes and/or their parents to file lawsuits.[305] But consider the variable "Types of Business Industries and Sectors" in Table 2. For purportedly exploited entrepreneurial collegiate athletes, the findings are somewhat bothersome and unexpected. Generally, plaintiffs are less likely to win an NIL lawsuit if the defendants' businesses are associated with the movie and television, recorded music, or professional and collegiate sports industries. The respective percentages are 58.6%, 54.8%, and 55.6%.

The findings also show that a plaintiff's probability of success depends in part on the defendant's business status. Complainants are significantly more likely (75.0%) to win NIL disputes against corporations. However, they are less likely to prevail when defendants fall into the categories of "advertisers, agents, or promoters" (39.4%) or "other business entities" such as small businesses, partnerships, and associations (42.9%).

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[304] *Id.*

[305] *See supra* note 274 and accompanying text.

TABLE 2. DISPOSITIONS OF NAME, IMAGE, AND LIKENESS (NIL) DISPUTES IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS

		Dispositions of NIL Disputes in State Trial & Federal District Courts			Dispositions of NIL Disputes in State and Federal Appellate Courts		
Independent or Predictor Variables	**Relevant or Stipulated Facts in the Records**	**Plaintiff Prevailed**	**Plaintiff Did Not Prevail**	**(N = 164)**	**Plaintiff Prevailed**	**Plaintiff Did Not Prevail**	**(N = 121)**
Courts' Geographic Locations	East	53.1	46.9	(N = 49) **	36.4	63.6	(N = 33)
	Midwest	24.0	76.0	(N = 25)	55.0	45.0	(N = 20
	South	29.2	70.8	(N = 24)	26.7	73.3	(N = 15)
	Southwest	83.3	16.7	(N = 6)	80.0	20.0	(N = 5)
	West	45.0	55.0	(N = 60) **	48.0	52.0	(N = 48)
Plaintiff of Record Gender	Female, Only	39.4	60.4	(N = 91) **	33.3	66.7	(N = 63) ***
	Male, Only	77.8	22.2	(N = 18)	92.3	7.7	(N = 13) ***
	Both Female & Male	38.2	61.8	(N = 55) **	46.7	53.3	(N = 45)
Plaintiff of Record Ethnicity or Lineage	White\European Linage	40.7	59.3	(N = 113)	45.4	54.6	(N = 86)
	Black\African Linage	40.7	59.3	(N = 27)	41.2	58.8	(N = 17)
	Asian or Hispanic Linage	58.3	41.7	(N = 24)	44.4	55.6	(N = 18)
Types of Business Industries & Sectors	Entertainment—Movies & TV	41.4	58.6	(N = 87)	35.8	64.2	(N = 67)
	Entertainment—Recording/Music	45.2	54.8	(N = 31)	60.9	39.1	(N = 23)
	Sports—Professional & College	44.4	55.6	(N = 36)	53.8	46.2	(N = 26)
	Other Sectors	50.0	50.0	(N = 10)	40.0	60.0	(N = 5)
Plaintiffs' "Mixed" Theories of Recovery	Breach of Contract	48.0	52.0	(N = 25)	52.6	47.4	(N = 19)
	Right of Publicity	35.2	64.8	(N = 88) *	40.0	60.0	(N = 70)
	Misappropriation—Common Law	63.6	36.4	(N = 11)	50.0	50.0	(N = 8)
	Misappropriation—Statutory	65.2	34.8	(N = 23) *	63.6	36.4	(N = 11)
	Other Theories†	35.3	54.7	(N = 17)	38.5	61.5	(N = 13)
Defendants of Record In the Name, Image & Likeness Lawsuits	Advertisers, Agents, and Promoters	39.4	60.6	(N = 127) **	42.5	57.5	(N = 94)
	Corporate Entities	75.0	25.0	(N = 16) **	75.0	25.0	(N = 8)
	Other Business Entities	42.9	57.1	(N = 21)	42.1	57.9	(N = 19)
Defendants' Affirmative Defenses	Federal Preemption	42.9	57.1	(N = 7)	83.3	16.7	(N = 6)
	Failure to State a Valid Claim	33.3	66.7	(N = 21)	46.7	53.3	(N = 15)
	Consent	46.7	53.3	(N = 15)	20.0	80.0	(N = 10)
	Fair Use	45.1	54.9	(N = 102)	46.2	53.8	(N = 78)
	Other Defenses	42.1	57.9	(N = 19)	33.3	66.7	(N = 12)

Chi-square statistical levels of significance: *** $p \leq .0001$ ** $p \leq .02$ * $p \leq .05$

†Includes nine right of privacy cases

A general question remains: whether plaintiffs' theories of recovery affect the outcomes of NIL related disagreements in state trial and federal district courts. The short answer is yes. Briefly stated, plaintiffs are statistically and substantially less likely to win NIL-related breach of contract (48.0%) and right of publicity (35.2%) causes of action than common law misappropriation (63.6%) and statutory misappropriation (65.2%) theories of recovery.

Nevertheless, the effects of various affirmative defenses on the outcomes of NIL disputes are debatably the most troublesome findings for aggrieved current and prospective collegiate athletes and/or their sports parents. Put simply, in state trial and federal district courts, plaintiffs are categorically less likely to prevail when defendants raise several key defenses: federal preemption, failure to state a claim, lack of consent, "fair use," and other defenses. The unfavorable percentages are 57.1%, 66.7%, 53.3%, 54.9% and 57.8%, respectively.

Without a doubt, from both legal and practical perspectives, trial and district courts' rulings are relevant. However, supreme and appellate court decisions are exceedingly more likely to be persuasive and final rulings, because courts of appeal have broader remedial powers.[306] Consider the columns under "Dispositions of NIL Disputes in State and Federal Appellate Courts." Approximately 74% of the 164 litigants decided to appeal. Although most of the bivariate relationships shown in these two columns are statistically insignificant, viewed from potentially aggrieved collegiate athletes and their parent investors' standpoints, the findings are nonetheless less than ideal.

Overall, the predictor variables' patterns of influence in state and federal appellate courts closely mirror their patterns of influence in state trial and federal district courts. But in appellate courts, aggrieved persons are substantially less likely to prevail against defendants that allegedly use or exploit persons' NILs without consent or paying compensation.

D. Bivariate Relationships Between Predictors and the Dispositions of Misappropriation and Breach of Contract Actions in State and Federal Courts of Appeal

The very last finding in Table 1 reveals that complainants are statistically and significantly more likely to win publicity right, misappropriation, and contract disputes in state courts rather than in federal courts. However, that finding is based upon an analysis of all state and federal, trial and appellate cases. It is important to repeat that appellate cases are more persuasive, because they are more likely to represent final procedural and substantive rulings as well as final judgments and remedies.

Review the findings in Table 3, which presents the bivariate relationships

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[306] *See, e.g.*, State v. Russell, No. 15CA11, 2016 WL 4176932, at *2 n.1 (Ohio Ct. App. July 22, 2016) ("[A]n Ohio Supreme Court decision always carries more weight than appellate court decisions . . . .").

between predictors and the dispositions of claims only in state and federal appellate courts. Now, focus on "State Appellate Courts' Dispositions of Contract and Misappropriation Disputes." The first finding shows that the jurisdictional location of a state court of appeal influences a plaintiffs' probability of winning. More specifically, complainants are statistically and significantly more likely to prevail if state appellate courts share the same jurisdictional spheres or have concurrent jurisdiction307 with the Fifth, Seventh, and Eleventh Circuits. The likelihood of prevailing in these jurisdictions is 60.5%, 55.6%, and 51.8%, respectively.

In contrast, plaintiffs are markedly less likely to prevail if state courts of appeal have concurrent jurisdiction with the Second, Sixth, and Ninth Circuits. The likelihood of prevailing in these jurisdictions is 35.4%, 41.4%, and 44.6%, respectively. Two of the latter findings are consistent with those in Table 3, illustrating eastern and western state appellate courts' apathy toward publicity right lawsuits.

Neither common law nor statutory procedural and substantive rules predict that a person's legal status will determine the person's likelihood of success in a court of law. Yet, the findings indicate that plaintiffs' legal statuses influence the dispositions of contract-based and misappropriation disputes in state appellate courts. Particularly, minors and "adult kids" (67.7%) as well as collegiate students (66.7%) are statistically and significantly more likely to prevail. On the other hand, parents and guardians (37.1%), as well as professionals (43.7%) and corporate entities (45.6%), are substantially less likely to win breach of contract and misappropriation disputes in state appellate courts.

At this point, it might be wise to consider a reputable statistician's insight and guidance, who suggests:

> Always keep in mind the *practical application* of [one's] finding. And [do not] get too hung up on setting a strict confidence interval . . . . [There is] a bias in scientific literature [which states that a result is not] publishable unless [its confidence level is a] p = 0.05 (or less) . . . . But for many decisions . . . [a researcher can use] a much lower confidence interval.[308]

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[307] *Cf.* Davis v. Dep't of Labor and Industry, 317 U.S. 249, 256 (1942) (recognizing that even though a disputed rule created theoretically two mutually exclusive state and federal jurisdictional spheres, factually a "twilight zone" exists at the border of the spheres that gives both state and federal governments concurrent jurisdiction).

[308] *See* Gallo, *supra* note 303, (emphasis added); *see also Thomas Redman*, DATAVERSITY, https://www.dataversity.net/contributors/thomas-redman/ (disclosing that Redman has a Ph.D. in statistics; he is the president of Data Quality Solutions; he published an article — "*Data's Credibility Problem*" —in Harvard Business Review, December 2013) (last visited July 24, 2023).

TABLE 3. DISPOSITIONS OF MISAPPROPRIATION AND BREACH OF CONTRACT CLAIMS IN STATE AND FEDERAL COURTS OF APPEALS

		State Appellate Courts' Dispositions of Contract & Misappropriation Disputes			Federal Courts of Appeals' Dispositions of Contract & Misappropriation Disputes		
Independent or Predictor Variables	**Relevant or Stipulated Facts in the Records**	**Plaintiff Prevailed**	**Plaintiff Did Not Prevail**	**(N = 1084)**	**Plaintiff Prevailed**	**Plaintiff Did Not Prevail**	**(N = 875)**
	Second Circuit Region	35.4	64.6	(N = 99) ***	39.7	60.3	(N = 58)
State & Federal	Fifth Circuit Region	60.5	39.5	(N = 243) ***	39.0	61.0	(N = 151)
Appellate Courts'	Sixth Circuit Region	41.4	58.6	(N = 99)	46.9	51.1	(N = 64)
Jurisdictional	Seventh Circuit Region	55.6	44.4	(N = 117)	48.3	51.7	(N = 87)
Regions	Ninth Circuit Region	44.6	55.4	(N = 175) ***	42.3	57.7	(N = 130)
	Eleventh Circuit Region	51.8	48.3	(N = 83) ***	37.6	62.4	(N = 85)
	Other Circuits Regions	42.4	57.5	(N = 268)	41.7	58.3	(N = 300)
	Minors & "Adult Kids"	67.7	32.3	(N = 31) *	38.0	62.0	(N = 50)
	Collegiate Students	66.7	33.3	(N = 9) *	62.5	37.5	(N = 8)
Complainants	Parents or Guardians	37.1	62.9	(N = 70) *	22.2	77.8	(N = 18)
Or Alleged Victims	Professionals	43.7	56.3	(N = 64) *	46.0	54.0	(N = 63)
	Corporate Entities	45.6	54.4	(N = 57)	52.8	47.2	(N = 106)
	Social & Other Business Entities	50.3	49.7	(N = 853)	43.0	57.0	(N = 630)
Types of Business	Movies & Television	35.7	64.3	(N = 42)	36.0	64.0	(N = 39)
Industries or	Music Recording	56.3	43.7	(N = 16)	50.0	50.0	(N = 12)
Sectors	Professional & College Sports	53.8	46.2	(N = 13)	60.0	40.0	(N = 15)
	Other Sectors	50.0	50.0	(N = 1013)	44.0	56.0	(N = 809)
	Breach of Contract	50.3	49.7	(N = 990)	43.8	56.2	(N = 760)
Plaintiff's "Mixed"	Right of Privacy	22.2	77.8	(N = 9)	25.0	75.0	(N = 8)
Theories of Liability	Right of Publicity	40.0	60.0	(N = 45)	42.2	57.8	(N = 45)
Common Law &	Misappropriation—Common Law	28.6	71.4	(N = 7)	48.3	51.7	(N = 29)
Statutory	Misappropriation—Statutes	66.7	33.3	(N = 6)	66.7	33.3	(N = 6)
	Other Theories	44.4	55.6	(N = 27)	44.4	55.6	(N = 27)
	Federal Preemption	33.3	66.7	(N = 15)	36.8	63.2	(N = 19)
Defendants'	Failure to State a Valid Claim	40.7	59.3	(N = 86)	33.3	66.7	(N = 42)
Affirmative Defenses	Consent	33.3	66.7	(N = 6)	14.3	85.7	(N = 7)
	Fair Use	41.7	58.3	(N = 48)	46.2	53.8	(N = 52)
	Other Defenses	51.0	49.0	(N = 929)	44.8	55.2	(N = 755)

Chi-square statistical levels of significance: *** $p \leq .001$ ** $p \leq .02$ * $p \leq .05$

Certainly, as displayed in the tables, the author used strict confidence intervals to determine whether legal and extralegal variables have statistically significant influences on the disposition of disputes. And, in Table 3**,** we find only two statistically significant bivariate relationships among state appellate court cases. The remaining three bivariate relationships, which appear in the left two columns of percentages, are not statistically significant.

But consider the data under "Federal Courts of Appeals' Dispositions of Contract and Misappropriation Disputes." A close examination of the percentages reveals a significant trend among the findings: complainants who commence breach of contract and misappropriation actions are remarkably less likely to prevail in federal courts of appeal. Or, stated somewhat differently, in federal appellate courts, plaintiffs are considerably less likely to win, regardless of the courts' locations, plaintiffs' legal statuses, types of entertainment industries, plaintiffs' theories of recovery, and defendants' affirmative defenses.

Arguably, viewed from the perspectives of potentially aggrieved collegiate athletes and/or their parent investors, the findings are disappointing. Although statistically significant bivariate relationships do not appear among the federal appellate cases, we have learned an important principle when analyzing and interpreting data: some marginally significant and statistically insignificant bivariate findings can still be informative or have practical applications.[309] Therefore, state legislators, parents, students, and their legal representatives have been informed. In general, parents' probabilities of losing NIL-related misappropriation and breach of contract disputes in state or federal appellate courts are fairly high—62.9% and 77.8%, respectively. And, in federal courts of appeal, athletes—minors and "adult kids"—could also have a high probability (62.0%) of losing NIL-related contract and misappropriation disputes.

E. A Two-Stage Multivariate Probit Analysis of State and Federal Appellate Courts' Dispositions of Publicity Right, Misappropriation, and Breach of Contract Actions, 1830 to 2023

We began the historical and legal analyses in this article by reviewing the highly profitable golden ages of several entertainment industries—movies and television, recorded music, professional and collegiate sports. And we learned that numerous talented minors, as well as their parents and guardians, filed right of publicity, misappropriation, and breach of contract actions, alleging that executives appropriated their property interests. In addition, we discovered that several legal questions have produced split decisions among and between state and federal courts.[310]

Additionally, an empirical analysis of appellate decisions uncovered some statistically significant bivariate findings: various extralegal and legal factors are

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[309] *See* Amy Gallo, *supra* note 303; *see also* Theodore Eisenberg, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 775–76 (2002).

[310] *See generally* Part III and accompanying discussion.

likely to substantially decrease a complainant's likelihood of winning publicity right and misappropriation lawsuits in state appellate courts. However, some of the same factors have no meaningful statistical effects on the dispositions of misappropriation and breach of contract disputes in federal courts of appeal.

Nevertheless, statistically significant bivariate findings do not prove conclusively that certain legal or extralegal factors cause judicial splits. Even more importantly, statistically and significant bivariate findings do not prove that appellate courts are, say illogically biased against allegedly exploited artists or collegiate athletes, nor that courts are irrationally biased in favor of, say, predators who allegedly exploit artists' and athletes' NILs.[311]

As discussed, to increase the trustworthiness and inferential value of one's empirical findings, two key questions must be answered: 1) whether a sample of only reported cases can reliably and completely explain state and federal appellate courts' decisions to embrace or reject plaintiffs' theories of recovery; and 2) whether courts of appeal intentionally or unintentionally allow extralegal factors to influence the procedural and substantive outcomes of legal disputes.[312] A researcher's statistically significant findings are considerably more reliable and useful when the analyst tests for selectivity bias in a sample,[313] applies more sophisticated statistics to make inferences, and evaluates the individual, shared, and contemporaneous impacts of multiple factors on the dispositions of disputes.

A researcher should test for selectivity bias in a sample of cases for a basic reason. Some litigants accept state trial and federal district courts' negative rulings and decide not to appeal. Other disgruntled litigants, however, simply cannot accept unfavorable decisions and file petitions for appellate review. A selectivity bias analysis will help to determine whether statistically significant

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[311] *See* Alison Gopnik, *Mind & Matter: How Money Helps to Build Brain Power*, WALL ST. J., June 17, 2023, at C4 (reminding the reader that a strong correlation does not necessarily imply causation).

[312] *See* Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900-1997*, 47 AM. U.L. REV. 1131, 1208–09 (1998) (explaining the inferential constraints that are associated with an investigator sampling reported decisions and using only simple percentages to explain judicial outcomes, and stressing that unreported decisions must also be included in the sample); Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L. J. 995, 1088–89 nn.431–32 (2000).

[313] *See* G.S. Maddala, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257–71, 278–83 (1983) (discussing self-selectivity bias and other-selectivity bias); Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143, 229 n.560 (2016); Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–19 (1994).

differences exist between litigants who "decide to appeal" and those who "decide not to appeal." And, if meaningful differences exist, a researcher can reasonably conclude that the appellants' unique attributes—rather than various predictors—explain their likelihood of prevailing or losing in appellate courts.

To repeat, the present database comprises probative facts about litigants who appealed adverse publicity right, misappropriation, and breach of contract decisions. Therefore, given the low predictive power and reliability of bivariate statistics, the author decided to perform a Search Term End two-staged multivariate probit analysis.[314] This latter statistical application tests for selectivity bias; and it can also determine the unique, shared, and simultaneous effects of several extralegal and legal factors on the outcomes of disputes in state and federal appellate courts.

Table 4 presents the outcomes of the multivariate-probit analysis using the 2,441 appellate decisions in the sample. Five groups of predictors are displayed, along with their respective probit values and robust standard errors.[315]

First, examine the probit values under "Litigants Who Decided to Appeal Procedural and Substantive Rulings." The left column of coefficients answers whether the predictors independently, jointly, or concurrently influenced litigants' decisions to appeal publicity right, misappropriation, and breach of contract rulings. Some probit coefficients are statistically significant, strongly suggesting that the respective predictors significantly influenced litigants' decision to appeal.

For example, persons who filed lawsuits in the Southwest and in the "largest" federal courts of appeal are more likely to appeal disappointing rulings. The positive and statistically significant probit values are .9358 and .2847, respectively. Dissatisfied parents are also significantly more likely (.5574) to appeal undesirable publicity right, misappropriation, and breach of contract rulings.

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[314] The author used Stata Corp's Stata Statistical Software to analyze the data, compute robust standard errors, and generate multivariate-probit coefficients.

[315] In several published law-journal articles, the author discusses and applies a probit analysis to determine the exclusive, mutual and simultaneous effects of multiple variables on the outcomes of various tort- and contract-based as well as statutory disputes in state and federal courts of appeals. *See* Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights*, *supra* note 312, at 995, 1088–94 nn. 431–32; Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct*, *supra* note 312 at 1208–1214 nn. 386–87; *see also* Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX, and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 286–88 nn.406–409 (1986). Furthermore, the author used Stata Corp's Stata Statistical Software to analyze the data, compute robust standard errors, and generate multivariate-probit coefficients.

TABLE 4. PROBIT ANALYSIS: THE SIMULTANEOUS EFFECTS OF PREDICTORS ON THE OUTCOMES OF NIL-RELATED COMMON LAW AND STATUTORY RIGHT OF PUBLICITY, MISAPPROPRIATION, AND BREACH OF CONTRACT LAWSUITS IN STATE AND FEDERAL COURTS OF APPEAL (N =2441)

	Litigants Who Decided to Appeal Procedural & Substantive Rulings			**Results of NIL-Related Common Law & Statutory Actions in State & Federal Appellate Courts**		
Single and Combined Effects of Extralegal and Legal Factors on Deciding to Appeal and Outcomes	**Probit Values**	**Robust Std. Errors**	***Z***	**Probit Values**	**Robust Std. Errors**	***Z***
Courts of Appeals						
Southwestern States†	.9358	.1014	9.22 ***	.0567	.0291	1.95 *
"Largest" Federal Circuits♦	.2847	.0540	5.27 ***	-.0445	.0228	1.95 *
Plaintiffs of Record						
Female	.0060	.0825		-.0748	.0341	2.19 *
Parents	.5574	.1899	2.93 **	-.1716	.0554	3.09 **
Professionals—Movies/Music/Sports	-.1599	.3515		.2408	.1301	1.85 +
NCAA Students Athletes	.0112	.5435		.1370	.1886	
Types of Sectors & Claims						
Cyberspace Misappropriation	-.6373	.3107	2.02 *	.1059	.1153	
NIL-Related Misappropriation	-.0175	.2539		.0721	.0956	
Right of Publicity Claim	.6676	.3371	1.98 *	-.2478	.0972	2.55 **
Defendants of Record & Defenses						
Advertisers, Agents, & Promoters	-.0812	.0900		-.0136	.0366	
Affirmative Defense—Preemption	.9660	.1004	9.62 ***	-.1000	.0276	3.53 ***
Affirmative Defense—Consent	-.1170	.3372		-.2191	.1100	1.99 *
Affirmative Defense—Fair Use	.4563	.2613		.0447	.0969	
Predictors' Interaction Effects						
White-European*State Courts	-.0872	.0598		.1009	.0238	3.81 ***
Black-African*Musicians	-.7054	.5681		.3876	.1866	2.08 *
Black-African*Misappropriation Claim	-.0789	.4385		-.3766	.1663	2.26 *
Male*Breach of Contract Claim	.1296	.1026		-.0553	.0411	1.35 †

Wald test for independent equations ("selectivity bias"): Chi-square = 2.51, *p*-value >.11

Chi-square levels of statistical significance: *** ≤ .001 ** $p \leq .01$ * $p \leq .05$ + $p = .06$ (ns) † $p = .17$ (ns)

†Southwestern states are Arkansas, Louisiana, Oklahoma, and Texas

♦This category comprises the Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits

Additionally, the positive .6676 probit value indicates that lower court rulings involving right of publicity claims influenced litigants' decisions to seek appellate review. In contrast, the negative .6373 probit value suggests that litigants are less likely to seek appellate review when they receive an adverse cyber-misappropriation ruling in trial and district courts. But one statistically insignificant finding is worth noting: adverse rulings involving NIL-related misappropriation claims had no meaningful effects on litigants' decision to appeal lower courts' rulings.

Because some predictors influenced litigants' decisions to appeal trial court rulings, it is at first unclear whether selectivity bias or self-selection contaminates the sample of appellate cases. Or, stated differently, there may exist noteworthy differences between the characteristics of litigants who decided to appeal publicity right, misappropriation, and breach of contract rulings and those who decided not to appeal. To find the answer, a test for similarities between the two distributions of probit values or two equations is needed. At the bottom of Table 4 is the result of a Wald test for independent equations. The Chi-square value is not statistically significant. Consequently, the test strongly—and only—indicates that the sample is not "tainted" statistically and substantially with any meaningful self-selection or error-creating bias.

Therefore, an enormously important question has emerged in light of an overwhelming majority of state legislatures enacting NIL statutes and encouraging collegiate athletes and/or their parents to file NIL-related lawsuits. Do courts of appeal, whether purposefully or inadvertently, permit the unique, joint, and simultaneous effects of legal and extralegal factors to influence the outcomes of NIL-related lawsuits? In a nutshell, the answer is yes.

It is important to reemphasize that unlike the previously discussed, less comprehensive bivariate percentages, the multivariate probit values show the individual, combined, and simultaneous effects of each factor. In other words, a multivariate probit analysis weighs all variables' collective influences, while controlling for and measuring each variable's unique effect at the same time.

Therefore, review the right column of probit values in Table 4 that appear under "Results of NIL-Related Common Law and Statutory Actions in State and Federal Appellate Courts." Of the seventeen positive and negative probit values, ten are statistically significant. Given the relative superiority of a multivariate analysis, the statistically significant effects of several extralegal factors are surprising. For instance, confirming what some bivariate findings strongly suggest, the analysis reveals that after controlling for all other factors in the probit model, parents (–.1718) and female athletes (–.0748) are statistically and substantially less likely to win right of publicity, misappropriation, and breach of contract actions. Certainly, the positive probit value (.2408) is not statistically significant. But, from some researchers' perspective, the latter coefficient is

"marginally significant,"[316] only suggesting that movies, music, and sports professionals are marginally more likely to prevail in courts of appeal.

Table 4 also displays the interaction effects of a plaintiff's ethnicity on the dispositions of disputes in appellate courts. The probit values indicate that white plaintiffs are more likely to prevail (.1009) in state courts of appeal rather than in federal courts of appeal. And, among Black-African descendants, musicians or their heirs are more likely (.3878) to prevail in courts of appeal. However, Black plaintiffs are generally less likely to win (–.3776) misappropriation disputes, regardless of their classification as celebrities, businesspersons, professionals, artists, or athletes.

And, although the –.0553 probit value is not statistically significant, it suggests that regardless of a male complainant's professional or business classifications, they also are generally less likely to prevail if they commence breach of contract actions. To be sure, a strict statistician may rightfully ask why accentuate a probit value that is statistically meaningless? The short answer might be unsettling: despite its negative value, the –.0553 probit value in Table 4 is marginally significant at a p = .17 confidence interval.317

Still, the same extralegal variables' substantial interaction effects are fairly puzzling. Under the common law and state statutes, there are no general or specific principles which forecast such gender and ethnicity effects. Yet, they are present in state and federal courts of appeal. In contrast, the statistical and significant effects of the three legal variables in Table 4 are not surprising.

The probit values for the effects of the legal variables communicate three strategic shortfalls. First, after controlling for all other factors in the model, the –.2478 probit value reveals that plaintiffs are generally statistically and substantially less likely to win right of publicity disputes. Second, the –.1000 value discloses that complainants are statistically and substantially less likely to win any disputes when defendants raise a federal preemption defense. And third, the –.2191 coefficient shows that plaintiffs are substantially less likely to win if defendants prove that plaintiffs' property interests or NILs were commercially exploited only after receiving complainants' express or implied consent.

Arguably, the federal preemption finding is quite serious and has strong implications for collegiate and high school athletes, as well as for their parent investors, who invest $2,500 to $12,000 per year to increase a child's likelihood

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[316] *See, e.g.*, *Rise in Reporting p-Values as Marginally Significant*, Psychological Science (May 20, 2016), https://www.psychologicalscience.org/publications/observer/obsonline/rise-in-reporting-p-values-as-marginally-significant.html (visited last on July 27, 2023) ("A researcher collects data, runs a statistical test, and finds that the *p* value is approximately .07. What happens next? . . . . [Researchers at major universities report that some authors are] likely to report that [the finding is] 'marginally significant' — not quite significant, but getting there. While it may be common, [the researchers] argue that this practice is 'rooted in serious statistical misconceptions' and is likely to lead to false-positive errors . . . . To make matters worse, evidence suggests that this practice is on the rise.").

[317] *See, e.g.*, *id.* (emphasizing that, as used in the top psychology journals, an acceptable *p*-value ranges from p = .05 to p = .18.).

of securing an NIL deal.[318] The overwhelming majority of NIL deals require student athletes to advertise sponsors' goods or services on social media.[319] However, the federal Communications Decency Act of 1996 (CDA) regulates, to some extent, activities on social media platforms.[320]

Assume that an NIL exploitation dispute arose between a business entity and an entrepreneurial athlete regarding a massive, social media marketing campaign on TikTok and YouTube.[321] Also, assume that the student or her parent investors commence a right of publicity action in a state court. Very likely, the CDA would preempt the state common law action and the case would be removed to a federal court.[322] But, we have learned that complainants—minors, "adult kids," parents, female-identifying people, Black people, and some professionals—are exceedingly less likely to win a right of publicity dispute in a federal court.

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[318] *See supra* note 19 and accompanying text.

[319] *See* Frieser, *supra* note 17 ("[The] NIL industry is booming . . . . Sponsored social media posts . . . [make] up the majority of NIL activity."); *NIL Contracts: What You Need to Know and Look For*, *supra* note 24 ("Student-athletes can now receive financial compensation [via] social media sponsorships . . . . [T]he U.S. influencer-marketing spending will reach $4.14 billion in 2022. The growth is primarily driven by social media such as TikTok.").

[320] *See* Pub. L. No. 104–104, Title V. (1996); *see also* Reno v. ACLU, 521 U.S. 844, 857–58 (1997) (explaining the Communication Decency Act's purpose, legislative history, enforcement powers and remedies); *see generally* Marguerite Reardon, *Section 230: How It Shields Facebook and Why Congress Wants Changes*, CNET (Oct. 6, 2021), https://www.cnet.com/news/politics/section-230-how-it-shields-facebook-and-why-congress-wants-changes/ (reporting that legislators generally agree that changes need to be made to Section 230 of the Communications Decency Act).

[321] *See generally* Belle Wong, *Top Social Media Statistics and Trends of 2023,* FORBES (Aug. 4, 2023), https://www.forbes.com/advisor/in/business/social-media-statistics/. Forbes reported that:

> TikTok [and] *YouTube* are poised to become powerful marketing stages for [brands]; an estimated 4.9 billion people use social media across the world [in 2023]. The number of social media users . . . has swelled to a record 4.9 billion people. The social media app market in 2022 was valued at $49.09 billion. The average person spends . . . about 145 minutes on social media [every day]. The most engaging type of content on social media is short-form videos. The most common way people access social media is a mobile device. The average CTR of ads across social media was 1.21% in 2022; 77% of businesses use social media to reach customers; 90% of users follow at least one brand on social media; 76% of social media users have purchased something they saw on social media. Half of millennials trust influencers' product recommendations. Influencer spending hit $4.14 billion in 2022. The minimum average cost of a sponsored YouTube video with 1 million views is $2,500.

Id.

[322] *Compare* Hepp v. Facebook, Inc., 465 F. Supp. 3d 491, 501 (E.D. Pa. 2020) (declaring that the CDA preempted the plaintiff's right of publicity claim and protected the social media platforms from liability), Parker v. PayPal, Inc., No. 16-4786, 2017 WL 3508759, at *7 (E.D. Pa. Aug. 16, 2017) (holding that the CDA sec. 230 preempted the plaintiff's right of publicity claim under California law), *and* Evans v. Hewlett-Packard Corp., No. C 13–02477 WHA, 2013 WL 4426359, at *3 (N.D. Cal. Aug. 15, 2013) (holding that the CDA preempted the plaintiff's claim under Pennsylvania's right of publicity statute), *with* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 26 n.9 (1st Cir. 2016) (finding a split of authority over whether the CDA preempts right of publicity claims, but refusing to decide the plaintiffs' claims were meritorious), *and* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1323–24 (11th Cir. 2006) (discussing without deciding whether the CDA preempts a right of publicity claim, although concluding that a right of publicity is an intellectual property right).

The analysis in this section discloses that legal and extralegal factors influence the dispositions of NIL-related misappropriation, breach of contract, and right of publicity disputes. And, using any reasonably objective measure, such influences in state and federal courts is extremely problematic.

Thus, consider a final question: should state legislatures amend NIL statutes and require NIL litigants to arbitrate or mediate their disputes, rather than litigate?

The question is timely. Why? Assuming that NIL deals and disputes continue to increase substantially, jurists as well as students and their parent investors are likely to question the "wisdom" of litigating NIL disputes in courts of law.

CONCLUSION

For approximately 150 years, colleges, universities, and collegiate sports associations exploited the talents and NIL of student athletes. These institutions and their business partners profited immensely by taking advantage of financially and legally unsophisticated "college kids" without paying any compensation. Ostensibly, this anti-competitive exploitation was mitigated in June 2021 after the Supreme Court decided *Alston* and an overwhelming majority of state legislatures and HSAAs subsequently enacted NIL rules. The new NIL rules enabled collegiate and high school athletes to legally monetize their NILs for the first time.

In the wake of these major changes, large numbers of parent investors are investing thousands of dollars per child each year, wanting and helping their high school and college kids to become successful entrepreneurial athletes.[323] Thousands of business entities are expected to form NIL contracts, wanting collegiate and high school athletes to become their promoters or marketing influencers on social media platforms.[324]

However, while athletes may now form contracts with third parties, a comprehensive analysis of states' NIL statutes reveals major problems for entrepreneurial athletes and their parental investors.[325] State legislatures

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[323] *See* Mark Moyer, *Why and How Athletes Can Become Successful Entrepreneurs*, FORBES (Dec. 13, 2022), https://www.forbes.com/sites/forbescoachescouncil/2022/12/13/why-and-how-athletes-can-become-successful-entrepreneurs/?sh=6e1f1dd239a7 (reporting many student athletes become entrepreneurs and explaining how students can become a successful entrepreneurs by thoroughly understanding "their skills and abilities," and "by growing and maintaining "a strong network of decision-makers and people of influence" within an industry of their choosing).

[324] *Student-athlete Influencers Work Like Magic for Meta-shoppers*, SOCIAL MEDIA TODAY (Feb. 22, 2022), https://www.socialmediatoday.com/spons/student-athlete-influencers-work-like-magic-for-meta-shoppers/618767/ (reporting that over 500,000 collegiate sports stars entered the influencer marketplace, "a traditional influencer typically achieves between a 2% and 3%", but "the average student-athlete's engagement ranges between "10% and 34% and beyond").

[325] *See* Bob Cook, *The Two Questions That Determine Whether Parents' Youth Sports "Investment" Will Pay Off,* FORBES (Jan. 17, 2018), https://www.forbes.com/sites/bobcook/2018/01/17/the-two-questions-that-determine-whether-

wittingly or unwittingly enacted complex NIL rules that continue to allow universities and their business partners to exploit students' NILs without securing the students' express consent. On the other hand, entrepreneurial collegiate athletes may not use universities' marks, logos, verbiage, name, or designs before obtaining the institution's written consent. And, even if approval is granted, the enterprising student and his sponsor must compensate the university for using the logo or marks.

Furthermore, colleges and universities may continue to exploit students' property interests without paying compensation. Yet if an institution decides that an NIL deal or contract conflicts with *any* ongoing institutional contracts, the institution may prevent a student from crafting an NIL contract, and the university may unilaterally cancel an executed NIL contract.

Debatably, for students and their parent investors, the latter prohibition is extremely problematic because it violates common law principles of contract. Generally, a college kid and a third party may form any valid employment, goods, or financial services contract.

But even greater concerns exist. Befittingly, NIL statutes allow and encourage entrepreneurial students and their parent investors to file right of publicity, misappropriation, and breach of contract actions against any third party that allegedly exploits the students' NIL rights. However, an empirical analysis of state and federal court cases—which were decided between 1830 and 2023—reveals that complainants are exceedingly less likely to win in federal courts if they are minors, parents, and female-identifying athletes. And, among state court cases, the statistically significant findings are mixed, because courts allow extralegal factors to influence the dispositions of publicity right, appropriation, and contracts disputes.

Moreover, the current NIL statutes create too many pro-institutional rights and too few anti-exploitative protections for students. Certainly, entrepreneurial students may form sponsorship, influencer marketing, and endorsement contracts. However, current NIL rules do not stop colleges, universities, and their business partners from exploiting students' NILs. In fact, if current college athletes execute NIL contracts, the statutes permit educational institutions and their third-party business partners to exploit students' NILs—without compensation or student consent. Thus, the statutes' purported mission to prevent commercial exploitation is largely elusive and illusory.

The Article's final message is for business and corporate entities—who have made or plan to make marketing-influencers agreements with collegiate athletes. Generally, both intercollegiate and high-school sports programs instill extremely strong, competitive, and aggressive drives in athletes, while concurrently teaching students when and how to control their aggression. Arguably,

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parents-youth-sports-investment-will-pay-off/ (reporting that parents make a "big investment in youth sports").

entrepreneurial collegiate athletes are likely to be decidedly more motivated and competitive. Such enterprising and younger students can become aggressive, vengeful, or retaliatory on social media after concluding correctly or incorrectly that his or her property rights were exploited.

Therefore, potentially exploitative businesses should appreciate several business realities. As effective marketing influencers, entrepreneurial students can use social media platforms to generate considerable profits for businesses and corporations.[326] But even more importantly, young and enterprising influencers can also use the same social media to retaliate, decreasing a company's profits, damaging the company's good reputation, or destroying the company altogether.[327]

Ultimately, this Article presents a comprehensive review of the current NIL statutes and encourages state legislatures to amend or enact completely new statutes to achieve two ends: 1) the termination of colleges' and universities' continuing right to exploit students' NILs without consent and without paying market-rate compensation, and 2) the termination of higher education institutions' statutory right to interfere with entrepreneurial athletes' common law right to form valid and totally integrated NIL contracts with sponsors, small businesses, and corporations.

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[326] *See* Jeff Foster, *Why Influencer Marketing Is Creating Huge Returns for Businesses*, CONVINCE & CONVERT (July 5, 2023), https://www.convinceandconvert.com/influencer-marketing/influencer-marketing-for-businesses/ (reporting that businesses generate $6.50 for each $1 invested in influencer marketing and that most businesses get solid results from influencers' marketing); Bill Carter, *NIL Corner: An NIL Success Story: Student-athlete Social Media*, SPORTS BUS. J. (July 25, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/07/25-Carter.aspx (reporting that an engagement rate gauges an influencer's level of interaction with social-media followers and disclosing that student athletes' average engagement rate is greater than other influencers' rate).

[327] *Cf.* Kevin Smith, *Social Influencers Can Make —Or Break—A Company's Reputation*, EAST BAY TIMES (Jan. 18, 2022), https://www.eastbaytimes.com/2022/01/18/social-influencers-can-make-or-break-a-companys-reputation/amp/ (reporting that "the impact of social influencers can cut both ways," and "Subway's reputation took a hit" after its social media influencer was convicted of a crime); Stabiner, *supra* note 207 (explaining how entrepreneurial influencers can exploit, undermine profits, or "take advantage" of a restaurant); Little, *supra* note 207 ("[W]hile a social media influencer can expand . . . [a] brand's awareness, [a sponsor] must be willing to accept the potential drawbacks of [a] relationship with an influencer.").