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# feslr

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# FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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# Letter from the E-Board

As a former athlete, I knew coming into law school that I was not ready to hang up my cleats entirely and wanted to pursue a career that allowed me to work alongside athletes. When I made the decision to come to UF Law, I made it a mission of mine to build sports & entertainment opportunities and an overall presence on campus. During my first few weeks on campus, I quickly met Hunter Bedard & Ashley Carlisle who had the exact same vision as me. The three of us worked tirelessly with Ty Robare to build the Entertainment & Sports Law Society by bringing in over 50 practitioners to share their experiences with our students. Fast forward to this year, the four of us recruited Alex Lopez and Samantha Whyte to continue this passion in growing the only sports & entertainment law review in the state of Florida, and I truly could not have asked for a better team.



Traditionally, a publication has a “Letter from the Editor”, but I could not imagine how I would have gotten through law school or this past year without our passionate Staff Editors, and most importantly, my hardworking Executive Board. I wanted to share this platform with the individuals who not only trusted my vision but trusted me as I pursued my dream of working for Major League Soccer in New York this semester... so please enjoy the following “Letter from the Executive Board.”



Lastly, thank you to my Executive Board for teaching me to lead by leading with me. It has been a pleasure seeing them all grow into talented, dedicated, and confident (very soon to be) lawyers. I’ll cherish my time at UF Law with this team throughout my entire career. I cannot wait to see the places our rising 2023-2024 Executive Board brings this journal; we will be cheering you on from the sidelines.

**—Alyssa Rodriguez, Editor-in-Chief**



When I decided to attend UF Law, I knew I wanted to immerse myself in the entertainment and sports law community. From serving on the Executive Board of the Entertainment and Sports Law Society with fellow members of the FESLR Executive Board to serving as the Executive Managing Editor of FESLR, I know that the 1L version of myself would be very proud. This journal has been one of the most rewarding experiences that I have ever been a part of, and I am so thankful to our Staff Editors and my fellow Executive Board members for making these publications possible. I cannot wait to see how FESLR continues to discuss the relevant and ever-changing topics within the entertainment and sports law fields, and I am beyond thankful to be a part of FESLR's legacy.

—**Ashley Carlisle, Executive Managing Editor**

Working alongside my fellow FESLR Executive Board members was one of my favorite parts of law school. Helping review and select the articles that we published was hard work, but extremely rewarding. None of it would have been worth it if it wasn't for Alyssa Rodriguez, our incredible Editor-in-Chief. She is a fearless leader, and it was an honor to be led by her. I'll always cherish the memories I made with the entire Executive Board!

—**Hunter Bedard, Executive Articles Editor**

It has been an honor and a privilege to serve as FESLR's Executive Research Editor this past year. It has been such an amazing experience to work with such a talented Executive Board and group of Staff Editors. I have learned so much from working with everyone, and I will carry these lessons with me as I begin my career and beyond. It fills me with excitement to think about the future of this journal, and I know it is in talented and capable hands. I will continue here at UF Law for one more semester as I earn my J.D. and LLM. Thank you FESLR for such an amazing experience.

—**Alex Lopez, Executive Research Editor**

When I started at UF Law, FESLR was a pipedream—a realistic pipedream actively in the process of coming true, but a pipedream nonetheless. I knew, at a minimum, that I wanted my UF Law career to educate me about what the entertainment and sports law fields entailed so that I could start to build a brand that might open those doors, either upon graduation or during my legal career.

Three years of law school later, I look proudly at what FESLR has accomplished in its organization-wide mission to become a preeminent journal and a catalyst in building this law school's foundation in the entertainment and sports law fields. Through our student works division, FESLR has offered all of our editors the opportunity to begin down the path of subject matter expertise and, more importantly, has offered an outlet to build their respective entertainment or sports law brands. I look forward to watching future Executive Student Works Editors continue shaping this process and opening more doors. Students interested in building entertainment or sports law-facing careers should not have to sacrifice their passions to attend our school. One day, I hope to see UF Law as *the* law school in the Southeastern United States for entertainment and sports law. I can't wait to see the role that FESLR plays in getting to that destination.

—**Ty Robare, Executive Student Works Editor**

Over the last two years, FESLR has given me the opportunity to work with talented students and attorneys in and outside of the UF Law community. Membership in FESLR has allowed me to grow as a leader and in the legal profession. I'm proud to be a part of an organization that is flourishing, reporting on relevant topics, and making a mark on the UF Law campus.

—**Samantha Whyte, Executive Communications Editor**



# FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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## CAREER SPOTLIGHT: LEN BROWN

Len Brown is the Chief Legal Officer/Executive Vice President for Licensing & Merchandising for the PGA TOUR, Inc. JD from the University of Pennsylvania Law School, MBA & BS from Pennsylvania State University.

### QUESTIONS & ANSWERS

#### **1. Please briefly explain your career path and what led you to your current position.**

I have always had a love for sports and could not imagine a life without them. I was a student-athlete through college but, out of undergrad, I took a job as a stockbroker. Although I was doing well, I was not passionate about my career. I decided to leave my position as a broker and ventured back into my other love—music. I started doing music production for others while working on my rap album (yes—my album). Because I loved what I was doing, I thought that I would pursue starting an independent record label. In order to sharpen my business skills, I enrolled in the MBA program at my alma mater, Penn State. My MBA was in finance and logistics. The summer before returning to State College, I married my college sweetheart. Between my first and second years of business school, my oldest child was born. As such—at least in my mind—dreams of struggling to start a record label were over (or at least on hold). Thus, after graduation, I took a “safe job” at Ford Motor Company in Detroit.

After two years at Ford—and many late-night conversations with my wife—I decided to apply to law school. I had to get back into sports and/or music, and I thought being a lawyer (agent and/or front office executive) was the route.

I went to U Penn Law School, which took me back to my hometown of Philadelphia. By this time, I was the father of two, and I had a lot of responsibility. That, I think, made me laser-focused on my goal of finding a job in sports. I took every intellectual property, sports, and/or entertainment law class offered. As Vice President of the Entertainment and Sports Law Society, I was constantly reaching out to industry executives under the guise of asking them to speak to our group, as my primary goal was to build up my network. I summered at Proskauer Rose in NYC, as it was (and still is) **the** firm for outside representation of the major sports leagues. I had a great summer at Proskauer, but, as the father of small kids at this point, my wife and I questioned raising a family in New York City.

During my summer at Proskauer, a good friend of mine summered at Williams and Connolly (W&C) in Washington, D.C. Known as one of the premiere white shoe litigation firms in the country, the firm also had

this niche sports representation practice. My buddy convinced me to reach out to the partner at the group, and, after interviewing, taking a judicial clerkship, and strongly finishing out my 3L year, I took a job at W&C.

At W&C, I helped represent incredible athletes like Grant Hill and Tim Duncan (I am dating myself). From W&C, it was on to Turner Sports and the Atlanta Braves, and from there, to the PGA TOUR.

**2. What is something you wish you could tell yourself in law school?**

Do well. I mean stay at the top of your class (it is important) but have more fun. Enjoy the ride and pedagogy. It is likely your last chance to be free from all of what comes with “adulting.”

**3. What is something that has changed since you began working in the sports and entertainment industry, and how has that change impacted your current job in the industry?**

I would say that advances in technology and social media have rippled into changes in the media space, NIL area, and gambling arena—all of which have resulted in significant changes to my job and the industry, in general.

**4. How much involvement does an in-house legal department have when your company, organization, or team signs on for a Netflix series or major motion picture?**

Our legal department was heavily involved from the very beginning stages of the Netflix series and would/will be involved at the inception of any similar projects. Our philosophy is to work with the business units from the very beginning of a deal. Not only do we avoid issues down the road, but also, understanding the business objections from the outset, forces (and/or allows) our legal team to proactively and creatively think about ways to achieve our desired outcomes.

**5. What key issues in the sports and entertainment industry are especially relevant right now, and what do you see becoming more prevalent in the next 5-10 years?**

Back to technology and social media, it is important to keep the integrity of the game (of any sport) while facilitating innovations such as gaming, etc. I fear that you could lose the core of the sport by chasing ancillary revenue sources.

**6. How do you envision the growth of legal sports gambling impacting your career in the next decade? How can attorneys get ahead of what's to come?**

Similar to last the question, job #1 is protecting the integrity of the enterprise. Gaming can bring fresh eyes and a new audience, but it can also bring some bad things. The Black Sox scandal happened over 100 years ago, but we still talk about it. The NFL could, and would likely, recover from a scandal like that. Smaller niche sports such as golf and tennis may not ever recover from something like that.

Getting out in front of it. The legal department drafted and adopted an integrity policy governing our approach to gaming before we ever signed any sponsorship, data distribution, or other deal surrounding the gaming industry. As lawyers, we need to think of the potential negatives and try our best to mitigate them beforehand.

**7. What is one of the biggest misconceptions in your industry?**

One of the biggest misconceptions is that the legal work around sports is somehow different. It is all the same. We just have a cool client.

**8. What is one piece of advice that you would give to students trying to break into the sports and entertainment industry?**

To the extent that you can afford it, be willing to go anywhere and take any reasonable position in sports because, much like coaching, once you have a job in sports, you are in “the club,” which makes it easier to get the next job in sports.





## CAREER SPOTLIGHT: EMILY LEKAHAL

Emily Lekahal is the Assistant General Counsel for the Tampa Bay Buccaneers. JD from the University of Minnesota; BA from Colorado State University.

### QUESTIONS & ANSWERS

**1. Please briefly explain your career path and what led you to your current position.**

I was lucky enough to get an internship with the Minnesota Vikings early on in my law school career. What originally was supposed to be a temporary winter break position during my 1L year turned into a standing internship until graduation. At the time of graduation, the Vikings didn't have any full-time legal positions open but were gracious enough to refer me to several firms, organizations, and sports properties both in Minnesota and elsewhere. One of these referrals led me to the Ladies Professional Golf Association (LPGA) in Daytona Beach, Florida. I didn't know much about women's golf at the time—but this was one of the best jobs I could have asked for to start my sports career. I worked with the LPGA for over two years, but I knew that I eventually wanted to get back to the National Football League (NFL). When a position opened with the Tampa Bay Buccaneers (the Bucs), I could not turn it down. I moved to the other side of the coast, and now, I am going into my 5th season with the Bucs.

**2. What is something that has changed since you began working in the sports industry, and how has that change impacted your current job in the industry?**

I think remote work has been the biggest change in several industries, but especially in sports. When the Bucs initially shut down due to COVID in 2020, the business staff didn't return to the office for over two years. Before that, working remotely in this industry (especially on the team and league side) was kind of unheard of . . . which was understandable. Sports are about live events, building relationships, and connecting with fans and people in person.

While that remains to be the focus in the sports industry, we have seen a shift in workplace practices that now allow for a more hybrid approach for employees. For better or worse, it is something that has changed how companies recruit and retain employees, and it will be interesting to see if this is something that continues for the foreseeable future.

**3. What was your first “win” that made you confident that you belonged in your job or the industry overall?**

Your career is going to be full of so many wins (big and small). I’m not sure I remember my first win, but I definitely remember that “winning” feeling early on in my career, after taking the lead on a contract negotiation, a board meeting presentation, or even just sending an email to an owner or commissioner advising on a business decision. I think it is natural to question whether you belong where you are, so it is important to hold on to that “winning” feeling even in the “losing” moments.

I’ve also been very lucky to work under great attorneys and leaders who instilled that winning confidence in me from the start. They valued my opinion, encouraged me to speak up in meetings, and delegated important projects early on to show that they trusted me and that they knew I could handle this job.

**4. What key issues in the sports industry are especially relevant right now, and what do you see becoming more prevalent in the next 5–10 years?**

I think right now in Florida the biggest trend that we are watching is the future of legalized sports betting. Obviously, it is a complicated issue at the moment, but I believe that an upcoming decision will have a major impact on Florida sports properties. Digital assets (NFTs, Fan Tokens, Crypto, etc.) are something that I have been TRYING to wrap my head around for the last year or so, and I think that will only become more and more prevalent. I also think things will continue to rapidly change as it relates to sports media, content distribution, and broadcast deals due to new technology and changes in fan preferences.

**5. What impact would you like to make on the sports industry throughout your career?**

I want to impact those trying to break into the industry. I feel an obligation to help do what so many people did for me. People were so gracious to take a phone call, meet for coffee, pass along my resume, or put in a good word for a job opening. Each gesture made such an impact on getting me to where I am, and I want to do that for someone else. We can always do more to pay it forward for others. Seeing people land a dream position, even when you may have had the smallest role, is such a great feeling. I will never forget those people who had this impact on me and my career, and I will continue to help do that for others.

**6. What is the biggest risk that you've taken in your career? How has that risk helped you in your career or what lessons did you learn from it?**

The main advice I got throughout law school was to go to a law firm for at least a couple of years and then try to break into the sports law industry. And I do not think that was bad advice. Honestly, some of the feedback I received when interviewing for positions in sports was that I didn't have the law firm experience that they were looking for.

When I graduated from law school, I had an offer at a mid-size law firm in Minneapolis. I turned down that offer and continued looking for something in sports. This was a big risk for me. I wasn't offered the position at the LPGA until after I received my bar results, which meant months without a job and months without knowing where I was going to live.

Obviously, it worked out for me because again, the LPGA was one of the best positions that I could have asked for, but that was a really stressful time. I remember questioning my decision to turn down the position at the law firm, and I still think about what would have been different if I didn't.

While I do not have law firm experience, I was really fortunate to get an in-house position doing exactly what I wanted to do right out of school. It is most likely that I wouldn't have moved to Florida without taking the LPGA job, and I am really lucky that I ended up here. Of all the places sports could have taken me—Tampa, Florida is at the top of my list.

**7. What is one of the biggest misconceptions in your industry?**

I would say the biggest misconception, for at least my position as counsel for an NFL team, is that I do the player contracts. I cannot tell you how many people had asked me if I did Tom Brady's contract when we originally signed him.

For the most part at the Bucs (and also several other NFL clubs), the business side and football side are fairly separate. Player contracts are heavily governed by the Collective Bargaining Agreement between the NFL and NFLPA, and the people in our organization that are way more knowledgeable on the salary cap handle those directly. Every other agreement that you can think of, however, comes through me and my team.

**8. What is one piece of advice that you would give to students trying to break into the sports industry?**

It is important to know that there is no magic formula to break into the industry. Focus on developing strong experience (wherever that may be) and be persistent in seeking out opportunities.

## CAREER SPOTLIGHT: BRIAN MENCHER

Brian Mencher is the General Counsel & Head of Business Affairs at Global Citizen, a multi-national not-for-profit organization bridging digital media, humanitarian policy, and major event productions to help end extreme poverty NOW. As General Counsel, Brian oversees all legal, compliance, and business affairs needs of the organization, and supports Global Citizen's international offices located in Canada, England, Australia, South Africa, Nigeria, and Germany. Brian received his JD and Masters in Mass Communication (joint degree) from the University of Florida and has a double major in Mass Communications and Criminal Justice from Florida Atlantic University.

### QUESTIONS & ANSWERS

#### **1. Please briefly explain your career path and what led you to your current position.**

“I consider myself to be in the hospitality industry and the concierge for the team.”

I grew up in the age of the OJ Simpson trial and thought that I wanted to be a criminal defense attorney. I loved the strategy involved in litigation. Once I arrived at law school, however, my interests eventually turned toward intellectual property law and the representation of creative people.

After attending a concert in downtown Gainesville, it clicked for me—I wanted to work with artists and other folks in the music industry. While in law school, I founded the Music Law Conference (a mini South by Southwest (“SXSW”) of sorts) developed and produced by law students (with the support of the UF Law staff).

Once I graduated, the law students continued to produce the conference for ten more years! I would visit from New York City (where I moved after graduation) every year to speak on a conference panel (and hopefully inspire others to also pursue a career in entertainment law).

In NYC, I started my own law firm and then established the partnership of Beame & Mencher, with my friend and fellow lawyer, David Beame. In 2012, David connected with three guys from Australia who were planning to put on a mega festival in Central Park to end extreme poverty. I initially filed the organization’s trademarks while David went on to help produce the first festival (and every festival since).

After attending Global Citizen Festival, I was inspired. I decided then to dedicate more of myself to Global Citizen’s mission to end extreme poverty, protect our planet from climate change, and advocate for equity for women and girls everywhere. It’s the best use of my skills and education I could imagine. The rest, as they say, is history—over time, I

continued to take a larger leadership role within the organization and have had the honor of serving as the General Counsel and Head of Business Affairs for nearly three and half years now.

**2. What is something that has changed since you began working in the entertainment industry, and how has that change impacted your current job in the industry?**

The industry is always evolving. So, as a lawyer, or really anybody serving in a leadership role, you have to stay ahead of (or, in the case of law practice, at least keep up with) technology and the ambitions of your clients and/or internal organization executive team. We often hear (and accept) that the law is always playing catch up with technological advancements. To be successful, however, we have to be able to forecast the potential issues and challenges and have strategies in place to answer any given scenario. I guess you can call me a legal futurist, always trying to think about what might be three steps ahead—whether presented by outside forces (such as technology) or internal factors (such as team ambition!).

**3. Does serving in an in-house capacity change your analysis of risk? For example, does it shift more towards operating with a focus on risk mitigation as opposed to outright risk avoidance which may be the more accepted route at a large firm?**

Being an in-house lawyer absolutely should change your risk assessment. It is not usually the role of outside counsel to advise on what decision to make. However, in my role as General Counsel of an entertainment and media nonprofit with the urgent mission to make a massive impact for the betterment of the world, I'm called on every day to advise on risk and/or make decisions taking risk into account.

Risk avoidance is typically not a useful (or realistic) goal for the in-house lawyer. Better, good lawyering commands that in-house counsel assess risk, mitigate it, transfer it wherever possible, and insure against it too. It is equally important to my role that I widen the aperture in how I view risk, looking at it from various angles—legal, compliance, business relationships, and reputational impact, to name a few.

#### **4. What type of legacy do you hope to leave behind in the entertainment industry?**

I measure my career success by how well I have championed my colleagues and supported their needs. I often say that I am in the hospitality industry, and my team is the “legal concierge”—we are to help the members of the wider team get to “yes” unless there is a compelling reason to say “no.” Lawyers have a reputation for getting in the way and I don’t subscribe to this approach. Easy lawyering is finding a reason to say “no”; good lawyering is finding a reason to say “yes” and then partnering with your colleagues to make it happen.

When people look back on my career, I hope that they talk about how kind I treated people and that I leveraged my experience in the entertainment industry to allow me and my colleagues to achieve a positive impact in the world.

#### **5. What is the most valuable lesson you have learned thus far in your career? How has that made you a better attorney?**

To be successful, you have to be able to bridge the gap between legal analysis and business realities. I’m grateful for the mentors in my career that demonstrate how to translate legal concepts into clear and concise language that a layperson will understand. Shifting the paradigm from “others need to understand what I understand and how I understand it” to “there is an opportunity here to broaden my skills by communicating in a way that sets my colleagues up for success,” is very important. To me, there is a zen quality to this—having a beginner’s mind—by studying deeply the legal nuances of the business you are in and then shedding those nuances to advise your client or colleague in the most effective way possible.

#### **6. What is the biggest risk that you’ve taken in your job? How has that risk helped you in your career or what lessons did you learn from it?**

I don’t view any of my career or day-to-day decisions through a risk-taking lens. My decisions in both are often more calculated and studied. Like the big wave surfer, Laird Hamilton, said when commenting on risk, “dealing with a large wave requires understanding its structure and behavior,” a “studied pursuit . . . and a certain cooperation with nature” that removes the most acute risk by only making informed decisions. Similarly, but hopefully not as potentially life-threatening as dropping into a 70-foot wave, my decisions in the practice of law are rooted in evaluating risk and understanding the potential outcomes before making



a decision. Some decisions are arrived at more quickly than others, but I never consider my actions to be risky; just risk-minded and I am willing to accept any of the forecasted or unpredictable outcomes.

### **7. What is one of the biggest misconceptions in your industry?**

I think one of the bigger misconceptions of entertainment lawyers is that we are not a value-add, but merely a necessary backend function of the business. While this may be true for some practitioners, this is not how I view my contributions to any given client. I'm consistently a collaborator in the deal-making process, helping connect the dots and advise on possible structures that will increase the value of each deal for my client. After all, I did serve as a co-executive producer on some of Global Citizen's biggest media productions to date!

And, I also approach any deal with the rigor, thoroughness, and pragmatism that any good lawyer should take when entrusted with matters of legal consequence—and solid contract drafting, for example, can also increase the financial value of the deal, whether that be a favorably drafted accounting provision or the transfer of certain risk that could otherwise cost the client money upfront or sometime in the future.

In summary, I don't think many non-lawyers fully appreciate the value that lawyers can potentially add to the team and the exactness with which we must do our job.

### **8. What is one piece of advice that you would give to students trying to break into the entertainment industry?**

Don't give up. You are not your last "no" or your most recent mistake. If your career path is anything like mine, you're going to have to stay resilient and be prepared to demonstrate your acumen at any moment to prove you're ready for the next level. But also remember, whenever you finally arrive at the place you thought you were hoping to arrive at, there's likely to be another place you will want to grow towards—so, truly, enjoy the ride at every step if you can. Keep on pushing through, and once you do, you're going to have a critical mass of connections, relationships, and credibility, and all that effort along the way may just catapult you into the place you wanted to be!

DEAD FROGS, DISSECTED JOKES, & THIN COPYRIGHT:  
ANALYZING COPYRIGHTABLE ELEMENTS AND LEGAL  
PROTECTION OF STAND-UP COMEDY

*Mark Edward Blankenship Jr.\**

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INTRODUCTION

In 1999, the Honorable Kimba M. Wood wrote the majority opinion for *Leonard v. Pepsico*,<sup>1</sup> the renowned contract law case that dealt with Pepsi points, teenagers riding harrier jets to school, aviator sunglasses, and other sweepstakes prizes, and is perhaps one of the most famously taught contracts cases in one’s first year of law school.<sup>2</sup> When challenged

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\* Media Law Committee Chair, The Missouri Bar (2022–2023); Senior Associate, Ott Law Firm; LL.M., Benjamin N. Cardozo School of Law at Yeshiva University (2021); J.D., J. David Rosenberg College of Law at the University of Kentucky (2019); B.A., Georgia Southern University (2015). I want to thank Professors Brian L. Frye, Melynda Price, and Allison Connelly, Joseph A. Ott, my friends, and family for their tremendous support. Finally, I dedicate this Article to the Tourette Associate of America.

1. *Leonard v. Pepsico*, 88 F. Supp. 2d 116, 117 (S.D.N.Y. 1999).

2. *See Leonard v. Pepsico*, WIKI L. SCH., [https://www.wikilawschool.net/wiki/Leonard\\_v.\\_Pepsico](https://www.wikilawschool.net/wiki/Leonard_v._Pepsico) [<https://perma.cc/LU44-EE5B>] (last visited Sept. 14, 2022); *see also High-Flying Contracts Case Takes Nosedive*, GLENDALE UNIV. COLL. OF L., <https://www.glendalelaw.edu/blog/high-flying-contracts-case-takes-nosedive/> [<https://perma.cc/P4MZ-N35A>] (last visited Sept. 14, 2022); *see also What Happened When a Kid Sued Pepsi for a Harrier Jet?*, OUR AM. STORIES (Jan. 26, 2022), <https://www.ouramericanstories.com/podcast/entertainment/what-happened-when-a-kid-sued-pepsi-for-a-harrier-jet> [<https://perma.cc/7UKB-CRDK>].

with the decision of whether to treat the Pepsi commercial's depiction of a Pepsi sweepstakes contestant riding a harrier jet as a serious offer for purposes of mutual assent, Wood wrote that such a challenge would "require[] the Court to explain why the commercial is funny."<sup>3</sup> Wood went on by stating: "Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, 'Humor can be dissected, as a frog can, but the thing dies in the process . . . .' The commercial is the embodiment of what defendant appropriately characterizes as 'zany humor.'"<sup>4</sup>

The same thing can perhaps be said when considering the copyright protection of stand-up jokes. Stand-up comedy performances can serve as an embodiment of one's creative use of humor.<sup>5</sup> This too requires some sort of dissection, especially when analyzing whether one has infringed upon another's copyrightable work of art.<sup>6</sup> More importantly, however, is the challenge of determining whether stand-up comedy is copyrightable subject matter. While many critics may argue that stand-up comedy should be copyright protected, they sometimes make incorrect assumptions in support of their argument.<sup>7</sup>

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3. *Pepsico*, 88 F. Supp. 2d at 128.

4. *Id.*

5. See *infra* Section II.

6. See Lewis R. Clayton, *'Tufenkian Import/Export Ventures': On 'Inexact' Copies of a Work*, 225 N.Y.L.J. 105 (2003) (explaining the Second Circuit's view that "while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation.").

7. See generally Scott Woodard, *Who Owns a Joke? Copyright Law and Stand-Up Comedy*, 21 VAND. J. ENT. & TECH. L. 1041 (2019) (explaining that if a stand-up comedian does not immediately fix their work or inadvertently diverts from their fixed work during a performance, the stand-up comedian will not be entitled to any copyright protection); Hannah Pham, *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 5 (2019) (arguing that outside of the realm of the comedy community, social norms do not adequately protect the work of stand-up comedians); Matthew L. Pangle, *The Last Laugh: A Case Study in Copyright of Comedy and the Virtual Identity Standard*, 28 TEX. INTELL. PROP. L.J. 183 (2020) (explaining that rigid social norms have been relied on within the comedy industry, while platforms like Netflix and Twitter have made the use of copyright protections over comedy more common); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms And the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (arguing that copyright law may not benefit all of the creative practices it is intended to regulate, thus practical norms systems should be permitted to supplement law); Sarah Gablin, *This is No Laughing Matter: How Should Comedians Be Able to Protect Their Jokes?*, 42 HASTINGS COMM. & ENT. L.J. 141 (2020) (explaining that the perceived ephemeral nature of jokes, along with the view that jokes are merely ideas prevent jokes from being protected under copyright law); Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453 (2022) (explaining that memes frustrate the principles of copyright, making copyright law inadequate for legal protection over memes).

This Article will be broken into two parts. Part I will dive into what comedy truly is. Part II will analyze both the copyrightability of stand-up jokes as to their subject matter and the complexity of copyright infringement in relation to stand-up comedy.

## I. DEFINING STAND-UP COMEDY

Let us start by asking this essential question: what defines stand-up comedy? Society recognizes that stand-up comedy is a performance of jokes that are tied in and organized in a peculiar way by the performer. But when is something a joke? Many might argue that stand-up comedy consists of jokes that are comedic, humorous, hilarious, comical, and/or witty. Certainly, these qualities are determinative factors in the performance's creative value, but they are subjective characteristics taken from the perspective of the observer.<sup>8</sup>

However, there are other factors that can also affect the creative value of a joke and the stand-up comedic performance, that are implemented by the performer. This may include the performer's prose, affect, tone, flamboyance, stage presence, and the use of props or other materials during the performance.<sup>9</sup> Stand-up comedy is also similar to music and certain forms of drama in that it sometimes leaves room for improvisation. So, for instance, when a heckler disturbs the scripted flow of the performance, the comedian can add material to his or her work in response.<sup>10</sup>

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8. See generally Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235, 1239–44 (2009) (explaining common categories and theories found in a human despite difficulty in objectively defining humor); Todd McGowan, *The Barriers to a Critical Comedy*, 3 CRISIS & CRITIQUE 200 (2014) (arguing that the politics behind comedy are dependent on the image of social order being portrayed); Ben Healy, *What Makes Something Funny?*, THE ATL. (Mar. 2018), <https://www.theatlantic.com/magazine/archive/2018/03/funny-how/550910/> [<https://perma.cc/9CAW-56Y9>] (explaining the difficulties in conceptualizing humor); Whitney Phillips, *Dissecting the Frog*, THE NEW INQUIRY (Apr. 8, 2013), <https://thenewinquiry.com/dissecting-the-frog/> [<https://perma.cc/5ATS-ZEXM>] (explaining group humor dynamics within online spaces).

9. See generally TEDx Talks, *Dissecting Stand up Comedy | Yousef Bayomy | TEDxUIIdaho*, YOUTUBE (Oct. 20, 2016), <https://www.youtube.com/watch?v=gWPihEL4RDU> [<https://perma.cc/RNG3-L87H>] (hereinafter TEDx Talks) (explaining that stand-up comedy is made by creating expectations and then subverting those expectations); Jeannine Schwartz, *Linguistic Aspects of Verbal Humor in Stand-up Comedy* (May 19, 2010) (Dissertation, Saarland University) (on file with ResearchGate) (explaining how different comedians approach comedy by developing different stage personas); Lawrence E. Mintz, *Standup Comedy as Social and Cultural Mediation*, 37 AM. Q. 71 (1985) (examining the role of stand-up comedy in promoting social aims like social harmony and social catharsis); Justyna Wawrzyniuk, *Identifying Humor in Stand-Up Comedy: A Preliminary Study*, 7 LINGUISTICS BEYOND & WITHIN 86 (2021) (examining how a stand-up comedy audience approaches humor by analysis).

10. But see TEDx Talks, *supra* note 9 (making the distinction between improv comedy and stand-up comedy).

As audience members or listeners of stand-up performances, many have experienced comedians taking narrative stances in their jokes.<sup>11</sup> While this is a very common tactic, it is not the only method of performance, which is a critical assumption that should be avoided. Below are a few alternative methods in which a joke is performed.

### A. Description

Sometimes, a comedian can create humor by illustrating descriptive details of the world around him. This can include the people the performer sees, the attitudes and statements of these people, and the location in which he or she is present. For example, comedian Sebastian Maniscalco has been notorious about telling jokes about the descriptive characteristics of TJ Maxx discount stores,<sup>12</sup> the customer service and the complexity of burrito-making at Chipotle restaurants,<sup>13</sup> and the social dynamics of growing up in an Italian family.<sup>14</sup>

Such illustration can be done through visual effects or the use of props, a common style that comedian Carrot Top implements.<sup>15</sup> Ventriloquists like Jeff Dunham often take this approach by using puppets.<sup>16</sup>

11. See *Storytelling in Stand-Up Comedy*, FRONTROW (Nov. 23, 2021), <https://frontrow.co.in/guides/storytelling-in-stand-up-comedy/> [https://perma.cc/8NSR-BQRD]; see also Gwen Moran, *How to Tell A Captivating Story Like A Stand-Up Comedian*, FAST CO. (Sept. 2, 2014), <https://www.fastcompany.com/3035042/how-to-tell-a-captivating-story-like-a-stand-up-comedian> [https://perma.cc/4XS2-P76K].

12. Sebastian Maniscalco, *The TJ MAXX Nightmare*, YOUTUBE (Dec. 8, 2020), <https://www.youtube.com/watch?v=08XpLbfskaM&t=18s> [https://perma.cc/2D6C-7ELT].

13. Sebastian Maniscalco, *Chipotle | Sebastian Maniscalco: Aren't You Embarrassed?*, YOUTUBE (Jan. 26, 2015), <https://www.youtube.com/watch?v=KijAPjXjg8c> [https://perma.cc/A3BH-YRGV].

14. See NYA COMEDY, *Sebastian Maniscalco - Old World Upbringing*, YOUTUBE (Apr. 22, 2019), <https://www.youtube.com/watch?v=4jKiq6WGjtY> [https://perma.cc/E8VH-VFAW]; see also Sebastian Maniscalco, *Sebastian Maniscalco - Italians Keep A Lot Of Things Private (Stay Hungry Clip)*, YOUTUBE (Mar. 25, 2021), [https://www.youtube.com/watch?v=Dv7L9\\_nTSJw](https://www.youtube.com/watch?v=Dv7L9_nTSJw) [https://perma.cc/837J-6S7Z].

15. See, e.g., *The Stories of Craig, Carrot Top doing Hilarious Prop Comedy on The Late Late Show!*, YOUTUBE (Jan. 10, 2018), <https://www.youtube.com/watch?v=EGV6A1J8sfY> [https://perma.cc/L7KC-YREV]; Zee G. Hunter, *Carrot Top on the Tonight Show with Jay Leno*, YOUTUBE (Dec. 31, 2021), <https://www.youtube.com/watch?v=byhzsQ0AzYI> [https://perma.cc/R8HJ-CNGS]; Keegan Kelly, *Carrot Top: The Most Successful Comedian No One Will Admit To Liking*, CRACKED (May 28, 2022), [https://www.cracked.com/article\\_34083\\_carrot-top-the-most-successful-comedian-no-one-will-admit-to-liking.html](https://www.cracked.com/article_34083_carrot-top-the-most-successful-comedian-no-one-will-admit-to-liking.html) [https://perma.cc/KK77-AC4Z].

16. See, e.g., Michael Schneider, *Jeff Dunham Returns to Comedy Central This Month with New Special, Featuring One Puppet's Joe Biden Makeover (EXCLUSIVE)*, VARIETY (Nov. 3, 2022, 2:14 PM PT), <https://variety.com/2022/tv/news/jeff-dunham-comedy-central-special-joe-biden-1235422677/> [https://perma.cc/7PKB-PPSM]; *The Best Jeff Dunham Puppets & Characters*, RANKER, <https://www.ranker.com/list/jeff-dunham-puppets-list/reference> [https://perma.cc/8N34-5HQA] (last updated Oct. 28, 2021).



Carrot Top on the *Tonight Show with Jay Leno* (1995)



Jeff Dunham with Achmed the Dead Terrorist

### B. *Retelling of Current Events*

Another method of presenting jokes is through the retelling of factual circumstances or current events. Like the descriptive method, this too provides an illustration of the world where the performer is immersed, though there is a limitation in the subjectivity of the performer's observations. For example, comedian Dave Chappell made a joke about

the factual circumstances of Jussie Smollett's alleged assault.<sup>17</sup> While he seemed to intentionally mispronounce Jussie Smollett's name ("Juicy Smoo-yay") on stage and took a few creative liberties in terms of commentary,<sup>18</sup> Chappell maintained a factual retelling of the events that took place, while also highlighting discrepancies of such events.<sup>19</sup>

### C. One-Liners

Several comedians have done stand-up performances with very short and witty quips, either à la carte or through musical accompaniment. Examples of such comedians include Nick Thune,<sup>20</sup> Mitch Hedberg,<sup>21</sup>

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17. Netflix Is A Joke, *Dave Chappelle on the Jussie Smollett Incident | Netflix Is A Joke*, YOUTUBE (Aug. 30, 2019), <https://www.youtube.com/watch?v=wZXoErL2124> [<https://perma.cc/K5YV-Q2EP>].

18. *Id.*

19. *Id.* Such discrepancies were key at Jussie Smollett's trial in determining whether Smollett committed five counts of disorderly conduct for making false reports to police that he was the victim of a hate crime in January of 2019, where Smollett alleged that two men, one of whom was wearing a red hat, had attacked him, shouted racial and homophobic slurs at him, poured bleach on him, and threw a noose around his neck. A jury eventually found him guilty on all charges, each of which were Count 4 felonies. See also Don Babwin & Sara Burnett, *Jussie Smollett Guilty Verdict Latest in Polarizing Case*, AP NEWS (Dec. 10, 2021), <https://apnews.com/6bacee833936ed9dbb0784cc0ee1df89> [<https://perma.cc/Y7TE-TMTC>]; see also Melissa Mahtani & Fernando Alfonso III, *Jussie Smollett Found Guilty of Falsely Reporting a Hate Crime*, CNN, <https://www.cnn.com/us/live-news/jussie-smollett-trial-verdict-watch-12-09-21/index.html#:~:text=A%20Chicago%20jury%20found%20Jussie%20Smollett%20guilty%20of,three%20years%20in%20prison%20and%20a%20%2425%2C000%20fine> [<https://perma.cc/2MPL-AQDR>] (last updated Dec. 9, 2021, 9:46 PM ET); see also *Jussie Smollett: A Complete Timeline from Actor's 2019 Arrest to Jail Time*, BBC (last updated Mar. 11, 2022), <https://www.bbc.com/news/newsbeat-47317701> [<https://perma.cc/2EWQ-UMAF>]; see also Deepa Shivaram & Jonathan Franklin, *Jussie Smollett Will Serve 150 Days in Jail for Lying About an Attack on Him*, NPR, <https://www.npr.org/2022/03/10/1085718072/jussie-smollett-sentence> [<https://perma.cc/K4NP-AP8Q>] (last updated Mar. 10, 2022, 7:45 PM ET).

20. See *Nick Thune*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Nick\\_Thune](https://en.wikipedia.org/wiki/Nick_Thune) [<https://perma.cc/4XNM-HCR5>] (last visited Oct. 10, 2022); see also *Nick Thune*, IMPROV, <https://improv.com/milwaukee/comic/nick+thune/#:~:text=Nick%20Thune%20comedian%20%2F%20actor%20hails%20from%20the,8%20times%20and%20on%20each%20occasion%20he%20won> [<https://perma.cc/Z7H2-5N59>] (last visited Oct. 10, 2022).

21. "Hedberg's standup comedy was distinguished by the unique manner of speech he adopted later in his career, his abrupt delivery, and his unusual stage presence. His material was based on wordplay, non sequiturs, paraprosookians, and object observations. His act usually consisted equally of compact one- or two-liners and longer routines, often with each line as a punchline. Many of his jokes were inspired by everyday thoughts or situations." *Mitch Hedberg*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mitch\\_Hedberg](https://en.wikipedia.org/wiki/Mitch_Hedberg) [<https://perma.cc/H9GA-7W8C>] (last visited Oct. 10, 2022). A paraprosookian is defined as "a figure of speech in which the latter part of a sentence, phrase, or larger discourse is surprising or unexpected in a way that causes the reader or listener to reframe or reinterpret the first part. It is frequently used for humorous or dramatic effect, sometimes producing an anticlimax." *Paraprosookian*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Paraprosookian> [<https://perma.cc/BCW6-2MAC>] (last visited Oct. 18, 2022).

Demetri Martin,<sup>22</sup> and Steven Wright.<sup>23</sup> As Nick Thune said, “I like to BCC Stevie Wonder in every email that I send . . . C-Sections are like the Di’Giorno of pregnancy, because it [is] not delivery.”<sup>24</sup>

## II. COPYRIGHT LAW ANALYSIS ON COMEDY

Under Article I, Section 8 of the U.S. Constitution, “Congress shall have Power . . . [t]o promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>25</sup> The incentive behind the Copyright Clause is an economic welfarist one, in that Congress’ bestowed authority in granting copyrights encourages individual artistic efforts in such a way that advances public welfare.<sup>26</sup>

### A. *Subject Matter Considerations*

Under Section 102 of the Copyright Act, the term “works of authorship include sound recordings, sculptures and visual works, dramatic works, musical works, pictorial works, and literary works.”<sup>27</sup> Section 102(a) of the Copyright Act states that in order for a work to obtain a valid copyright, the work must be an original work of authorship that is fixed in a tangible medium of expression and is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>28</sup> A work is original if it is independently created by the author, as opposed to copied from another’s work, and it possesses some minimal degree of creativity.<sup>29</sup> There are however several aspects of subject matter that copyright law does not protect.

Stand-up comedy can involve different types of writings under Section 101. Without a doubt, the audio and video recordings of these stand-up performances can be protected by copyright law.<sup>30</sup> It is harder to consider whether the jokes themselves can be protectable. The problem with arguing that stand-up comedy should fall as a literary work of art is the assumption that all stand-up comedy is narrative.<sup>31</sup>

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22. *Demetri Martin*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Demetri\\_Martin](https://en.wikipedia.org/wiki/Demetri_Martin) [https://perma.cc/B76U-D55B] (last visited Oct. 10, 2022).

23. *Steven Wright*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Steven\\_Wright](https://en.wikipedia.org/wiki/Steven_Wright) [https://perma.cc/Y8UV-WTKV] (last visited Oct. 10, 2022).

24. *HeadlineActs, Comedian Nick Thune*, YOUTUBE (Aug. 11, 2011), <https://www.youtube.com/watch?v=aQ-XlkJOgTQ&t=357s> [https://perma.cc/8EL4-8PVH].

25. U.S. CONST. art. I, § 8, cl. 8.

26. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954).

27. 17 U.S.C. § 102.

28. *See* § 102(a).

29. *See Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

30. *See Woodard, supra* note 7, at 1054–63.

31. *See id.* and accompanying text.



## 1. Fixation

To receive copyright protection, a work must be fixed in any tangible medium of expression and capable of being communicated or reproduced.<sup>32</sup>

In *Williams Electronics, Inc. v. Artic International, Inc.*,<sup>33</sup> the Third Circuit held that an audiovisual copyright on a computer program that involves user interaction meets the requirement under the Copyright Act, 17 U.S.C. § 101, that the copyrighted material be fixed.<sup>34</sup> There, the court analyzed the copyrightability of three separate attributes of the *Defender* videogame: (1) the computer program, which was stored in read-only memory (ROM) computer chips; (2) the game's attract-mode feature, which displayed on the console screen when the game was not in use; and (3) the game's play-mode audiovisual effects, including how a player interacted with the game.<sup>35</sup> The defendant argued that the play-mode was not fixed because each player plays a different game and has an interaction with it that is different from before.<sup>36</sup> However, the court disagreed, and indicated that although each user may interact with the game in a different way, the game's software produces a set of symbols and visual and audio outputs that are sufficiently repetitive and predictable to nonetheless count as fixation.<sup>37</sup>

In *Kelley v. Chicago Park District*,<sup>38</sup> the Seventh Circuit held that the plaintiff could not acquire a copyright for his garden.<sup>39</sup> The court viewed the garden as not being sufficiently repetitive and predictable for it to be considered a fixed work of art because the garden is susceptible to changes in nature, including growth, wilting, degradation, and death.<sup>40</sup>

The fixation requirement is a simple one to accomplish because stand-up comedy performances, similar to musical lyrics and acting lines, are written, outlined, and rehearsed before being performed.<sup>41</sup>

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32. See 17 U.S.C. § 102(a).

33. *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (1982).

34. *Id.* at 874.

35. *Id.* at 872.

36. *Id.* at 874.

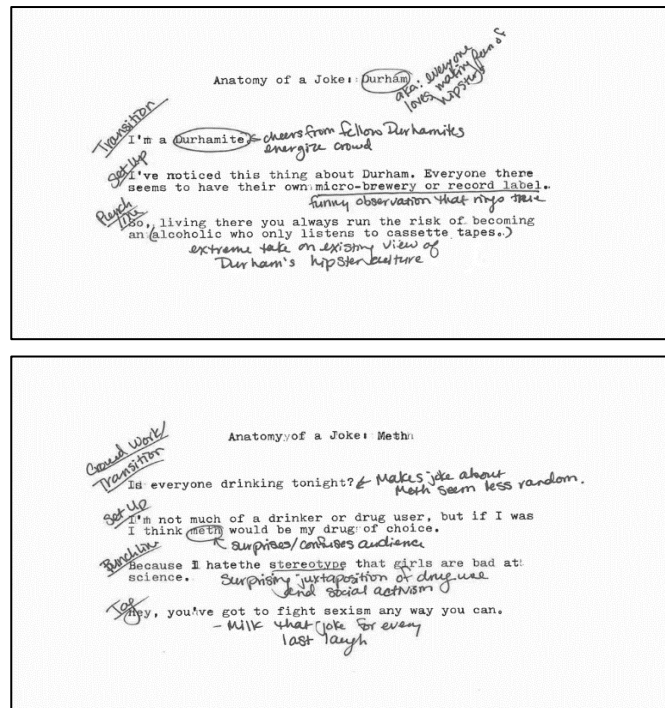
37. *Id.*

38. *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

39. *Id.* at 306.

40. It is also important to note that merely the garden as a sculpture is at issue, not the photograph of said garden. *Id.* at 303–06.

41. See Mintz, *supra* note 9; see also *How to Write Stand-Up Comedy in 6 Easy Steps*, MASTERCLASS, <https://www.masterclass.com/articles/how-to-write-stand-up-comedy-in-6-easy-steps> [https://perma.cc/384M-EPKL] (last updated Aug. 23, 2021); see also Jason Rutter, *Rhetoric in Stand-up Comedy: Exploring Performer-Audience Interaction*, 10 *STYLISTYKA* 307, 308 (2001); CAROLINE MONDAY, <http://www.carolinemonday.com/stand-up-comedy> [https://perma.cc/M2ZH-C39A] (last visited Dec. 1, 2022).



Caroline Monday, *Anatomy of a Joke*

## 2. Facts of the World

Originality also requires that the work entails some minimal degree of creativity. The Court in *Feist Publications v. Rural Telephone Service, Co.*<sup>42</sup> held that facts are not copyrightable and although compilations of facts may be, facts are not copyrightable per se.<sup>43</sup> Take the “Juicy Smoo-yay” bit, for example. Being able to copyright facts in order to exclude others from retelling the same facts would mean that an individual would not be able to gain a monopoly over the use of the retelling of the allegations and incidents involving Jussie Smollett.<sup>44</sup>

## 3. Idea-Expression Dichotomy

Under Section 102(b), copyright protection does not extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.<sup>45</sup> Expressions of those ideas, procedures, and

42. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

43. *Id.* at 345, 357.

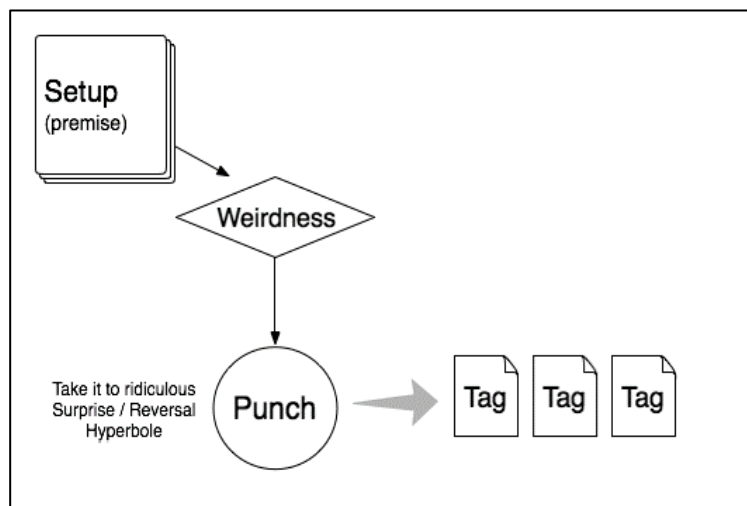
44. *But see Int'l News Serv. v. Associated Press*, 248 U.S. 215, 247 (1918) (holding that a quasi-property right exists in published news such that appropriating the published news gathered by another for further commercial purposes constitutes unfair competition in trade).

45. *See* 17 U.S.C. § 102(a).

the like, however, can be protectable.<sup>46</sup> The distinction between an idea and expression falls along a continuum; the various doctrines surrounding idea and expression point to originality, including the process-expression distinction, historical fact-expression distinction, merger, and *scènes à faire*.<sup>47</sup>

In *Baker v. Selden*,<sup>48</sup> the Court held that while the description of the system is an expression of Selden's system, which was copyrightable, the visual representations of that system were not copyrightable because they represented Selden's idea itself.<sup>49</sup> The visual representations however could have been patented.<sup>50</sup> This is true if the process was conceived with at least some aesthetical considerations in mind.<sup>51</sup>

In the context of stand-up comedy, the practices of overlapping, imagery, comparison, and misdirection are essential components of stand-up bits, particularly within the one-liner style of comedy. These methods of operation by themselves are not protectable under copyright law.<sup>52</sup>



Robert Richman Diagram (2021)

46. *See id.*

47. 17 U.S.C. § 102(b).

48. *Baker v. Selden*, 101 U.S. 99, 107 (1879).

49. *Id.* at 107.

50. *Id.* at 107.

51. *See Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015).

52. *See What I Learned About Culture From Stand-Up Comedy*, ROBERT RICHMAN (Apr. 13, 2021), <https://robertrichman.com/what-i-learned-about-culture-from-stand-up-comedy/>. Copyright law does not protect ideas or procedures for doing, making, or building things, scientific or technical methods or discoveries, business operations or procedures, mathematical principles, formulas or algorithms, or any other concept, process, or method of operation. *Compare* Section II.A.3, *with* Section I.

## B. Infringement

A plaintiff can establish infringement by providing circumstantial evidence of (1) ownership of a valid copyright, and (2) actionable copying by the defendant of constituent elements of the work that are original.<sup>53</sup> There are two types of copying that serve as constituent elements of the infringement analysis: (1) copying in fact and (2) copying in law.<sup>54</sup>

### 1. Copying in Fact

Copying in fact is established by showing that the defendant actually used some elements of the plaintiff's work in making the defendant's allegedly infringing work.<sup>55</sup> Absent direct evidence of copying, proof of infringement may involve fact-findings demonstrating that (1) the defendant had access to and actually copied plaintiff's work and (2) probative similarity exists.<sup>56</sup> Proof of access is defined as a reasonable opportunity or reasonable possibility of viewing or copying the plaintiff's work.<sup>57</sup>

In *Three Boys Music Corp. v. Bolton*,<sup>58</sup> the court considered a variety of different ways to prove the access requirement, such as obtaining an actual tangible copy, access due to widespread distribution or dissemination of the plaintiff's work, or a particular chain of events which is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company).<sup>59</sup>

### 2. Copying in Law

After demonstrating copying-in-fact, an assessment of copying in law or substantial similarity should be conducted.<sup>60</sup> This considers whether the defendant copied a copyrightable expression in such a way that liability should follow. Unlike the factual copying-in-fact inquiry, this assessment requires a judgment call—it is a question of how much and of what kind rather than a simple yes-or-no question. Proving substantial similarity does not require exact replication but can instead be shown

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53. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

54. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 214 (3d ed. 2021).

55. *Id.* at 214.

56. *See* MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 420-24 (5th ed. 2010).

57. *See, e.g.,* *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984); *see also* *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

58. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000).

59. *Id.*

60. *See, e.g.,* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

where portions of the later work are recognizably based on the infringed work to a lay observer.<sup>61</sup>

Additionally, although ideas and *scènes à faire* cannot be protected, the expression of those items can be.<sup>62</sup> But if portions of the original work are taken from the public domain, the substantial-similarity test for copyright infringement requires a more discerning analysis.<sup>63</sup> Although the elements of a work that are in the public domain do not receive copyright protection, the more discerning analysis of the substantial-similarity standard does not require each element of a work to be analyzed on its own.<sup>64</sup>

There is also the concept of “thin copyright.”<sup>65</sup> In *Skidmore v. Led Zeppelin*,<sup>66</sup> the court emphasized that similarities are required for infringement if the range of protectable expression is narrow, because the similarities between the two works are likely to cover public domain or other unprotectable content.<sup>67</sup> Essentially, when there is a narrow range of available creative choice, the defendant’s work would necessarily have to be identical to the plaintiff’s in order to be substantially similar.<sup>68</sup> By contrast, the more original the plaintiff’s work is, the broader the plaintiff’s copyright to protect against other work copies.<sup>69</sup>

In the *Led Zeppelin* case, the plaintiffs were not claiming the melody of the song as a whole was copyrighted, the way in which the notes proceed through the chromatic scale going down the scale.<sup>70</sup> The Katy Perry “Dark Horse” dispute also dealt with something similar, involving a descending 8-note motif.<sup>71</sup> By limiting the scope of the copyright regarding such works, this prevents authors from attempting to copyright common musical progressions if not “basic building blocks” of music composition.<sup>72</sup> Rather, it is the particular way in which the author realized or expressed the use of these musical phrases, motifs, or progressions,

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61. *Id.*; see also *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

62. See *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001).

63. *Id.* at 272.

64. *Id.*

65. See Woodard, *supra* note 7, at 1069–70.

66. *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

67. *Id.* at 1089 n.13.

68. *Id.*

69. *Id.*

70. *Id.* at 1058.

71. See *Gray v. Perry*, No. 2:15-CV-05642, 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020).

72. See *id.* at \*15–16; see also *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020). See generally Marisa C. Schutz, *Is Gray v. Perry The One That Got Away? The Idea Expression Dichotomy and Music Copyright Infringement*, 20 UIC REV. INTELL. PROP. L. 290 (2021). (explaining how music copyright disputes are fought and argues that *Gray* was correct in its conclusion that the basic music building blocks are not copyrightable)

such as the coordination of these phrases, the complex instrumentation, and the degree of ostinato implemented for example.<sup>73</sup>

Like music or drama, stand-up comedy falls into the same problem; while comedy has been compared to various forms of music, it incorporates less notation and pedagogy.<sup>74</sup>

#### a. More Discerning Ordinary Observer Analysis

The total-concept-and-feel locution functions as a reminder that, “while the infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, an infringement analysis is not simply a matter of ascertaining similarity between components viewed in isolation.”<sup>75</sup>

When a work is comprised of creative and original adaptations of elements taken from works in the public domain, it is capable of copyright protection. However, the extent of such protection is limited to the creative and original components of the adaptation, or the original expression.<sup>76</sup> Under the Second Circuit’s more discerning ordinary observer test, a plaintiff must prove unlawful appropriation by demonstrating that the alleged infringing work has copied protectable elements of the plaintiff’s work.<sup>77</sup> While the copying does not have to be exact, infringement can still occur if the creator mimics the structure or arrangement of the existing work’s artistic elements.<sup>78</sup> In determining whether an inexact copy of a work infringes upon the work, the overall look and feel of each work must be considered, including the structural and artistic decisions.<sup>79</sup> While isolated public-domain elements should be excluded from a determination of infringement, the selection, arrangement, and adaptation of such elements should still be considered.<sup>80</sup>

#### b. Extrinsic-Intrinsic Analysis

By contrast, the Ninth Circuit uses a two-part standard to determine whether the defendant’s work is substantially similar to the plaintiff’s

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73. *See Perry*, 2020 WL 1275221, at \*24.

74. *Compare supra* notes 65–73 and accompanying text, *with* TEDx Talks, *supra* note 9. (notes 65–73 explain musical copyright disputes and how music is built on common building block and note 9 also explains that stand-up comedy is built on common building blocks).

75. *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134–35 (2003).

76. *See Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d. Cir. 2001).

77. *Id.* at 267–68.

78. *Id.* at 273.

79. *Id.*

80. *Id.* at 268.

copyrighted work.<sup>81</sup> The first part, the extrinsic test, compares the objective similarities of specific expressive elements in the two works.<sup>82</sup> Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, “it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.”<sup>83</sup> The second part, the intrinsic test, “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.”<sup>84</sup> Furthermore, the Ninth Circuit has held that a combination of unprotected elements in a work can be granted copyright protection so long as the work adds original aspects to features in the public domain.<sup>85</sup>

Essentially, the Ninth Circuit recognizes that authors borrow from predecessors’ works to create new ones, so giving exclusive rights to the first author who incorporates an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works. In lieu of this understanding, the Ninth Circuit’s approach seems to favor future authors and leave room for originality.<sup>86</sup>

#### CONCLUSION

With regard to the debate on whether stand-up comedy should be protected by copyright law, it is important to emphasize what exactly a plaintiff is attempting to copyright. There seems to be a tendency to blur the distinction between a recorded performance and the jokes themselves. Additionally, critics also err in creating the assumption that stand-up comedy is a one-size-fits-all method, and as a result, jokes can be copyright protectable literary works. Thus, perhaps copyrighting stand-up jokes à la carte is as valuable as dissecting a frog, especially when considering the interests of authors, consumers, and subsequent creators.

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81. *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

82. *Id.*

83. *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).

84. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

85. *Id.* at 1169.

86. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018); *see also Cavalier v. Random House, Inc.*, 297 F.3d 815 (9th Cir. 2002); *see also Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003).

THE ONGOING BATTLE TO END THE GENDER PAY GAP IN  
THE WORLD OF PROFESSIONAL TENNIS, BASKETBALL, AND  
SOCCER AND HOW THE MEDIA REMAINS THE UNDERLYING  
ISSUE

*Michaela M. Kluska\**

Abstract

If you were to Google the following question, “Which tennis player spent the most time ranked number one?” You would be presented with a list of articles highlighting Novak Djokovic’s tennis career and crowning him with the title of longest time spent at the number one position in professional tennis. As of the end of February 2023, Novak Djokovic has held the number one position for 377 consecutive weeks.<sup>1</sup> Interestingly enough, if you were to also Google “How many weeks was Steffi Graf ranked number one?” You would find that during Steffi Graf’s professional tennis career, she also held the number one position in professional tennis for 377 consecutive weeks—a title that Djokovic has only recently accomplished. If you were to Google, again, “Which soccer teams have won the most world cups?” You would be presented with articles only referencing men’s soccer. In fact, you would have to conduct an entirely separate Google search including the words “female” or “women” to find any articles on women’s soccer.

None of the above search questions involved any reference to male sports or athletes, yet Google first fed the searcher information directed solely to the male gender. This is a prime example of how the media remains the underlying issue for the gender disparities within professional athletics.

This Note addresses the impact that male-domination in the sports and media industries has on the financial opportunities available to female professional athletes. Specifically, this Note provides a thorough analysis of how the media continues to widen the gender pay gap in professional tennis, basketball, and soccer by promoting outdated gender norms that ultimately hinder female athletes’ ability to gain equal opportunities for media coverage, sponsorships, endorsements, and more. The lack of

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1. See *Most Weeks at ATP No. 1*, ULTIMATE TENNIS STATS. (2023), <https://www.ultimate-tennisstatistics.com/record?recordId=WeeksAtATPNo1> [<https://perma.cc/FP6K-8MQG>].



gender equity within the sports and media industries has serious consequences for female professional athletes, and there is a call for major policy changes as a result. This Note not only provides an explanation of the legal remedies available to female athletes facing discrimination, but also proposes a policy change that could help narrow the pay gap by providing female athletes with more opportunities for media coverage.

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## INTRODUCTION

Gender inequality remains an ongoing battle within the professional sports industry. There are evident disparities between male and female professional athletes, and this sex discrimination manifests itself most predominantly in the “pay gaps between men and women,” consistent with many other industries throughout today’s society.<sup>2</sup> A large gender pay gap exists amongst professional athletes, specifically in the sports of tennis, basketball, and soccer. This wage inequality is apparent in the differences in compensations and sponsorship opportunities available to

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2. Pat K. Chew, *Hiding Sexual Harassment: Myths and Realities*, 21 NEV. L.J., 1223, 1226 (2021).

the players. While there are a multitude of factors that have contributed and still contribute to this persistent issue, the gender pay gap within the professional sports industry primarily stems from the lack of media coverage available for female athletes and sports teams, as well as the ongoing gender norms that were established centuries ago and still continue to influence modern society. Allowing this disparity in gender pay to remain unsolved could continue to limit the opportunities for young, aspiring female athletes and ultimately discourage women from pursuing any career as a professional athlete.

This Note analyzes the gender pay gap between male and female professional athletes in tennis, basketball, and soccer. It first addresses how the media continues to promote outdated gender norms that negatively affect the opportunities available for female professional athletes. Next, it explains the governing law and legal remedies available to female athletes facing discrimination. It then discusses how the professional tennis, basketball, and soccer industries function before exploring the gender pay gap within each of those industries. Finally, this Note concludes by addressing the possible implications of an unchanged gender gap in the sports industry and proposes a policy change that uses the media's power to provide more equal financial opportunities and treatment amongst genders in professional athletics.

## I. GENDER BARRIERS WITHIN THE SPORTS AND MEDIA INDUSTRIES

### A. *Learning Gender Norms Through the Media*

The gender norms currently influencing the gender pay gap in sports trace all the way back to 1896, when female participation in the first Olympic Games was not permitted because it was considered “inappropriate.”<sup>3</sup> Four years later, in 1900, women made their first appearance in the Olympic Games; however, women were only permitted to compete in two events, while men were allowed to compete in ninety-three male-only events and two additional mixed gender events (where both men and women were able to compete in that single event), making up a total of ninety-five events available to men.<sup>4</sup> One century later, in 2000, men were able to compete in 180 male-only events—sixty more than were available to women.<sup>5</sup> Finally, almost two decades later, at the 2016 Rio Olympic Games, men could still compete in 161 male-only

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3. Kuang Keng Kuek Ser, *See 120 Years of Struggle for Gender Equality at the Olympics*, THE WORLD (Aug. 17, 2016, 4:15 PM), <https://theworld.org/stories/2016-08-17/see-120-years-struggle-gender-equality-olympics> [<https://perma.cc/L79D-ZDDE>].

4. *Id.*

5. *Id.*

events (and 145 mixed events), while women were limited to participation in the 145 women and mixed events.<sup>6</sup>

Again, while a small improvement has occurred over hundreds of years, sufficient evidence exists to conclude that gender norms, which established that women are not “‘cut out to sustain certain shocks,’” have drastically influenced society’s preferences when watching sports and cheering for sports teams, favoring men.<sup>7</sup> This learning curve is known as “social learning.”<sup>8</sup> Psychologist Albert Bandura established the “social learning theory” to explain the way in which behaviors are learned by observing, watching, and imitating others.<sup>9</sup> Through this type of learning, “[t]he learner is not a passive recipient of information,” as learners are consciously observing new things every day. Over the years, social media, in all its forms, has become a “social learning tool” that allows people from all over the world to engage, collaborate, connect, and imitate one another’s behaviors.<sup>10</sup> As a result, the gender norms, which show greater preference for watching and supporting men’s sports than women’s, remain prevalent issues today and contribute significantly to the gender pay gap in professional tennis, basketball, and soccer.

#### B. *Male Domination Within the Industries and Its Impact on the Producer/Consumer Relationship*

Over the last several years, the sports industry has continued to gain popularity, evolving significantly and adapting to advancements in technology, media, and viewership. These advancements permit a deeper look into which sports and sports teams attract the most viewers, and therefore gain the largest profit. It is widely known that the sports industry is a multi-billion-dollar industry.<sup>11</sup> However, when people think of the “sports industry,” it is often male-dominated sports that come to mind. In the last decade, watching men’s sports has become significantly more popular and preferred than watching women’s sports; as of 2020, forty-nine individual sports teams were each valued at a billion dollars or

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6. *Id.*

7. *Id.* (quoting *Women, Gender Equality and Sport*, WOMEN 200 AND BEYOND (2007)), <https://www.un.org/womenwatch/daw/public/Women%20and%20Sport.pdf> [<https://perma.cc/XEX3-XYES>].

8. Elizelle Juanee Cilliers, *Reflecting on Social Learning Tools to Enhance the Teaching-Learning Experience of Generation Z Learners*, FRONTIERS (Jan. 11, 2021), [https://www.frontiersin.org/articles/10.3389/feduc.2020.606533/full#:~:text=The%20social%20learning%20theory%20\(Bandura,the%20behavior%20of%20learners%20accordingly](https://www.frontiersin.org/articles/10.3389/feduc.2020.606533/full#:~:text=The%20social%20learning%20theory%20(Bandura,the%20behavior%20of%20learners%20accordingly) [<https://perma.cc/T7M4-YFMT>].

9. *See id.*

10. *See id.*

11. *See* Kurt Badenhausen, *The World’s Most Valuable Sports Teams 2020*, FORBES (July 31, 2020, 6:30 AM), <https://www.forbes.com/sites/kurtbadenhausen/2020/07/31/the-worlds-most-valuable-sports-teams-2020/> [<https://perma.cc/9D5B-6364>].

more.<sup>12</sup> However, every single one of those sports teams are men's teams.<sup>13</sup>

Consequently, despite progress towards gender equity, statistics demonstrate that persistent gender norms are ingrained into society and refuse to go away, regardless of women's constant efforts. To make any true progress toward gender equity within the sports industry, one must pinpoint the nucleus of the problem: the media. Although all three sports have various ways to disperse money to their players, the impact of the media, sponsorship and endorsement opportunities, and audience feedback all play major roles in determining how much money an athlete can make. As the professional sports industry continues to grow, so does its overall importance in the media.<sup>14</sup> The media determines which sports teams and individual athletes secure the most attention. This exposure is ultimately what allows an athlete to hold bargaining power to negotiate deals and earn the most income.

The problem for female athletes arises because both the producer and consumer markets within the sports media industry are heavily male-dominated and continue to promote the outdated gender norms. The 2021 Sports Media Racial and Gender Report Card: Associated Press Sports Editors (APSE), revealed the sports media industry remains heavily male-dominated.<sup>15</sup> The APSE analyzed certain professions within the industry, including, but not limited to, sports editors, reporters, columnists, web specialists, and copy editors.<sup>16</sup> Within each of those professions, the percentage of male employees surpassed 70%, proving once again, men dominate the industry from all perspectives.<sup>17</sup> Flipping the lens from producer to consumer, as of 2023, 4.9 billion of the 8 billion people in the world are actively using different forms of social media.<sup>18</sup> Of all the active media users worldwide, 54% of users are men and 46% are women.<sup>19</sup> Thus, if the producers and consumers within these industries are conditioned to accept the gender norms and prefer watching and supporting men's sports, then each market will continue to feed off the

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12. *See id.*

13. *See id.*

14. *See* Taylor Kennedy Gersch, *The Gender Pay Gap: Seeking Fairness for Women in Professional Sports*, 22 OR. REV. INT'L L. 147 (2021).

15. Richard Lapchick, *Sports Media Remains Overwhelmingly White and Male, Study Finds*, ESPN (Sept. 22, 2021), [https://www.espn.com/espn/story/\\_/id/32254145/sports-media-remains-overwhelmingly-white-male-study-finds](https://www.espn.com/espn/story/_/id/32254145/sports-media-remains-overwhelmingly-white-male-study-finds) [<https://perma.cc/4WM2-3MKY>].

16. *Id.*

17. *Id.*

18. Daniel Ruby, *Social Media Users — How Many People Use Social Media In 2023*, DEMANDSAGE (Jan. 4, 2023), <https://www.demandsage.com/social-media-users/> [<https://perma.cc/8RGZ-CJYQ>].

19. *Id.*

other and never seek to challenge the norms, which is why women continue to face obstacles like the gender pay gap.

As of 2021, a study determined that over 90% of all television coverage and ESPN highlights favored showing and covering men's sports in 2019.<sup>20</sup> Furthermore, "other research has found that the media tends to perpetuate gender stereotypes in their coverage of women's sports."<sup>21</sup> The result of this is drastic for athletes because television and media exposure has become a crucial point of revenue for them. This "lack of authentic coverage" women receive in the media greatly contributes to the number of sponsorships and endorsement deals they receive, which are considered "primary sources of revenue for most leagues."<sup>22</sup>

Like any other money-making entity, the media must prioritize the teams, players, and sports the audience prefers most. However, the statistics above show the media holds the power here because if it continually feeds its viewers male-dominated content, viewers will continue to innately prefer male sports, and thus, will drive media outlets to focus their time away from female programs. It then becomes difficult for the media to incorporate female presence into any program without creating an uproar amongst viewers. For example, take the introduction of the U.S. Women's National Soccer Team to the International Federation of Association Football (FIFA). Prior to 2015, the FIFA soccer video games only featured the U.S. Men's National Soccer Team. However, 2015 was the first-year women became a prime feature of the game, and the audience engagement and feedback on the topic highlighted the challenging gender norms that still hold women back today. Following the release of the EA Sports trailer on YouTube that revealed popular female soccer stars would be incorporated into FIFA 16, YouTube users flooded the comments with discriminatory and sexist remarks about the decision, stating that women should not play sports because they "belong in the kitchen" and making stereotypical jokes about female menstruation, asking if the female avatars' morale "go

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20. Katana Dumont, *A Breakdown of the Gender Pay Gap in the WNBA and the NBA*, YAHOO! (July 11, 2022), [https://www.yahoo.com/video/breakdown-gender-pay-gap-wnba-121314531.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guc\\_e\\_referrer\\_sig=AQAAAL73vUY80QFXMkhqFKclkJ0REQWOzgM-xDdbb7fPEOF7VsN340AWLd\\_4UGYZbpPcYSJUf6Lg6KZYr90whniIgziv2oLmcCGfi9nU49uTB05JRKdbVoY2dqbegYjQ2UhRlat-XQPyfnUbH2gPUIVHQ5b0DHI7VVAc0QzX08G8hNcH#:~:text=The%20pay%20disparity%20between%20WNBA,the%20average%20WNBA%20player%20makes](https://www.yahoo.com/video/breakdown-gender-pay-gap-wnba-121314531.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guc_e_referrer_sig=AQAAAL73vUY80QFXMkhqFKclkJ0REQWOzgM-xDdbb7fPEOF7VsN340AWLd_4UGYZbpPcYSJUf6Lg6KZYr90whniIgziv2oLmcCGfi9nU49uTB05JRKdbVoY2dqbegYjQ2UhRlat-XQPyfnUbH2gPUIVHQ5b0DHI7VVAc0QzX08G8hNcH#:~:text=The%20pay%20disparity%20between%20WNBA,the%20average%20WNBA%20player%20makes) [https://perma.cc/SJ5K-ANHU].

21. *Id.*

22. *Id.*

down every month suddenly?”<sup>23</sup> Other comments included mentions of pregnancy, the comparison of the female athlete’s introduction to the game being as out of the ordinary as introducing animals or aliens to the game, and direct statements saying, “[w]e don’t want Women.”<sup>24</sup>

This blatant online abuse of female athletes is still visible today as a World Athletics study revealed that female participants in the 2020 Olympics were subject to an overwhelming amount of online abuse from viewers, “including sexist, racist, homophobic and transphobic posts.”<sup>25</sup> According to the study, which observed the Twitter accounts of 161 Olympic participants during the span of the 2020 Olympic Games, the female athletes were the targets of abuse in 40% more online posts than their male counterparts.<sup>26</sup> The study also revealed 87% of all the hate posts displayed online about the 2020 Olympics targeted women.<sup>27</sup> Of these posts, most comments aligned with stereotypical gender norms and “stemmed from overt sexism; criticizing athletes and berating their skill-set.”<sup>28</sup>

## II. UNDERSTANDING EQUAL PAY AND THE LAW

Before analyzing the gender pay gap in professional tennis, basketball, and soccer, it is important to first identify the relevant laws and policies that govern them. The two primary legal remedies that exist for one to sue based on gender discrimination are: (1) The Equal Pay Act of 1963 (EPA) and (2) Title VII of the Civil Rights Act of 1964 (Title VII).

The EPA prohibits employers from discriminating on the basis of sex in terms of wages or benefits between men and women employees who are performing similar jobs that require similar skills or efforts and working under the same working conditions.<sup>29</sup> To establish a *prima facie* case of an equal pay violation under the EPA, an employee “must show

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23. Victoria Turk, *Here are Some Internet Comments about 'FIFA 16' Adding Women*, VICE (May 28, 2015, 1:30 PM), <https://www.vice.com/en/article/qkv5p5/here-are-some-internet-comments-about-fifa-2016-adding-women> [https://perma.cc/ZHQ6-4NTE].

24. *Id.*

25. Dan Palmer, *World Athletics abuse study finds "disturbing" posts with women usually targeted*, INSIDETHEGAMES (Nov. 25, 2021), <https://www.insidethegames.biz/articles/1115944/world-athletics-online-abuse-survey> [https://perma.cc/6WTB-SXMK].

26. *Id.*

27. Saumya Kalia, *Women Athletes Faced 'Disturbing Level' of Online Abuse During Tokyo Olympics: Survey*, THE SWADDLE (Nov. 26, 2021), <https://theswaddle.com/women-athletes-faced-disturbing-level-of-online-abuse-during-tokyo-olympics-survey/> [https://perma.cc/UT9G-6AXG].

28. *Id.*

29. *See The Equal Pay Act of 1963*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/equal-pay-act-1963#:~:text=To%20prohibit%20discrimination%20on%20account,Equal%20Pay%20Act%20of%201963.%22> [https://perma.cc/6TLP-U4EK] (last visited Dec. 1, 2022).

that an employer pays different wages to employees of opposite sexes ‘for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.’”<sup>30</sup> Once the employee demonstrates this, the burden of proof shifts to the employer to show that the difference in pay is justified under one of the EPA’s four exceptions:<sup>31</sup> (1) a seniority system; (2) a merit system; (3) a system that measures earnings by production quantity or quality; or (4) any other differential factor besides sex.<sup>32</sup> One can file suit under the EPA for up to two years following the violation.<sup>33</sup> Further, the statute of limitations may be extended three years if the court deems the employer’s act is willful.<sup>34</sup>

Created a year later, Title VII of the Civil Rights Act of 1964 prohibits any compensation discrimination relating to sex, race, color, religion, or sexual orientation in relation to employment.<sup>35</sup> To establish a *prima facie* wage discrimination case under Title VII, “an employee must show that she is paid less than a similarly situated male employee who is ‘directly comparable in all material respects.’”<sup>36</sup> Once the employee establishes these elements, the burden shifts to the employer to provide a justifiable and nondiscriminatory explanation for the differences in compensation.<sup>37</sup> Title VII also allows the employer to use the same four exceptions employed by the EPA, as mentioned above, when filing a claim.<sup>38</sup> The statute of limitations for an employee filing a wage discrimination claim under Title VII is either 180 days or 300 days of the discriminatory practice.<sup>39</sup> During President Obama’s presidency, he signed into law the Lilly Ledbetter Fair Pay Act.<sup>40</sup> This Act changed the statute of limitations

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30. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

31. *Id.* at 196.

32. 29 U.S.C. § 206(d)(1).

33. Patricia J. Martin, Denise M. Visconti & Corrin Jackson, *Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen*, LITTLER, at 5 (Aug. 1, 2019), <https://www.littler.com/publication-press/publication/minding-pay-gap-what-employers-need-know-pay-equity-protections-widen> [https://perma.cc/UF3R-QDSS].

34. *Id.*

35. *See Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> [https://perma.cc/NM8Q-HY4T] (last visited Dec. 1, 2022).

36. Amy Steketee Fox, *U.S. Women's Soccer Team's EEOC Charge Spotlights Wage Discrimination Issues*, HR DAILY ADVISOR (Aug. 18, 2018), <https://hrdailyadvisor.blr.com/2016/06/19/u-s-womens-soccer-teams-eEOC-charge-spotlights-wage-discrimination-issues/> [https://perma.cc/BDU5-3XF5].

37. *See* Martin, Visconti & Jackson, *supra* note 33, at 7.

38. *Id.* at 12.

39. 42 U.S.C. § 2000e–5(e)(1).

40. Megan Slack, *From the Archives: President Obama Signs the Lilly Ledbetter Fair Pay Act*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Jan. 30, 2012), <https://obamawhitehouse.archives.gov/blog/2012/01/30/archives-president-obama-signs-lilly-led-better-fair-pay-act> [https://perma.cc/4X9P-HU6V].

for those wishing to file equal-pay lawsuits, allowing the clock to restart every time an unequal paycheck is issued, rather than leaving it at the original 180 days from the time the first paycheck was issued.<sup>41</sup> This Act was based on the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, where a female employee sued her former employer because she did not receive the same pay as her male coworkers who worked at the same level that she did.<sup>42</sup> In defense, the employer argued that the employee's claims were time-barred because she failed to bring the Title VII suit within the necessary 180 days before filing a claim with the EEOC.<sup>43</sup> After a 5-4 decision in the employer's favor, and strong dissents from female Justices, Congress drafted several bills of the Lilly Ledbetter Fair Pay Act and President Obama ultimately signed it into law.<sup>44</sup>

The main distinction between a Title VII claim for pay disparity and an EPA claim is that when filing suit under Title VII, the plaintiff bears the burden of proof, which is not the case when filing suit under the EPA.<sup>45</sup> This means "an employee filing an EPA lawsuit is not required to demonstrate that the employer intended to discriminate."<sup>46</sup> Thus, liability under the EPA may not always equate to liability under Title VII.<sup>47</sup>

Despite having these two legal remedies available, there is no explicit law or policy requiring that men and women receive the same compensation, even when the women are achieving the same or greater levels of success than the men. So, while women may feel *comfort* knowing they may file suit, it has not provided any significant remedy to the gender pay gap problem.

### III. THE GENDER PAY GAP IN PROFESSIONAL TENNIS, BASKETBALL, AND SOCCER

Professional athletes' incomes supposedly depend on various factors, including the level of the sport's popularity, level of athletic performance and achievement, length of an athlete's career, and much more.<sup>48</sup> However, nearly all of these factors are out of athletes' control, and instead lie in the hands of the media to help gain name recognition, which

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41. See 42 U.S.C. § 2000e – 5(e)(1).

42. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

43. *Id.* at 622.

44. See Joanna L. Grossman, *The Lilly Ledbetter Fair Pay Act of 2009: President Obama's First Signed Bill Restores Essential Protection Against Pay Discrimination*, FINDLAW (Feb. 13, 2009), <https://supreme.findlaw.com/legal-commentary/the-lilly-ledbetter-fair-pay-act-of-2009.html> [https://perma.cc/9EKD-28K8].

45. *Id.*

46. Fox, *supra* note 36.

47. Martin, Visconti & Jackson, *supra* note 33, at 10.

48. Mary McMahon, *What Factors Affect Professional Athlete Salaries?*, PRACTICALADULTINSIGHTS (Feb. 11, 2022), <https://www.practicaladultinsights.com/what-factors-affect-professional-athlete-salaries.htm> [https://perma.cc/YJ8D-56H8].



leads to endorsements, appearance opportunities, sponsorships, and leverage for negotiating contracts.<sup>49</sup> One of the only factors that *is* in an athlete's control is the level of athletic performance and achievement, yet that will prove to be an irrelevant component in determining a female athlete's salary versus a male athlete's salary.

### A. *The Tennis Industry*

The tennis industry consists of four major governing bodies: (1) The International Tennis Federation (ITF); (2) The United States Tennis Association (USTA); (3) The Association of Tennis Professionals (ATP); and (4) The Women's Tennis Association (WTA).

The ITF is the governing body of world tennis, wheelchair tennis, and beach tennis.<sup>50</sup> This organization organizes the Grand Slam tennis tournaments for professional players and hosts various annual events, including the annual men's team competition (the Davis Cup), the women's team competition (the Billie Jean King Cup), and the wheelchair tennis events at the Summer Olympic and Paralympic Games.<sup>51</sup> In addition, the ITF sanctions the four Grand Slam tennis events, the junior and professional circuit events, and disciplines.<sup>52</sup> The USTA is the national governing body for United States tennis and hosts a number of professional tournaments, including one of the four major grand slams, the U.S. Open.<sup>53</sup> The ATP is the governing body of the men's professional tennis circuits and includes the ATP Tour, the ATP Challenger Tour, and the ATP Champions Tour.<sup>54</sup> Lastly, the WTA is the governing body of the women's professional tennis circuit and includes *only* the WTA Tour.<sup>55</sup>

Despite the four major Grand Slams (U.S. Open, Australian Open, French Open, and Wimbledon) that host athletes of both genders, men and women players spend the rest of the year competing in separate circuits, governed by their respective associations—the ATP and the WTA. Each individual circuit manages and distributes its prizes.

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49. *Id.*

50. *See* ITFTENNIS, <https://www.itftennis.com/en/> [<https://perma.cc/3M8H-MESU>] (last visited Nov. 16, 2022).

51. *See id.*

52. *See id.*

53. *See* USTA, <https://www.usta.com/en/home.html> [<https://perma.cc/2WNC-432Y>] (last visited Nov. 16, 2022).

54. *See The Official Site of Men's Professional Tennis: ATP Tour*, TENNIS ATP TOUR, <https://www.atptour.com/> [<https://perma.cc/3LCF-2XFD>] (last visited Nov. 16, 2022).

55. *See The Official Home of the Women's Tennis Ass'n: WTA tennis*, WOMEN'S TENNIS ASS'N, <https://www.wtatennis.com/> [<https://perma.cc/B6TD-CARR>] (last visited Nov. 16, 2022).

## 1. The Tennis Pay Gap

The differences in salary between men and women professional tennis players is significant. Although female tennis players are considered some of the highest-paid female athletes in the world, they still experience a drastic pay gap compared to male tennis players, despite achieving the same levels of success or even outperforming their male counterparts.<sup>56</sup> In addition, although it may appear that the pay gap has diminished in tennis because men and women get awarded the same prize money at each of the four Grand Slam events, that is not the case.

Tennis players earn their money competing in separate circuits (ATP for men and WTA for women) until the four major grand slams, in which both genders compete. Each circuit tournament manages and disperses its own prize money. This means most men and women tennis players' income comes from the fifteen to twenty-five circuit tournaments they play a year, in addition to the grand slams. This becomes a struggle for female tennis players when the WTA prize money available to them is significantly less than the ATP prize money available to men for the same level of tournaments. For example, in the 2015 Western & Southern Open, the ATP awarded Roger Federer \$731,000 for winning the tournament, while the WTA awarded Serena Williams only \$495,000 for winning the same tournament.<sup>57</sup> Taking this a step further, as of 2022, men's total prize money earning on the ATP tour amounted to 75% more than that of their female counterparts on the WTA.<sup>58</sup> This is "the widest the gap has been since 2001."<sup>59</sup>

Breaking down the prize money earnings even further, in 2022, the female tennis player to earn the second highest amount in prize money, Venus Williams, with just under forty-three million dollars earned, has not earned as much as even the fifth-highest-earning male tennis player, Pete Sampras, with just over forty-three million dollars earned.<sup>60</sup> This is the case even though Venus Williams ended her career with a total of 1,000 combined singles and doubles matches won, while Pete Sampras

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56. See Danial Hashemi, *Examining the Tennis Pay Gap*, WASHINGTON SQUARE NEWS (Sept. 16, 2019), <https://nyunews.com/sports/2019/09/16/tennis-pay-gap-problem/> [<https://perma.cc/BG2H-KHLP>].

57. *Id.*

58. John Burn-Murdoch, *Don't blame market forces for female tennis stars being short-changed*, FIN. TIMES (June 23, 2022), <https://www.ft.com/content/e4dcb726-3f0c-4dbf-89c4-10dd7f7a725c> [<https://perma.cc/B69T-KLEZ>].

59. *Id.*

60. *WTA tennis players by total career prize money earnings as of 2022*, STATISTA (Dec. 9, 2022), <https://www.statista.com/statistics/807745/wta-tennis-players-by-prize-money-earnings/> [<https://perma.cc/VXY3-VQ4F>] [hereinafter *WTA Career Earnings 2022*]; *ATP tennis players by career prize money earnings as of July 2022*, STATISTA (Jan. 6, 2023), <https://www.statista.com/statistics/277002/tennis-players-worldwide-by-career-prize-money-earnings/> [<https://perma.cc/FTU8-5WHA>] [hereinafter *ATP Career Earnings 2022*].

ended his career with a total of only 826 combined singles and doubles matches won in comparison.<sup>61</sup> This issue also dominates the highest earning position for Serena Williams, who earned a career-high of almost ninety-five million dollars in 2022, but did not even come close to Novak Djokovic's total prize money earning as of 2022, which was more than 159 million dollars.<sup>62</sup> Like Venus Williams and Pete Sampras, this disparity between Serena Williams and Novak Djokovic is even more shocking considering Serena Williams has won a total of thirty-nine grand slam titles in her career (twenty-three singles titles, fourteen women's doubles titles, and two mixed doubles titles), while Novak Djokovic has only won twenty-one grand slam titles in his career (all men's singles titles).<sup>63</sup>

If an athlete's income is dependent on the level of performance and achievement, then it would only make sense that tennis players like the Williams sisters, and many more on the WTA Tour, would earn at least a comparable amount to their male counterparts.<sup>64</sup> This is not the case, which leads to a conclusion that other factors are at play. Therefore, historic gender norms that prioritize the support of male athletes over female athletes are still what remains beneath the surface of the sports industry today, despite what may appear otherwise.

#### A. *The Basketball Industry*

The National Basketball Association (NBA) was formed in the United States in 1949 when the National Basketball League and the Basketball Association of America merged.<sup>65</sup> Prior to the merger, these two competing organizations were rivals.<sup>66</sup> Over twenty years later, in 1976, the American Basketball Association (ABA) disbanded, and the NBA absorbed four more of its teams, making a total of thirty teams.<sup>67</sup> The

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61. *Venus Williams: Player Stats & More – WTA official*, WOMEN'S TENNIS ASS'N, <https://www.wtatennis.com/players/230220/venus-williams#overview> [https://perma.cc/ZD46-DWBQ] (last visited Dec. 2, 2022); *Pete Sampras: Overview*, TENNIS ATP TOUR, <https://www.atptour.com/en/players/pete-sampras/s402/overview> [https://perma.cc/8PE9-D9JX] (last visited Dec. 2, 2022).

62. *WTA Career Earnings 2022*, *supra* note 60; *ATP Career Earnings 2022*, *supra* note 60.

63. *Serena Williams, Player Stats & More – WTA official*, WOMEN'S TENNIS ASS'N, <https://www.wtatennis.com/players/230234/serena-williams#overview> [https://perma.cc/57CQ-E3LR] (last visited Dec. 2, 2022); *ATP Tour, Novak Djokovic: Overview*, ATP TOUR TENNIS, <https://www.atptour.com/en/players/novak-djokovic/d643/overview> [https://perma.cc/4PJZ-64A2] (last visited Dec. 2, 2022).

64. *See* McMahon, *supra* note 48 (“Performance-based pay can be seen with some professional athlete salaries.”); *id.*

65. *National Basketball Association*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/National-Basketball-Association> [https://perma.cc/EL22-NCJ2] (last visited Nov. 16, 2022).

66. *Id.*

67. *Id.*

Women's National Basketball Association (WNBA) was formed in the United States in 1997.<sup>68</sup> Up until 2002, a male counterpart, the NBA, owned each of the WNBA franchises.<sup>69</sup> However, the WNBA eventually started to allow franchises to sell to ownership groups in cities where an NBA team was not currently affiliated; therefore, the WNBA became its own association, separate from the NBA.<sup>70</sup> The WNBA currently has twelve teams.<sup>71</sup>

### 1. The Basketball Pay Gap

The gender gap in basketball is one of the most substantial in all professional sports. Both men's and women's basketball associations each have individual collective bargaining agreements (CBA), which is an agreement between the governing body and its respective players association (National Basketball Players Association for men and Women's National Basketball Players Association for women).<sup>72</sup> The CBA establishes, among other things, minimum and maximum player salaries, bonus opportunities for players, and promotional appearances for players.<sup>73</sup> The NBA recently created a new CBA in 2017 and the WNBA also created a new CBA in 2020.<sup>74</sup> The minimum annual salary for both the NBA and WNBA are measured in years of service.<sup>75</sup>

Beginning with the NBA's CBA, the minimum salary available for a player with zero years of experience, meaning he has never played in the NBA, is at least \$838,464 in his first year playing.<sup>76</sup> Alternatively, if the athlete is a returning NBA player, making him a "more experienced player," he would earn a minimum salary that year of at least \$2,564,743.<sup>77</sup> Neither of these salaries includes bonuses, sponsorships, or promotional appearances. In drastic contrast, the WNBA's CBA provides clear evidence of pay disparity between the two organizations. The minimum salary offered to a player in the WNBA with zero years of

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68. *Women's National Basketball Association*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Womens-National-Basketball-Association> [https://perma.cc/CG7L-BR3W] (last visited Nov. 16, 2022).

69. *Id.*

70. *Id.*

71. *Id.*

72. *See CBA 101*, NAT'L BASKETBALL ASS'N (2018), <https://cdn.nba.com/manage/2021/03/2018-19-CBA.pdf> [https://perma.cc/5A46-MSDP]; Matt Ellentuck, *The WNBA's new CBA, explained*, SBNATION (Jan. 14, 2020, 9:27 PM), <https://www.sbnation.com/wnba/2020/1/14/21062768/wnba-cba-player-salaries-paid-maternity-leave-revenue-sharing> [https://perma.cc/EZ A7-9MK4].

73. *See CBA 101*, NAT'L BASKETBALL ASS'N, *supra* note 72.

74. *See id.*

75. *See id.*

76. *Id.*

77. *Id.*

experience is capped at \$57,000.<sup>78</sup> In addition, “more experienced players” in the WNBA are offered a minimum salary of only \$68,000.<sup>79</sup>

Again, those salaries are just the minimum available to players in the NBA and WNBA. In reality, the average salary for NBA players is over 7.5 million dollars.<sup>80</sup> On the other hand, the average salary for WNBA players is around \$75,000.<sup>81</sup> This equates to players in the WNBA making 1% of what their male counterparts make in the NBA.<sup>82</sup> Like in professional tennis, evidence proves that level of performance and achievement has little to no correlation in making these numbers make sense. For example, in a statistical comparison of NBA player Anthony Davis to WNBA player Natasha Howard, the two athletes appear to perform at the same levels in their respective leagues.<sup>83</sup> However, Anthony Davis earns twenty-seven million dollars a year, while Natasha Howard earns \$117,000 a year.<sup>84</sup>

The gender pay gap within the NBA and WNBA further provides evidence that performance and achievement are not highly considered factors when paying athletes. Instead, it is a similar trend to what occurs in the tennis industry, where female athletes are performing the same, if not better than, their male counterparts, yet still barely making even half of what the male athletes make in a year.

### B. *The Soccer Industry*

The United States Men's National Soccer Team (USMNT) represents all men's international soccer competitions in the United States.<sup>85</sup> The USMNT is a member of the FIFA and the Confederation of North, Central American, and Caribbean Association Football (CONCACAF).<sup>86</sup> In addition, the United States Soccer Federation governs the men's soccer team.<sup>87</sup> Like the USMNT, United States Women's National Soccer Team (USWNT) represents all international women's soccer competitions.<sup>88</sup>

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78. Ellentuck, *supra* note 72.

79. *Id.*

80. Josh Strupp, *Visualizing the Gap*, MEDIUM (Mar. 10, 2021), <https://medium.com/nightingale/visualizing-the-gap-eccb912d75e2> [<https://perma.cc/39S6-UYJX>].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *U.S. Men's National Team*, USSOCCER, <https://www.ussoccer.com/teams/usmnt> [<https://perma.cc/JHA4-2Y8H>] (last visited Dec. 2, 2022).

86. See *Organizational Structure*, USSOCCER, <https://www.ussoccer.com/history/organizational-structure/about> [<https://perma.cc/CM7D-ZQSL>].

87. *Id.*

88. See *U.S. Women's National Team*, USSOCCER, <https://www.ussoccer.com/teams/uswnt> [<https://perma.cc/G9RJ-WC3U>] (last visited Dec. 2, 2022).

The United States Soccer Federation also governs the USWNT and the female team competes in the CONCACAF.<sup>89</sup>

### 1. The Soccer Pay Gap

Similar to the tennis and basketball industries, the same trend carries over into the world of professional soccer. Despite the USWNT continuously outperforming the men's team, the USWNT has faced a long battle trying to end the pay gap between them and their male counterpart team. As a team, the USMNT has made a total of eleven appearances in FIFA World Cups. However, the team has never won a World Cup, nor has it ever even advanced to the finals of a World Cup series.<sup>90</sup> In stark comparison, the USWNT is one of the most successful teams in all of international women's soccer.<sup>91</sup> The team has won the World Cup four times (in 1991, 1999, 2015, and 2019), half of the eight World Cups since 1991.<sup>92</sup> The team still appeared in each World Cup Series, reaching the finals in 2011 and coming in third place in 1995, 2003, and 2007.<sup>93</sup>

Despite the women's unarguable success, the players still received significantly less than the men's team. From 2002 to 2015, the USWNT doubled the UWMNT's overall win percentage over the span of thirteen years and appeared in half of the World Cup finals, while the men's team appeared in zero.<sup>94</sup> Taking these performance results and final appearances into account and looking at the possible World Cup bonuses available for each team, women still earned significantly less than men. There are four types of World Cup bonuses available for both the USMNT and the USWNT: (1) roster bonuses; (2) third-place finish bonuses; (3) second-place finish bonuses; and (4) the World Cup win bonus.<sup>95</sup> The USWNT would make less than the USMNT in every single one of these potential bonuses, with the most drastic gap at the World Cup win bonus (USMNT could earn 9.38 million dollars and USWNT could earn 2.5 million dollars).<sup>96</sup>

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89. See *Organizational Structure*, *supra* note 86.

90. Kristen Conti, *Has the US ever won a World Cup?*, NBCSPORTS (Dec. 3, 2022), <https://www.nbcsports.com/chicago/has-us-ever-won-world-cup> [<https://perma.cc/2HNU-PB7U>].

91. See Michael Lewis, *A Look Back at All the History the USWNT Made in the World Cup*, TEAM USA (July 10, 2019), <https://www.teamusa.org/News/2019/July/10/A-Look-Back-At-All-The-History-The-USWNT-Made-In-The-World-Cup> [<https://perma.cc/QP7J-4S8N>].

92. *Id.*

93. *Id.*

94. See Caitlin Murray, *USWNT, USMNT pay gap explained: Comparing their U.S. soccer contracts as both sides negotiate new CBAs*, ESPN (Feb. 10, 2022), <https://www.espn.com/soccer/united-states-usaw/story/4589310/uswntusmnt-pay-gap-explained-comparing-their-us-soccer-contracts-as-both-sides-negotiate-new-cbas> [<https://perma.cc/9H5P-NNKM>].

95. *Id.*

96. *Id.*

This drastic pay disparity caused uproar in the soccer industry when the women's team finally had enough and decided to take a stand. As of recently, the USWNT reached a settlement for \$24 million with the U.S. Soccer Federation (USSF) after filing an EEOC complaint and suing for unequal pay compared to the USMNT.<sup>97</sup> In the suit, the USWNT brought forth two claims against the USSF: (1) the USSF violated the EPA and (2) the USSF violated Title VII.<sup>98</sup> The USWNT's main argument consisted of the fact that if both the men's and women's teams played and won the same amount of games, the difference in pay would be significantly different than what it currently is.<sup>99</sup> However, that is not the case, and the USWNT still performs increasingly better than the USMNT, yet the men's team is the one bringing in more revenue, so naturally they would get the higher salary.<sup>100</sup> At the end of the day, "[t]he issue isn't the math, it's the lack of creative solutions being brought forward by the governing body to mark and support the women's game equal to the men's."<sup>101</sup> This is a problem also being experienced in the WNBA.<sup>102</sup>

Following this settlement, the USSF agreed to pay the USMNT and the USWNT an equal amount in bonuses, tournaments, and World Cup appearances.<sup>103</sup> The equal-pay lawsuit between the USWNT and the USSF "has exposed just how out of whack performance and pay have become in American soccer, legally or not."<sup>104</sup> Once again, demonstrating that level of performance and achievement truly has no relation to the amount of income a team should receive. Instead, this proves that gender norms ingrained in modern society and the media building on those norms are the deciding factors in determining an athlete's salary.

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97. Marlene Lenthang, *U.S. Soccer and Women Soccer Stars Settle Equal Pay Lawsuit for \$24 Million*, NBCNEWS (Feb. 22, 2022, 7:25 PM), <https://www.nbcnews.com/news/us-news/us-soccer-women-soccer-stars-settle-equal-pay-lawsuit-24-million-rcna17138> [<https://perma.cc/XF6C-2BQB>].

98. Alex Morgan, et al. v. United States Soccer Federation, Inc., 445 F. Supp. 3d 635, 640 (C.D. Cal. 2020).

99. See Renata Simril, *Show Her The Money: Why Female Athletes Deserve Higher Pay*, FORBES (June 5, 2019), <https://www.forbes.com/sites/renatasimril/2019/06/05/show-her-the-money/?sh=50256ac56b55> [<https://perma.cc/9UAR-KY9K>].

100. *Id.*

101. *Id.*

102. *Id.*

103. Andrew Das, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html> [<https://perma.cc/Q6GB-MS67>].

104. Peter Keating, *Analysis: What equal pay in sports really means, as the fight goes on for U.S. women's soccer*, ESPN (May 14, 2020), [https://www.espn.com/espnw/story/\\_/id/28971949/analysis-equal-pay-sports-really-means-fight-goes-us-women-soccer](https://www.espn.com/espnw/story/_/id/28971949/analysis-equal-pay-sports-really-means-fight-goes-us-women-soccer) [<https://perma.cc/A2QW-MSWX>].

#### IV. IMPLICATIONS OF THE PAY GAP AND A POTENTIAL SOLUTION

While there are many implications to the gender pay gap, two main issues will likely result if it goes unchanged. First, there could be a potential decrease in the level of female participation in professional sports. If women continue to see such little progress in this realm, they may become discouraged. It takes a great deal of money to travel and train professionally for any sport, and if female athletes are not able to earn enough money to make up for what they are forced to spend, this may sway them from wanting to pursue a professional athletic career—despite level of skill or talent because it may cost them more than they could ever make.

Women in the workforce are already experiencing increasing levels of burnout. In fact, “[w]omen are even more burned out than they were a year ago, and the gap in burnout between women and men has almost doubled. In the past year, 1 in 3 women has considered leaving the workforce or downshifting their careers.”<sup>105</sup> This statistic demonstrates the struggles women already face in the workforce and continuing down this path could ultimately result in a lack of female participation in the sports industry altogether. Second, there could be a continued trend of unequal coverage for women’s sports in the media due to unchallenged gender norms. A lack of change will keep media coverage where it is, meaning women continue to have little room for growth in the field and no reasonable opportunity to ever reach the spotlight or reach their occupational potential.

To narrow the gender pay gap within professional sports, the media would need to use its power to achieve gender equality through the practice of gender equity. Gender equity is the process of treating men and women with fairness.<sup>106</sup> To successfully achieve this goal, one must consider the “women’s historical and social disadvantages that prevent women and men from otherwise operating on a level playing field” to find the right strategies to use moving forward.<sup>107</sup> Recognizing these past hardships can allow society to proceed with the right strategies to correct gender biases and improve economic outcomes for future female generations; this is how gender equity leads to gender equality.<sup>108</sup> The

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105. Alexis Krivkovich et al., *Women in the Workplace 2022*, MCKINSEY & CO. (Oct. 18, 2022), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/WQ9F-AXRM>].

106. UNFPA, *Frequently Asked Questions About Gender Equality*, U.N. POPULATION FUND (2005), <https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality> [<https://perma.cc/DA5F-E2B5>].

107. *Id.*

108. See Katica Roy, *Why We Need Gender Equity Now*, FORBES (Sept. 14, 2017, 10:44 AM), <https://www.forbes.com/sites/elleivate/2017/09/14/why-we-need-gender-equity-now/?sh=1b3e66d077a2> [<https://perma.cc/9L8A-CTYV>].



overall goal of gender equality is to create a society where men and women are afforded like opportunities, responsibilities, and rights.<sup>109</sup> Combining these two objectives together, “[i]f gender equality is the end, gender equity is the means.”<sup>110</sup> Applied here, to achieve gender equality in the sports industry, we must first achieve gender equity, meaning women and men professional athletes are provided the same rights and opportunities for media coverage, sponsorships, endorsements, and financial growth.

Luckily, 2022 marked the media’s first major steps in practicing gender equity. In 2022, the first-ever Women’s Sports Network launched and was created to focus solely on female athletes.<sup>111</sup> One supporter, Angela Ruggiero, Sports Innovation Lab CEO and co-founder, argued this will play a significant role in narrowing the media coverage gap between male and female athletes because “women’s sports typically go under-invested, under-supported, [and] under-viewed” and “[t]he media ecosystem is still fairly male dominated, and women aren’t getting the ratings.”<sup>112</sup> While it is certainly true that any opportunity for female athletes to gain more media coverage is progress, the separation of women’s sports from men’s sports through varying network channels will not ultimately achieve gender equality within the industry and close the pay gap. Instead, it seems to feed into the issue because it will allow viewers to continue to see the male and female sports industries as two separate entities with no common ground, when in reality, the common ground remains in the simple fact that there are highly talented men and women athletes in every sport, and they must all be recognized as such. As Ruggiero stated, this is a male dominated industry, so to bridge the gender gap, the media must engage in more drastic efforts to break down the gender norms.

While it may seem far-fetched, a media policy could be invoked to provide more equal financial opportunities and overall treatment amongst genders within professional athletics. This policy could entail network stations, social media platforms, and cable television networks all increasing the amount of time lent to women’s sports broadcasts on their channels. Because all these organizations and businesses must maintain their own source of income, and society still gravitates towards men’s sports, this policy would not need to require equal coverage of both male and female sports yet. However, any policy that would require a set increase in the amount of coverage that women’s sports receive could

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109. *See id.*

110. *Id.*

111. Kaitlin Balasaygun, *Women athletes now have their own sports network*, CNBC (Nov. 7, 2022, 10:44 AM), <https://www.cnbc.com/2022/11/02/women-athletes-now-have-their-own-sports-network.html> [https://perma.cc/333H-6TBF].

112. *Id.*

open many doors for female athletes with sponsorships, promotional opportunities, and more by providing a sense of security to the female sports industry—a security that the male sports industry *already* has.

#### CONCLUSION

While significant progress has been made in narrowing the gender pay gap in professional sports—such as through the USWNT reaching a settlement with the USSF and men and women tennis players being awarded the same prize money at the four grand slam tournaments—the pay gap continues to exist. Inequalities between men and women professional athletes are evident in their respective salaries, promotional opportunities, and media coverage. Although it may seem most logical that sports teams and athletes would get paid in accordance with their level of performance and achievement, that is very clearly not the case. Instead, media coverage rules the sports industry and ultimately becomes the deciding factor for how many professional athletes today earn their outside sources of income. The problem is that the media gains all its input from its viewers, and the majority of those viewers have been subconsciously trained to adhere to the ongoing gender norms without seeking to challenge the norms. Sports fans all over the world cannot conduct a general internet search and get information on both male and female athletes because they would only be presented with articles on male athletes and male sports relating to their search. So, instead, those sports fans must conduct an entirely separate internet search and specify that they are looking for news on female athletes in the sport. The media then remains a social learning tool that continues to engrain those outdated values into society, making it a never-ending cycle. To spark any change here and help inspire women to join the sports industry rather than discourage them, the media needs to use its unique power to help break down, little by little, the innate gender norms that are buried within today's society.



THE PRESSURED PLAYER: THE COLLEGE ATHLETE’S  
STRUGGLE WITH MENTAL HEALTH

*Raina Desai\**

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#### INTRODUCTION

Katie Meyer's life seemed perfect.<sup>1</sup> Just hours before her death, Katie's parents Facetimed her and described her as happy and in good spirits, even though she may have had a lot on her plate.<sup>2</sup> Later, Katie was found in her dorm room after taking her own life.<sup>3</sup> Although her parents believed she was the "usual jovial Katie," it seemed that nobody knew just how deep her torment went.<sup>4</sup> Ultimately, Katie was unable to find the help she needed on campus.<sup>5</sup>

Mental health involves our emotional, psychological, and social well-being and affects the way we think, act, handle stress, and interact with others.<sup>6</sup> For student-athletes, maintaining mental health is especially important because of the stress of balancing school, scholarships, and schedules.<sup>7</sup> Sadly, because student-athletes struggle to balance these commitments, they are at a greater risk for developing anxiety,

1. See Scott Stump, *Parents of Stanford soccer team captain Katie Meyer Speak out about her death*, TODAY (Mar. 4, 2022, 7:37 AM), <https://www.today.com/news/sports/katie-meyer-death-parents-interview-rcna18694> [<https://perma.cc/7SGE-AJYC>] (discussing the tragic story of Katie Meyer's suicide at Stanford University where she was a star soccer goalie for the women's team).

2. See *id.* (discussing Katie's parents' description of her on the phone right before her death).

3. See Elisha Fieldstadt, *Parents of Stanford soccer captain found dead in dorm say they 'had no red flags'*, NBC NEWS (Mar. 4, 2022, 8:06 AM) <https://www.nbcnews.com/news/us-news/parents-stanford-soccer-captain-found-dead-dorm-say-no-red-flags-rcna18700> [<https://perma.cc/G2XF-V7DK>] (discussing Katie Meyer's tragic death).

4. See Stump, *supra* note 1 (discussing Katie's parents' description of her right before her death).

5. See Kyle Bonagura, *Parents of Stanford women's soccer goalie Katie Meyer, who died from suicide, push for 'Katie's Save' policy*, ESPN (May 31, 2022), [https://www.espn.com/college-sports/story/\\_/id/34013887/parents-stanford-goalie-katie-meyer-died-suicide-push-katie-save-policy-additional-safety-net](https://www.espn.com/college-sports/story/_/id/34013887/parents-stanford-goalie-katie-meyer-died-suicide-push-katie-save-policy-additional-safety-net) [<https://perma.cc/SX3E-BKF2>] (discussing how Katie's parents are pushing for a new mental health policy for students and how extra support may have saved Katie's life).

6. See *About Mental Health*, CDC, <https://www.cdc.gov/mentalhealth/learn/index.htm> [<https://perma.cc/FZ4T-PJ9K>] (last visited June 28, 2021) (explaining the importance of mental health at every stage of a person's life).

7. See *College Student-Athlete Health and Well-being*, TIMELY MD (Aug. 30, 2021), <https://timely.md/blog/student-athlete-mental-health/> [<https://perma.cc/CH4G-NDQT>] ("Student-athletes are college students, with all the daily life challenges that young adults face. And as college athletes . . . these students carry the hopes and expectations of their campus and community. Their wins and losses are seen by all, questioned by many, and criticized publicly."); see also Eric Lindberg, *Let's Talk About the Quiet Crisis in College Sports: Mental Health*, USC (2021), <https://news.usc.edu/trojan-family/college-athlete-mental-health-usc-sports-psychologists/> [<https://perma.cc/7878-L5UP>] (finding student-athletes face academic pressure, social challenges, and stress from coaches and parents who emphasize performance over personal growth).

depression, eating disorders, and substance abuse problems compared to non-athletes.<sup>8</sup> The COVID-19 pandemic only exasperated student-athletes' struggle with mental health.<sup>9</sup> Specifically, athletes lost the social connection involved with being on a team.<sup>10</sup> Because social connection relates to relationships with others, it is understandable that student-athletes struggled more with mental illness once social connection decreased during the pandemic.<sup>11</sup> In 2020, the University of North Texas found that more than 20% of 6,000 National Collegiate Athletic Association (NCAA) athletes experienced clinical depression.<sup>12</sup> In another NCAA survey, one in ten of the over 30,000 student-athletes surveyed "were having difficulty functioning because of depression."<sup>13</sup> These athletes were struggling with issues such as, "housing instability, food insecurity and lack of access to health care and appropriate facilities to maintain their training while gyms were closed."<sup>14</sup> Alarming, only

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8. See *College Student-Athlete Health and Well-being*, supra note 7 (discussing how college athletes are two percent more likely to suffer from severe mental illness compared to regular college students and how they "are at greater risk of substance abuse, social anxiety, and eating disorders" such as anorexia and bulimia); see also Barbara Bickford, *The Legal Duty of a College Athletics Department to Athletes with Eating Disorders: A Risk Management Perspective*, 10 MARQUETTE U. SPORTS L.J. 87, 88 (1999–2000) (according to NCAA, eating disorders are a serious issue in virtually every sport and disordered eating is a huge issue because of its connection to beauty ideals). The Comment further explains how eating disorders are the "gravest health problem facing female athletes" in particular and provides an in-depth analysis of the different types of eating disorders, *id.* at 91 (explaining the impact of eating disorders and its connection to athletes' obsessions with perfecting body image).

9. See Chris Burt, *Mental health care support crucial for college athletes*, UNIV. BUS. (Aug. 20, 2020), <https://universitybusiness.com/mental-health-care-support-crucial-for-college-athletes/> [<https://perma.cc/R2NN-5RZB>] ("Empty stadiums. Abandoned locker rooms. Scrapped schedules. The loss of camaraderie. The potential loss of scholarships. And an uncertain future."). The article discusses how athletes are already balancing practice, games, and celebrations, but now have to add the difficult effects of the pandemic to their plates, *id.* (discussing the stress of adding the pandemic to the mix). The sense of loss these athletes have felt during the pandemic will require more support for them to "express and process their feelings," *id.* (discussing the need for mental health support now more than ever because of pandemic).

10. See Ana Soares et al., *Mental Health and Social Connectedness During COVID-19 Pandemic: An Analysis of Sports and E-Sports Players*, FRONTIERS IN PSYCH. (May 25, 2022), (Numerous studies done found that in the beginning of Covid-19, team-sport athletes were more anxious and exhibited depressive symptoms most likely because of social isolation). The pandemic harmed student-athletes' mental health because social connection is vital to maintaining good mental health, *id.* (discussing importance of social connection for mental health).

11. See *id.* (Social connection is "connecting to a specific group or person and to the generalized ability to connect" within a social society).

12. See Gwen Aviles, *As college sports programs pivot, mental health becomes bigger priority*, NBC (Aug. 31, 2020, 10:44 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/college-sports-programs-pivot-mental-health-becomes-bigger-priority-n1238468> [<https://perma.cc/V93S-MCTG>] (providing mental health statistics of college-athletes during pandemic).

13. See *id.* (providing mental health statistics of college-athletes during pandemic).

14. See *id.* (explaining difficult reality for many student-athletes during pandemic).

10% of college athletes sought out mental health support even though 85% of college students struggled with stress during the pandemic.<sup>15</sup> Unsurprisingly, student-athletes were struggling with mental illness at increased rates given the sudden end to their seasons and the looming sense of dread over an uncertain future.<sup>16</sup> These statistics make it even more imperative that mental health initiatives are implemented and strengthened by the NCAA and universities to protect athletes—even in a post-pandemic world.<sup>17</sup>

This Comment discusses the mental health issues that student-athletes face and further discusses the importance of addressing these issues to eliminate the stigma surrounding mental illness.<sup>18</sup> Section I provides an overview of NCAA mental health policies, athlete mental health issues, and proposed federal legislation.<sup>19</sup> Section II then provides an analysis of organizations' remedial measures for more mental healthcare for student-athletes and how the federal government can step in under the Interstate Commerce Clause.<sup>20</sup> Section III finally concludes by discussing the future of mental health within collegiate student athletics.<sup>21</sup>

## I. THE ANXIOUS ATHLETE: BACKGROUND ON NCAA POLICIES AND ADDRESSING THE PSYCHOLOGICAL AND SEXUAL ABUSE STUDENT-ATHLETES FACE

### A. *Play Ball: An Overview of NCAA Mental Health Policies*

The NCAA has partnered with several of the leading mental-health organizations across the country to create and develop the *Interassociation Consensus Document: Best Practices for Understanding and Supporting Student-Athlete Mental Wellness*, which provides recommendations to university athletic departments “for supporting and

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15. See Burt, *supra* note 9 (providing mental health statistics of college-athletes during pandemic).

16. See *id.* (“Empty stadiums. Abandoned locker rooms. Scrapped schedules. The loss of camaraderie. The potential loss of scholarships. And an uncertain future.”). The author discusses how these students have trained hard for most of their lives and it is devastating that it has been taken from them, *id.* (discussing negative impact of pandemic for student-athletes).

17. For further discussion of NCAA mental health resources, see *infra* notes 22–43 and accompanying text.

18. For further discussion of how student-athletes are struggling with their mental health and the stigma, see *infra* notes 44–85 and accompanying text.

19. For further discussion of NCAA policies, athletes' struggles, and legislation see *infra* notes 26–123 and accompanying text.

20. For further discussion of the effectiveness of NCAA policies and how the federal government can step in, see *infra* notes 118–61 and accompanying text.

21. For further discussion of the future of mental health and collegiate student-athletes, see *infra* notes 162–96 and accompanying text.

promoting student-athlete mental health.”<sup>22</sup> The NCAA has addressed the importance of mental health for young adults including student-athletes.<sup>23</sup> The organization understands that a collaborative process between campus and community resources is the best way to serve athletes’ mental well-being.<sup>24</sup> The NCAA has identified its ideal “Best Practices” which are split into four components.<sup>25</sup>

### 1. “Clinical Licensure of Practitioners”<sup>26</sup>

The NCAA has identified the athletic trainer as the first point of contact for a student with mental health concerns.<sup>27</sup> The team physician should provide holistic physical and mental care and management for the athlete.<sup>28</sup> However, if a student-athlete requires a formal evaluation, the team physician should make a referral to a licensed practitioner.<sup>29</sup> It is important that the practitioner is easily accessible to athletes; the NCAA

22. *See Interassociation Consensus Document: Mental Health Best Practices*, NCAA [https://ncaaorg.s3.amazonaws.com/ssi/mental/SSI\\_MentalHealthBestPractices.pdf](https://ncaaorg.s3.amazonaws.com/ssi/mental/SSI_MentalHealthBestPractices.pdf) [<https://perma.cc/8UQR-7W49>] (revised Jan. 2020) (discussing the history of consensus document and the purpose of providing recommendations to universities for supporting the mental health of student-athletes).

23. *See id.* (“Emerging adulthood is an important and sometimes difficult developmental period . . . The sport environment has both risk and protective factors for mental health disorders . . . Mental and physical health are inextricably linked . . . Mental health is a key component of student- athlete wellness.”); *see also* AP, *ACC, Big Ten, Pac-12 launch mental health initiative*, USA TODAY (Nov. 30, 2021, 12:41 AM), <https://www.usatoday.com/story/sports/ncaab/2021/11/29/acc-big-ten-pac-12-launch-mental-health-initiative/49453415/> [<https://perma.cc/YM3L-8KA5>] (explaining the ACC, Big Ten, and Pac-12’s new alliance to raise awareness of mental health with student-athletes). The purpose of the alliance is to share best mental health practices across the forty-one universities and three conferences, *id.* (identifying purpose of alliance); *see also* Maureen A. Weston, *The Anxious Athlete: Mental Health and Sports’ Duty and Advantage to Protect*, 13 HARV. SPORTS & ENT. L.J. 1, 49 (2021) (describing NCAA’s guidebook on mind, body, and sports following suicide of two student-athletes in 2018). The guidebook serves as an important resource for athletes and schools because it includes personal stories of students and identifies factors impacting student-athlete mental health, *id.* (discussing the importance of NCAA guidebook for athletes).

24. *See Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22 (engaging and integrating campus and community resources is the best way to serve student-athletes and their mental health).

25. *See id.* at 4 (breaking down the consensus into four key components).

26. *See id.* at 5 (providing the name of first key component).

27. *See id.* (explaining how “evaluation and treatment” of students should be coordinated through the primary athletic health care providers which are the athletic trainer and team physician).

28. *See id.* (explaining how the team doctor oversees and coordinates different aspects of student’s overall health including both physical and mental health).

29. *See id.* (discussing the qualifications of licensed practitioners in providing mental health services and conducting formal evaluations and treatments for student-athletes). Registered dietitians should also be included for athletes with eating disorders, *id.* (identifying licensed practitioners—including dietitians—who should evaluate student-athletes).



recommends that the practitioner is provided with office space on or near campus.<sup>30</sup> Lastly, the NCAA “Best Practices” recommends each school to establish an interdisciplinary team consisting of the athletic trainer, team physician, psychologists, social workers, and others, whose combined role is to support student-athlete mental health.<sup>31</sup>

## 2. “Procedures for Identification and Referral of Student-Athletes to Qualified Practitioners”<sup>32</sup>

University athletic departments are suggested to have procedures for the “management of emergency mental health situations” and “routine mental health referral.”<sup>33</sup> The NCAA provides a list of considerations and suggestions for schools as they develop protocols for emergency and non-emergency situations.<sup>34</sup> The NCAA also advocates that schools are transparent with students and families about these protocols and encourages the use of handbooks and websites to maintain open communication.<sup>35</sup>

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30. *See id.* at 6 (“[T]his practitioner should be easily accessible to student-athletes, which includes being accessible through establishment of a self-referral process. Ensuring that all student-athletes receive mental health care . . . may require hiring relevant personnel, or helping support the dedicated service of an on-campus practitioner . . .”).

31. *See id.* at 5 (providing a list of interdisciplinary team members that each school should have and explaining how each team member has their own role in supporting athletes’ mental health); *see also* Brian Gearity & Whitney Moore, *National Strength and Conditioning Association’s Endorsement of the National Collegiate Athletic Association Sport Science Institute’s “Mental Health Best Practices: Inter-Association Consensus Document: Best Practices for Understanding and Supporting Student-Athlete Mental Wellness,”* 39 NAT’L STRENGTH AND CONDITIONING J. 1, 2 (2017) (finding CSCS (Certified Strength and Conditioning Specialists) spend many hours per week with student-athletes and need to understand and support mental health besides athlete performance).

32. *See Interassociation Consensus Document: Mental Health Best Practices, supra* note 22, at 8 (providing the name of second key component).

33. *See* Brian Hainline, *An introduction to Mind, Body, and Sport*, NCAA, <https://www.ncaa.org/sports/2014/11/3/an-introduction-to-mind-body-and-sport.aspx> [<https://perma.cc/Q7WE-2AG7>] (last visited Oct. 27, 2022) (discussing the various chapters of NCAA’s best practices including “the role and perspective of sports medicine staff in identification and referral”); *see also* Gearity & Moore, *supra* note 31 (discussing the important role of primary athletic providers because of substantial interaction with student-athletes); *see also* *Interassociation Consensus Document: Mental Health Best Practices, supra* note 22 (explaining that athletic departments should work with licensed practitioners and sports medicine personnel in developing written protocols for emergency and non-emergency mental health situations).

34. *See Interassociation Consensus Document: Mental Health Best Practices, supra* note 22, at 6 (listing suggestions including contacting trained on-call counselor, training coaches and staff on identifying symptoms of mental health crisis and identifying cultural differences of student-athletes to better create protocols that support those differences).

35. *See id.* (encouraging transparency between athletes and parents about protocols and providing communication through handbooks, websites, and more).

### 3. “Pre-Participation Mental Health Screening”<sup>36</sup>

The primary athletic providers and licensed practitioners should implement pre-participation screening questionnaires to be able to identify at-risk student-athletes.<sup>37</sup> The NCAA recommends including a series of nine specific questions in the survey but recognizes that these are just a starting point.<sup>38</sup> It is important to note that these screening questionnaires should not be the sole tool for screening mental illness.<sup>39</sup>

### 4. “Health-Promoting Environments That Support Mental Well-Being and Resilience”<sup>40</sup>

Lastly, student-athletes should be supported by an environment that normalizes seeking care.<sup>41</sup> Being open to communication about mental health shows a university’s commitment to the health and wellness of its students.<sup>42</sup> To provide this care, it is important that primary athletic health care providers and practitioners meet annually to stay updated on mental health protocols and to communicate information to students and coaches.<sup>43</sup>

36. *See id.* (providing the name of third key component).

37. *See* Hainline, *supra* note 33 (discussing the various chapters of NCAA’s best practices including an overview of clinical diagnoses). These clinical diagnoses address various student-athlete mental wellness issues such as depression, anxiety, eating disorders, and gambling addiction, *id.* (listing various clinical diagnoses); *See also Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22 (“The decision about what screening questionnaire approach will be used should be made in consultation with the primary athletics health care providers and the licensed practitioners who are qualified to provide mental health services to student-athletes.”).

38. *See Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22, at 28 (identifying “yes” to any of the nine questions in Appendix F should lead to discussion between athlete and member of the provider team). These questions include “I often have trouble sleeping” and “I struggle with being confident,” *id.* (listing questionnaire questions from appendix).

39. *See id.* at 27 (noting screening tools should be incorporated into the holistic pre-participation evaluation).

40. *See id.* at 12 (providing the name of fourth key component).

41. *See id.* (explaining importance of supporting student mental health by encouraging experiences of “personal growth, self-acceptance, autonomy, and positive relations with others”); *see* Hainline, *supra* note 33 (introducing the NCAA best practices and impact of mental illness on minority groups and cultural pressures).

42. *See Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22, at 12 (“The way we communicate about mental health can demonstrate our commitment to inclusion and wellness, and our support of all student-athletes . . .”).

43. *See id.* (recommending that the team meet annually to discuss school’s mental health protocols and “should have the explicit endorsement of the team coaches because coaches help foster a culture about the importance of seeking mental health care when needed”). Because coaches have frequent interactions with student-athletes, they can help identify athletes who need mental health resources, can normalize care seeking, and support “mental well-being and resilience,” *id.* (discussing importance of coach’s role for struggling student-athletes).

### B. *Hitting Below the Belt: Male Athletes' Struggles with Mental Health*

Men's mental health is often overlooked.<sup>44</sup> The stigma surrounding mental health affects men more because of the deeply engrained cultural concept that they must always be "macho" and "tough."<sup>45</sup> Thus, male athletes are often less aware of their mental health and more reluctant to share these issues with friends and family.<sup>46</sup> Men are also less likely to seek out mental health resources and support, despite experiencing higher suicide rates than women.<sup>47</sup> Male and female athletes commonly experience depressive symptoms.<sup>48</sup> Specifically, depressive symptoms decrease athletes' focus and motivation while also creating intrusive thoughts and fear of failure.<sup>49</sup> For men, in particular, these depressive symptoms lead to overtraining which in turn affects hormone levels, the immune system, and performance.<sup>50</sup> It is also common for student-athletes to struggle with disordered eating.<sup>51</sup> Athletes are constantly pressured to be physically perfect and to maintain an ideal body shape.<sup>52</sup> For male athletes—especially young male athletes—59% are dissatisfied with their body with 19% of male athletes having an eating disorder.<sup>53</sup> Lastly, men are more likely than women to resort to alcohol as a means of handling mental health symptoms.<sup>54</sup>

Although men's mental health has been stigmatized, male athletes are still encouraged to seek help.<sup>55</sup> The stigma surrounding mental health makes people believe that mental toughness and mental health are rivals.<sup>56</sup> However, with proper support and the use of resources, mental

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44. See Molly Knudsen, *Let's Talk About Mental Health in Male Athletes*, INSIDE TRACKER (June 29, 2021), <https://blog.insidetracker.com/lets-talk-about-mental-health-in-male-athletes> [<https://perma.cc/B8TA-7AP8>] (explaining the norm of ignoring men's mental health in research and culture).

45. See *id.* (discussing the stigma surrounding mental health, especially for men).

46. See *id.* (discussing the effects of stigma for male athletes).

47. See *id.* (identifying that suicide rates for men are three point seven times higher than for women).

48. See *id.* (discussing the depressive symptoms of male and female athletes).

49. See *id.* (discussing the impact of depressive symptoms on mental health).

50. See *id.* (explaining that overtraining is excessive exercise without enough recovery).

51. See Gary Souter et al., *Men, Mental Health and Elite Sport: a Narrative Review*, 4 SPORTS MED.-OPEN 57 (2018) (discussing eating disorders for male athletes).

52. See *id.* (discussing the reasons for eating disorders).

53. See *id.* (sharing statistics surrounding eating disorders of male athletes); see also Knudsen, *supra* note 44 (sharing statistics on male athlete eating disorders).

54. See Knudsen, *supra* note 44 (discussing the prevalence of substance abuse among male athletes).

55. See Souter et al., *supra* note 51 (discussing the stigma for male athletes about mental health and encouraging them to seek help and resources).

56. See *id.* at 5–6 (discussing mental toughness).

toughness can be a positive indicator of mental health.<sup>57</sup> Attacking the stigma through increased education and awareness will allow male athletes to gain a “greater sense of emotional wellbeing.”<sup>58</sup>

### C. *Hitting Below the Belt Part 2: Female Athletes’ Struggles with Mental Health*

In 1972, the federal government passed Title IX, which states, “[n]o person . . . on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program.”<sup>59</sup> Society viewed this as a monumental measure because it promised gender equality in sports programs across the country.<sup>60</sup> However, even after all the progress made following the passage of Title IX, gender-based harassment and discrimination still exists.<sup>61</sup> Gender-based harassment and discrimination have a significant effect on women’s mental health.<sup>62</sup> Specifically, female athletes suffer from depression and anxiety at higher rates than male athletes.<sup>63</sup> Further, social media has had a negative effect on body image and a female athlete’s innate nature to strive for perfection.<sup>64</sup> Fortunately, several organizations are working to create a safer environment for women in sports.<sup>65</sup> For example, the Women’s Sports Foundation (WSF) was

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57. *See id.* (discussing how mental toughness is a positive indicator of mental health because athletes are better able to address their needs and feel more confident and in control).

58. *See generally id.* (discussing the goal for mental health and male athletes to help them combat mental illness).

59. Title IX, 20 U.S.C. § 1681(a) (1972).

60. *See* Kathleen M. Pike, *Title IX is About More than Sports*, GLOB. MENTAL HEALTH PROGRAMS (Apr. 14, 2017), <https://kathypikephd.com/five-on-friday/title-ix-is-about-more-than-sports/> [<https://perma.cc/94RF-LVKZ>] (“There is no doubt that Title IX was a watershed moment in U.S. history . . . majority of colleges and universities around the country had become coed, bringing gender equality to classrooms and sports programs and everything in between.”).

61. *See id.* (explaining that the more women experience harassment and discrimination, the more they feel depressed and anxious and increase their use of drugs and alcohol).

62. *See id.* (explaining how women tend to suffer from self-blame, low self-esteem, anger, disgust, and lower life satisfaction).

63. *See* Christina P. Herrero et al., *The psychology of the female athlete: how mental health and wellness mediate sports performance injury and recovery*, 6 *Annals of Joint* 1, 3 (2021) (discussing mental health statistics of female athletes compared to male athletes).

64. *See id.* (discussing the negative effects of social media as a source of body dissatisfaction); *see also* Devi Jags, *There’s a mental health crisis in college sports. I know it firsthand*, WASH. POST (Apr. 29, 2022, 12:07 PM), <https://www.washingtonpost.com/lifestyle/2022/04/29/mental-health-crisis-college-sports/> [<https://perma.cc/9D5D-CB3Z>] (discussing women athletes’ struggle with perfectionism and tendency to fear judgment). Female athletes “tend to magnify their mistakes and shortcomings, and feel relieved instead of joyful when they succeed,” *id.* (discussing female athletes’ self-image struggles).

65. *See generally* *Training and Education*, U.S. CTR. FOR SAFE SPORT, <https://uscenterforsafesport.org/training-and-education/> [<https://perma.cc/P98R-3UHT>] (last visited Aug. 10, 2022) (discussing efforts to end “sexual, physical, and emotional abuse” for

established in 1974 to advocate equality for women and girls in sports.<sup>66</sup> WSF provides funding and research on gender disparity and offers resources on participation, leadership, body image, and more.<sup>67</sup> Additionally, Champion Women is a nonprofit organization that provides legal support to women athletes.<sup>68</sup> This organization conducts research on the implementation of Title IX in educational institutions, provides petitions to end sexual abuse in sports, and contains numerous other resources for athletes.<sup>69</sup> Lastly, SafeSport is a nonprofit organization committed to creating a safe community for athletes.<sup>70</sup> The organization has numerous training courses and outreach initiatives for athletes, families, and coaches.<sup>71</sup> SafeSport also has a webpage for reporting abuse.<sup>72</sup> Although organizations like SafeSport have made positive strides toward creating a safe and equal environment for athletes, there is still more work to do.<sup>73</sup> For example, many athletes feel that SafeSport initiatives do not do enough to eliminate microaggressions and discrimination surrounding race, gender, and sexuality.<sup>74</sup> Through education, advocacy, and community engagement, SafeSport can better promote a culture of equity and inclusion.<sup>75</sup> Recommendations include coaching seminars, the use of pronouns when introducing oneself, and the use of social media to advocate for minority groups.<sup>76</sup>

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athletes); *see also* *Girl Serving Programs*, WOMEN'S SPORTS FED'N, [https://www.womenssportsfoundation.org/wsf\\_program\\_categories/girl-serving-programs/](https://www.womenssportsfoundation.org/wsf_program_categories/girl-serving-programs/) [<https://perma.cc/P8UL-5XVB>] (last visited Aug. 10, 2022) (discussing efforts to create a safer environment for female athletes); *see also* *Champion Women: Advocacy for Girls and Women in Sport*, CHAMPION WOMEN, <https://championwomen.org/> [<https://perma.cc/CLV4-B9WL>] (last visited Aug. 10, 2022) (discussing efforts to advocate on behalf of female athletes).

66. *See* *Girl Serving Programs*, *supra* note 65 (discussing the history of WSF).

67. *See id.* (discussing the purpose of WSF).

68. *See* *Champion Women: Advocacy for Girls and Women in Sport*, *supra* note 65 (discussing the background of Champion Women).

69. *See id.* (discussing the purpose of Champion Women).

70. *See* *Training and Education*, *supra* note 65 (quoting the mission for athletes is to “work and learn together free of emotional, physical and sexual abuse and misconduct”).

71. *See id.* (identifying numerous resources on website).

72. *See id.* (identifying the webpage to report abuse).

73. *See* Joseph Gurgis et al., ‘*Safe Sport Is Not For Everyone*’: *Equity-Deserving Athletes’ Perspectives of, Experiences and Recommendations for Safe Sport*, FRONTIERS IN PSYCH. (Mar. 7, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8934877/> [<https://perma.cc/99WV-4PGP>] (discussing a research study of black, white, gay, queer, male, and female athletes and their experiences with SafeSport).

74. *See id.* (discussing discrimination faced by athletes on teams).

75. *See id.* (noting how SafeSport can improve).

76. *See id.* (sharing athletes’ recommendations).

### D. *Hitting Below the Belt Part 3: Transgender Athletes' Struggles with Mental Health*

The Biden administration has recently proposed new rules to add to Title IX that would prohibit harassment and discrimination based on gender identity and sexual orientation.<sup>77</sup> This proposal is in response to several states passing laws that target transgender student-athletes.<sup>78</sup> Transgender athletes should be included in Title IX because of the disproportionate level of harassment they face, which can severely affect their mental health.<sup>79</sup> In general, transgender people are at an increased risk for substance abuse, depression, anxiety, post-traumatic stress disorder, and eating disorders.<sup>80</sup> Currently, the NCAA requires trans-athletes to regularly report testosterone levels and provide additional documentation that demonstrates they are meeting certain standards to compete in their sport.<sup>81</sup> Although the NCAA is striving for inclusiveness and fairness in all sports, there is still a great deal of opposition to trans-athletes' participation in collegiate sports, which undoubtedly has a negative impact on trans-athletes' mental health.<sup>82</sup>

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77. See Meghan Brink, *Protections for Trans Athletes in Title IX Proposal Still Unknown*, INSIDE HIGHER ED (July 5, 2022), <https://www.insidehighered.com/news/2022/07/05/title-ix-transgender-athletes-be-considered-separately> [<https://perma.cc/P3MS-H3M8>] (discussing Biden's proposed Title IX rules regarding transgender student-athletes).

78. See *id.* (identifying the twenty states that have passed laws that restrict transgender student involvement in sports); see also Melissa Block, *Idaho's Transgender Sports Ban Faces A Major Legal Hurdle*, NPR (May 3, 2021, 7:36 PM), <https://www.npr.org/2021/05/03/991987280/idahos-transgender-sports-ban-faces-a-major-legal-hurdle> [<https://perma.cc/UJ76-LAKW>] (Alabama, Arkansas, Idaho, Mississippi, Tennessee, and West Virginia have signed bills that essentially ban transgender females from competing on teams that align with the gender they identify with). Currently, Idaho's law calling for an invasive and humiliating process of female sex verification is being questioned in *Heckox v. Little* where the plaintiff is a transgender female track and cross-country player at Boise State University, *id.* (discussing an Idaho case brought by a transgender athlete).

79. See Brink, *supra* note 77 (“[T]rans athletes have reported facing a disproportionate level of bullying and harassment compared to their cisgender peers.”); see also *Understanding The Mental Health of Transgender Athletes*, BETTER HELP (Jan. 19, 2023), <https://www.betterhelp.com/advice/general/understanding-the-mental-health-of-transgender-athletes/> [<https://perma.cc/B89Q-XAGE>] (“Transgender athletes often face several distinct barriers that cisgender counterparts may not.”).

80. See *Understanding The Mental Health of Transgender Athletes*, *supra* note 79 (listing numerous mental health issues that transgender people face a heightened risk of). Specifically, transgender people are more likely to experience heightened PTSD because of previous trauma from “intimate partner violence or adverse childhood experiences,” *id.* (discussing the PTSD triggers of transgender people).

81. See Brink, *supra* note 77 (explaining new NCAA guidance that will be fully implemented in August 2023).

82. See *id.* (explaining the NCAA's commitment to an inclusive and fair environment for athletes and discussing state bills targeting trans-athletes). The states that have proposed or already introduced these bills are harming the mental health of student-athletes through their

Athlete Ally is a nonprofit organization that promotes trans-athletes' rights.<sup>83</sup> It is a large organization that advocates for equality within sports regardless of sexual orientation or gender identity.<sup>84</sup> Athlete Ally educates sports governing bodies, teams, and athletes on inclusion and works with the NCAA to create policies that are inclusive of trans-athletes.<sup>85</sup>

### E. *Out of Left Field? NCAA Faces Numerous Lawsuits*

The psychological and sexual abuse faced by student-athletes is a prevalent issue across universities in the country.<sup>86</sup> In 2020, Wichita State's men's basketball coach, Gregg Marshall, was paid \$7.75 million to resign after he was investigated for player abuse.<sup>87</sup> Multiple players accused Marshall of verbal and physical abuse including punching a player in the back and making racially derogatory remarks.<sup>88</sup> Furthermore, this past March, the University of San Francisco's baseball coach, Nino Giarratano, was fired for sexually abusive behavior after plaintiffs filed a class action against him.<sup>89</sup> The plaintiffs alleged that Giarratano created an "intolerable sexualized environment for over 22 years."<sup>90</sup> Giarratano allegedly gave players sex toys, discussed sexual fantasies with players, and retaliated against players who refused to "participate in the sexualized atmosphere."<sup>91</sup> The athletes experienced

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invasive techniques to verify sex and the humiliation that comes with targeting a certain group of students. *id.* See Block, *supra* note 78 (discussing the invasive process of sex verification).

83. See generally ATHLETE ALLY, <https://www.athleteally.org> [<https://perma.cc/L3W9-6NQU>] (last visited Sept. 6, 2022) (discussing efforts and initiatives to create an inclusive environment for LGTBG+ athletes).

84. See *id.* (discussing the purpose of organization).

85. See *id.* (discussing how the organization is working towards creating an inclusive environment).

86. For further discussion of player abuse, see *infra* notes 87–108 and accompanying text.

87. See Nick Bromberg, *Wichita State coach Gregg Marshall gets \$7.75M to resign after investigation into player abuse* allegations, YAHOO! SPORTS (Nov. 17, 2020), <https://sports.yahoo.com/wichita-state-coach-gregg-marshall-gets-775-m-to-resign-after-investigation-into-player-abuse-allegations-165414974.html> [<https://perma.cc/FYY7-L5FR>] (discussing Marshall's resignation which became inevitable after the allegations).

88. See *id.* (describing the allegations as "downright awful" such as when Marshall put his hands around a staffer's neck and was accused of racial verbal abuse by a Native American player).

89. See Aaron Tolentino, *12 former USF baseball players file lawsuit against coaches, school, NCAA for alleged abuse*, KRON 4 (July 15, 2022, 7:11 PM), <https://www.kron4.com/news/bay-area/12-former-usf-baseball-players-file-lawsuit-against-coaches-school-ncaa-for-alleged-sexual-abuse/> [<https://perma.cc/G3M5-8KTU>] (discussing the class action lawsuit by former USF baseball players against the head coach and associate head coach).

90. See *Doe v. NCAA*, No. 3:22-CV-01559-LB, 2023 U.S. Dist. LEXIS 1186, at \*2 (N.D. Cal. July 15, 2022) (quoting the allegations).

91. See *id.* (listing the allegations).

severe emotional distress from the abuse.<sup>92</sup> Many considered suicide.<sup>93</sup> Further, in 2020, Erin Aldrich and two other female track athletes filed suit against their former coach, John Rembao, for sexual abuse.<sup>94</sup> Aldrich alleged that Rembao began grooming her when she was a junior in high school and that Rembao initiated a sexual relationship with her when she was in college; it was not until later that Aldrich realized she was a victim of abuse.<sup>95</sup> The resultant stress caused her to be hospitalized.<sup>96</sup>

Unfortunately, sexual abuse of players at the hands of coaches is a common occurrence that stems from the close relationships formed between the two.<sup>97</sup> Coaches play an integral role in training and protecting athletes and often become their source of dependency because of the incredible amount of stress and scrutiny athletes have to perform.<sup>98</sup> Coaches also “set the social and cultural environment” and are “primary gatekeepers in regard to attitudes and beliefs that most heavily influence mental health service utilization among their student-athletes.”<sup>99</sup> Because

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92. *See id.* (“... wielded their power to subject their players to recurring sexual harassment and psychological abuse resulting in emotional distress...”).

93. *See id.* (“... resulting in emotional distress so severe that multiple players contemplated suicide.”).

94. *See Aldrich v. NCAA*, 484 F. Supp. 3d 779, 784–87 (N.D. Cal. 2020) (describing allegations made by three former female track players at University of Texas in Austin); *see* Paula Lavigne, *NCAA sued by 7 women for failure to protect in alleged sexual assaults*, ESPN (Apr. 29, 2020), [https://www.espn.com/college-sports/story/\\_/id/29114869/ncaa-sued-7-women-failure-protect-alleged-sexual-assaults](https://www.espn.com/college-sports/story/_/id/29114869/ncaa-sued-7-women-failure-protect-alleged-sexual-assaults) [<https://perma.cc/TG7F-TXVC>] (listing other sexual abuse lawsuits filed by female athletes against universities and NCAA for failing to protect them and not taking action against perpetrators).

95. *See Aldrich*, 484 F. Supp. 3d at 785 (describing Aldrich only later discovered her abuse while watching documentary on boys sexually abused by Michael Jackson). The plaintiffs allege that Rembao would inappropriately touch and massage them, make sexual remarks, call them at night, and would invite them over his house to engage in sexual activity, *id.* at 784–87 (discussing the horrifying allegations made against Rembao).

96. *See id.* at 785 (stating Aldrich’s hospitalization after her realization).

97. *See* Sonja Gaedicke et al., *Sexual Violence and Coach-Athlete Relationship- a Scoping Review From Sport Sociological and Sport Psychological Perspectives*, FRONTIERS IN SPORTS AND ACTIVE LIVING (May 13, 2021), <https://www.frontiersin.org/articles/10.3389/fspor.2021.643707/full> [<https://perma.cc/2TYM-4P2Y>] (discussing the intense relationship formed between a player and a coach and how it carries risks for “negative dependencies, misuse of trust, and commission of abuse”).

98. *See id.* (“Coaches undoubtedly perform a key function in the training, promotion, and safeguarding of athletes.”). The author discusses the negative dependencies that form within this relationship, *id.* (discussing the power imbalances and negative dependencies formed within coach-athlete relationships).

99. *See* Jesse Steinfeldt et al., *How College Football Coaches Perceive Sport Psychology Services*, ADU, <https://athleticdirector.com/articles/how-college-football-coaches-perceive-sport-psychology-services/> [<https://perma.cc/A7PA-4PJU>] (explaining the role coaches play for student-athletes).



of this intense relationship, it can be easy to exploit that trust.<sup>100</sup> The power imbalance between these two roles can create a relationship of dominance and submissiveness.<sup>101</sup> “Sexual grooming” is a process in which a perpetrator, usually in a position of power, “gains a person’s or organization’s trust with the intent to be sexually abusive.”<sup>102</sup> In a sports context, abusive coaches use the trust to create friendships and build upon their personal relations with athletes to then engage in sexual activities.<sup>103</sup>

Additionally, college athletics have had trouble addressing emotional abuse because of the unclear standards for what constitutes abusive coaching.<sup>104</sup> Where does one draw the line between tough coaching and straight abuse?<sup>105</sup> A clearer definition may be when a coach uses an athlete’s identity to fuel their criticism of the player’s performance.<sup>106</sup> Emotional abuse only aggravates athletes’ mental health struggles.<sup>107</sup> Abusive coaching can also lead to revoked scholarships which leave a student’s tuition, food, and housing completely in the hands of the controlling coach.<sup>108</sup> Undoubtedly, this would have a severe impact on the athlete’s mental health.<sup>109</sup>

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100. See Gaedicke et al., *supra* note 97 (discussing the misuse of trust that occurs once a boundary is crossed in a relationship).

101. See *id.* (explaining how coaches take on an authoritarian role by ignoring the needs of players and relying on sexual harassment and abuse to qualify their power).

102. See Daniel Pollak & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, A.B.A. (Nov. 1, 2015), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/) (discussing the key elements of sexual grooming including targeting and isolating a victim and gaining their trust).

103. See *id.* (explaining the “grooming” process); see also *Aldrich v. NCAA*, 484 F. Supp. 3d 779, 784–87 (N.D. Cal. 2020) (describing Rembao grooming girls through conversations and compliments that turned into sexual abuse).

104. See Katie Lever, ‘A Mental Health Battle’: How Abusive Coaching Impacts College Athletes, GLOB. SPORT MATTERS (May 24, 2022), <https://globalsportmatters.com/culture/2022/05/24/mental-health-battle-how-coach-impacts-college-athletes/> [<https://perma.cc/ZBQ5-9XUH>] (“The industry lacks a clear definition of what constitutes abusive coaching, especially when it involves emotional instead of physical harm.”).

105. See *id.* (asking this question and identifying researcher’s findings of certain “tells” and patterns of behavior that indicates abuse). Behaviors like belittling, humiliating and isolating are only a few indicators of abuse, *id.* (listing some indicators of coaching abuse).

106. See *id.* (discussing Jonathan Katz’s definition of coaching abuse). Jonathan Katz is a clinical and sports psychologist *id.* (identifying Jonathan Katz).

107. See *id.* (explaining how abuse aggravates athletes’ existing feelings of anxiety, insecurity, and depression). Abusive coaching can also lead to controlling behaviors such as eating disorders and self-harm, *id.* (explaining the consequences of abuse coaching).

108. See *id.* (explaining how coaches have the power to revoke scholarships and how an athlete’s lack of control makes it easy for coaches to control basically everything including scholarships, room and board, and playing time).

109. See *id.* (discussing how removing scholarships threatens athletes with negative consequences for reporting abusive coaching).

### F. *The Ball is in Your Court: Potential Federal Legislation*

In a March 2022 virtual panel discussion on inequities within the NCAA, Senators Chris Murphy, Richard Blumenthal, and Cory Booker addressed the issue of student-athlete mental health.<sup>110</sup> In December 2020, the senators introduced federal legislation that would create a bill of rights for student-athletes.<sup>111</sup> The College Athletes Bill of Rights would include health and safety standards and fair compensation where schools are required to share revenues with athletes.<sup>112</sup> The senators believed that college athletes' mental health is "fundamentally a civil rights and economic rights issue" warranting federal intervention.<sup>113</sup> The proposed bill focused on empowering these athletes by providing them with the tools they will need to protect their health, safety, and economic rights.<sup>114</sup> It also calls out the NCAA for only protecting compensation for an athlete's name, image, and likeness rather than focusing on protecting the athletes themselves.<sup>115</sup>

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110. See Dean Golembeski, *College Athletes' Mental Health Concerns Draw Congressional Attention*, BEST COLLEGES (Apr. 5, 2022), <https://www.bestcolleges.com/news/2022/04/04/ncaa-college-athletes-mental-health-safety-congress/> [<https://perma.cc/4JSV-STND>] (discussing three democratic senators' virtual panel on NCAA and student-athlete mental health where students were invited to speak on their experiences, including previous UMass tennis player, Brittany Collens).

111. See Booker, *Senators Announce College Athletes Bill of Rights*, CORY BOOKER (Aug. 13, 2020), <https://www.booker.senate.gov/news/press/booker-senators-announce-college-athletes-bill-of-rights> [<https://perma.cc/T8QF-VFZE>] (describing proposed legislation that would create more rights and protections for student-athletes).

112. See *id.* (listing rights and protections as "fair and equitable compensation," enforcing "evidence-based health, safety, and wellness standards," improving "educational outcomes and opportunities," providing "comprehensive health care coverage and support with sport-related injuries," enforcing "accountability across college sports," and providing for "an oversight panel that gives athletes a real voice"). The proposed legislation would include holding coaches accountable for abusive decision-making, providing financial assistance for athletes, and requiring schools to release detailed annual public reporting on their programs and revenues, *id.* (listing protections and opportunities for student-athletes in Democrats' proposed legislation).

113. See Golembeski, *supra* note 110 (quoting Senator Murphy on importance of student-athlete mental health).

114. See *id.* (calling the NCAA an exploitative industry that ignores student-athlete health and injuries); see also Booker, *Senators Announce College Athletes Bill of Rights*, *supra* note 111 (discussing that proposed legislation will not only provide for fair and equitable compensation for students but also create enforceable standards of care).

115. See Golembeski, *supra* note 110 (" . . . the NCAA needs to do more to help athletes than just allowing them to cash in on their name, image, and likeness . . . college athletes called on the NCAA to prioritize their health and safety."); see also Booker, *Senators Announce College Athletes Bill of Rights*, *supra* note 111 (discussing \$14 billion industry of college athletics where NCAA profits off "literal blood, sweat, and tears of student athletes" and how there should be fair compensation for athletes to market and profit off their name, image, and likeness). There are many restrictions on athletes profiting off their NIL and the proposed legislation would give them autonomy to determine their NIL agreements while also protecting their mental health, *id.* (explaining NIL protections within proposed legislation).

Furthermore, the National Labor Relations Board (NLRB) recently published a memo that reflects their favorable position that student-athletes at private universities should be considered employees under federal labor law.<sup>116</sup> If officially declared, this would afford student-athletes the right to numerous protections, including the right to unionize.<sup>117</sup> For private school athletes, this would mean progress toward the fight for mental health change at their institutions.<sup>118</sup> However, the NLRB's position does not seem to extend to student-athletes at public institutions.<sup>119</sup> Therefore, many student-athletes will most likely remain reliant on the NCAA to address their mental health struggles for the foreseeable future.<sup>120</sup>

The federal government's last "hail mary" play to regulate student-athlete mental health resources is through the Interstate Commerce Clause.<sup>121</sup> Since Congress has the ability to regulate individuals in interstate commerce and any economic activities that may potentially impact interstate commerce, it is possible that NCAA mental health resources could fall within these controlled activities.<sup>122</sup> Thus, if sport organizations, proposed federal legislation, and the NLRB are not successful in their movements towards promoting and protecting student-athletes' mental health, Congress could potentially intervene through its Interstate Commerce power.<sup>123</sup>

## II. THE STRESSED SPORTSMAN: NCAA IMPROVEMENT AND THE INTERSTATE COMMERCE CLAUSE

This Section analyzes remedial measures that can be implemented to protect student-athletes' mental health.<sup>124</sup> Subsection A discusses

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116. See Maria Carrasco, *Treating Private Athletes Like the Pros*, INSIDE HIGHER ED. (Sept. 30, 2021), <https://www.insidehighered.com/news/2021/09/30/nlr-decision-paves-way-college-athlete-rights> [<https://perma.cc/YL6Z-4LW7>] (discussing the NLRB's new change for student-athletes at private institutions).

117. See *id.* (discussing the implications of change).

118. See Jayce Born, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L. J. 1221, 1233 (2017) (discussing the NLRB's positive change for private student-athletes).

119. See *id.* (discussing the gap it creates for public student-athletes).

120. See *id.* at 1234 (explaining that more needs to be done at federal level to create positive mental health change for all student-athletes).

121. For further discussion of how Congress can use its commerce power to regulate mental health resources, see *infra* notes 151–61 and accompanying text.

122. For further discussion of the activities Congress can regulate, see *infra* notes 152–58 and accompanying text.

123. For further discussion of the Interstate Commerce Clause as the strongest solution for regulation of student-athlete mental health resources, see *infra* notes 190–96 and accompanying text.

124. For further discussion of remedial measures, see *infra* notes 128–61 and accompanying text.

measures the NCAA and other organizations have taken and how these measures may be improved.<sup>125</sup> Subsection B discusses how the federal government can step in through the Interstate Commerce Clause.<sup>126</sup> Finally, the last Section concludes by discussing the future of mental health within collegiate student athletics.<sup>127</sup>

*A. Dropped the Ball: NCAA and Organizations Must Step Up Their Game*

Although the NCAA recently instituted concussion protocols in light of litigation and social awareness surrounding athlete concussion-based deaths, the organization refuses to tackle mental health with the same passion.<sup>128</sup> Student-athletes surveyed on the prevalence of mental health issues and NCAA effectiveness identified that female athletes were not aware of any NCAA resources despite the fact that they are “nearly twice as likely as men to develop depression, anxiety, and eating disorders.”<sup>129</sup> Additionally, 10% to 15% of NCAA athletes require counseling to address severe psychological issues.<sup>130</sup> These alarming statistics indicate that the NCAA must approach mental health just as aggressively as it does concussions.<sup>131</sup> The self-declared mission of the NCAA is “protecting student athletes and providing a safe environment for

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125. For further discussion of measures taken by NCAA and organizations, *see infra* notes 128–42 and accompanying text.

126. For further discussion of how the federal government can use the Interstate Commerce Clause to address student-athlete mental health, *see infra* notes 151–61 and accompanying text.

127. For further discussion of the future of college athlete mental health, *see infra* notes 162–96 and accompanying text.

128. *See* Born, *supra* note 118, at 1224 (finding athletes deserve more than what the NCAA has done for mental health and they cannot wait for litigation attention like the NCAA has done with the concussion issue).

129. *See* Matt Gonzalez, *How the NCAA Is Tackling Mental Health*, THE RECOVERY VILLAGE (May 11, 2022), <https://www.therecoveryvillage.com/mental-health/ncaa-tackling-mental-health/> [<https://perma.cc/DY2N-DVN9>] (finding that female athletes view NCAA more negatively than males and only twenty-three percent of men and thirteen-percent of women who were surveyed thought NCAA provided enough mental health resources). Even with the enactment of Title IX, athletic departments on average spend twice as much on programs for men than women which results in a discrepancy in counseling resources between the programs, *id.* (discussing inequity between athletic programs).

130. *See* Born, *supra* note 118, at 1223 (providing NCAA athlete statistics on mental health). The article also notes that suicide is the third-leading cause of death for student-athletes and that a study from the University of Pennsylvania found that out of the entire NCAA student-athlete population of 460,000 students about 40,600 would have contemplated suicide, *id.* (listing suicide statistics of student-athletes).

131. *See id.* at 1224 (discussing the need for a more aggressive approach to mental health); *see also* Gonzalez, *supra* note 129 (finding that although the NCAA provides educational resources to athletes and coaches, and counseling is more prevalent in athletic departments, many NCAA campuses are still lacking).

them.”<sup>132</sup> Although the NCAA has many resources and services on student-athlete mental health, further research is necessary to actually verify the effectiveness of these “Best Practices.”<sup>133</sup>

Furthermore, although SafeSport serves as an advocate for equality and inclusion and is a positive resource for training and best practices, it still has room for improvement.<sup>134</sup> SafeSport (the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act) has the authority to address abuse and misconduct within the U.S. Olympics and Paralympics.<sup>135</sup> Given SafeSport’s limited authority to just those two organizations, it is clear why the NCAA may not be utilizing SafeSport resources or enforcing their reporting requirements.<sup>136</sup> A solution to bolstering mental health resources is to allow SafeSport to partner with the NCAA and other collegiate sports organizations in changing and developing better mental health policies and initiatives for student-athletes.<sup>137</sup>

Although the NCAA has had a slow start in addressing the mental health crisis, many universities have taken the lead.<sup>138</sup> For example, the

132. See Born, *supra* note 118, at 1224 (quoting the NCAA mission statement).

133. See Andrea Stamatis et al., *Can Athletes Be Tough Yet Compassionate to Themselves? Practical implications for NCAA mental health best practice no. 4*, NAT’L LIBR. OF MED. (Dec. 31, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7774983/#:~:text=Recent%20tragic%20events%20and%20data,against%20stressors%20associated%20with%20sports> [https://perma.cc/QBY9-N26H] (stating NCAA’s “best practices provide general goals, but they do not clarify the specific skills and education needed for their realization.”).

134. See Gurgis et al., *supra* note 73 (discussing issues with SafeSport for certain groups of athletes).

135. See *Training and Education*, *supra* note 65 (discussing the history of SafeSport and how it has oversight authority over the U.S. Olympic & Paralympic Committee).

136. See *id.* (discussing SafeSport’s authority over the Olympics and Paralympics but nothing about the collegiate level); see also *Understanding Mandatory Reporting Obligations for NCAA Coaches: Title IX & SafeSport*, GLOB. SPORTS ADVOC., <https://www.globalsportsadvocates.com/blog/mandatory-reporter-obligations-for-ncaa-coaches.cfm> [https://perma.cc/Z9EB-PH3F] (last visited Oct. 27, 2022) (discussing SafeSport’s only requirement for NCAA coaches is to report sexual abuse and this requirement only applies to coaches who are members of a National Governing Body under the USOPC); see also Scott Reid, *Why aren’t college coaches subject to SafeSport bans for sexual misconduct?*, DAILY BULLETIN (Jan. 22, 2020, 2:07 PM), <https://www.dailybulletin.com/2020/01/22/why-arent-college-coaches-subject-to-safesport-bans-for-sexual-misconduct/> [https://perma.cc/4J2J-Z3K5] (discussing how the NCAA does not enforce “SafeSport and NGB sanctions for sexual and physical abuse for coaches or athletes”). This indicates that if the NCAA is not even required to enforce abuse, then it will not use nor require SafeSport training and education, *id.* (discussing NCAA lack of enforcement for SafeSport sanctions).

137. See Reid, *supra* note 136 (discussing how NCAA does not enforce sanctions for abuse). This indicates that SafeSport should work with or have more authority over NCAA to ensure player safety and mental health., *id.* (discussing how the NCAA always evades and ignores problems).

138. See Lindberg, *supra* note 7 (discussing the USC’s strides in addressing mental health); see also Hank Kurtz Jr. & Erica Hunzinger, *College athletes push mental health to the forefront*,

University of Southern California (USC) has a team of sport psychologists who are dedicated to helping student-athletes thrive.<sup>139</sup> These sports psychologists provide individual therapy sessions, educate coaches and players on mental health and substance abuse, and respond to suicidal crises.<sup>140</sup> The team identified ‘performance-based identity’ as the root of the problem— i.e., if “you aren’t achieving, you don’t perceive yourself to have value . . . [t]hen when you do achieve something, it may be experienced as relief more than joy.”<sup>141</sup> The stable mental health support that USC has provided for its student-athletes has resulted in students feeling better, improving their performance, and quashing the stigma surrounding mental health.<sup>142</sup>

## B. *Reach Your Goal: How the Federal Government Can Step In*

### 1. Get the Ball Rolling: Democrats’ Bill Needs Improvement

Although the College Athletes Bill of Rights, as proposed, is a positive step towards reform, it is too broad—the proposed legislation encompasses multiple aspects of student-athletes’ lives and does not adequately address mental health issues.<sup>143</sup> While it seeks to improve athletes’ health and safety, it focuses more on the educational and economic opportunities for students.<sup>144</sup> Specifically, the bill calls for more educational resources for athletes to earn their degrees as well as the ability for them to profit off their games.<sup>145</sup> Student-athletes deserve

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THE SAN DIEGO UNION TRIB. (June 4, 2022, 7:36 AM), <https://www.sandiegouniontribune.com/news/california/story/2022-06-04/college-athletes-push-mental-health-to-the-forefront> [https://perma.cc/42QM-CP3Q] (discussing how Nova Southeastern and Colorado are addressing the mental health crisis). Nova Southeastern teaches athletes how to integrate mental health into their lives and Colorado has increased its budget to go towards a crisis hotline and hiring more staff, *id.* (discussing college programs’ efforts to address student-athlete mental health).

139. *See* Lindberg, *supra* note 7 (“USC is really a model . . . [w]e collaborate a lot, and . . . is a national leadership voice for mental health.”).

140. *See id.* (discussing everything USC is doing for student-athlete mental health and battling stigma by telling students it is okay to ask for help).

141. *See id.* (quoting a sport psychologist on student-athletes’ dangerous mindset).

142. *See id.* (sharing stories of USC athletes and how far they have come with their mental health since starting at the school). The students share how it has “been a complete game changer, being able to speak to someone with no judgment” and the importance of therapy for everyone, *id.* (discussing USC athletes’ stories of struggling and overcoming mental health issues with the help of athletic department).

143. *See* Booker, Blumenthal, Schatz, Wyden, Padilla *Introduce College Athletes Bill of Rights*, INSIDER NJ (Aug. 3, 2022, 10:08 PM), <https://www.insidernj.com/press-release/booker-blumenthal-schatz-wyden-padilla-introduce-college-athletes-bill-of-rights/> [https://perma.cc/68FP-FS53] (explaining the numerous issues within collegiate athletics bill hopes to address).

144. *See id.* (“This issue is about fairness and justice, which is why athletes deserve . . . increased educational resources . . . the right to financially benefit from their hard work.”).

145. *See id.* (quoting above footnote regarding what bill hopes to achieve).

legislation that also solely focuses on addressing mental health.<sup>146</sup> This would break the mental health stigma and provide more resources for suffering student-athletes.<sup>147</sup>

Additionally, the bill's lack of timeliness presents potential flaws.<sup>148</sup> Notably, it has already been almost two years since the bill was proposed.<sup>149</sup> Due to the difficulty of passing laws in a bipartisan system, perhaps a more effective solution for federal oversight of student-athlete mental health is through the Interstate Commerce Clause.<sup>150</sup>

## 2. Hail Mary: The Interstate Commerce Clause

Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power to “regulate commerce . . . among the several states” under the Interstate Commerce Clause.<sup>151</sup> The U.S. Supreme Court has gradually expanded the meaning of the commerce power to define the types of activities that Congress may regulate.<sup>152</sup> Today, “Congress can (1) regulate the “channels of interstate commerce (2) regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . and (3) regulate economic or commercial activities that “substantially affect interstate commerce.”<sup>153</sup>

Given the constantly evolving “tests” of the commerce power, it may seem difficult to envision how the federal government could regulate NCAA student-athlete mental health resources.<sup>154</sup> However, the NCAA

146. See Born, *supra* note 118, at 1224 (stating student-athletes “deserve an aggressive approach to providing greater mental health resources”).

147. See *id.* (discussing the importance of providing more mental health resources to student-athletes); see also Lindberg, *supra* note 7 (discussing the stigma of mental health).

148. See Booker, *Senators Announce College Athletes Bill of Rights*, *supra* note 111 (showing the proposed bill was made two years ago).

149. See Ross Dellenger, *Five Senators to Reintroduce Sweeping College Athlete Bill of Rights in Congress*, SPORTS ILLUSTRATED (Aug. 3, 2022), <https://www.si.com/college/2022/08/03/college-athlete-bill-of-rights-congress-transfers-nil> [<https://perma.cc/Y78K-FLPZ>] (discussing democrats reintroducing the bill to Congress with changes since 2020).

150. See *Good Question: Why Is It So Hard To Pass A Law?*, CBS NEWS MINN. (June 23, 2016, 10:56 PM), <https://www.cbsnews.com/minnesota/news/good-question-passing-bills/> [<https://perma.cc/X33G-JYCK>] (describing Congress as a graveyard because of the extreme difficulty of passing laws in a partisan system); see also Born, *supra* note 118 (introducing possible solution for federal regulation through Interstate Commerce Clause).

151. See U.S. CONST. art. 1, § 3, cl. 1 (quoting the Interstate Commerce Clause).

152. See Born, *supra* note 118, at 1241 (discussing the evolution of Commerce Clause jurisprudence).

153. See *id.* (quoting three circumstances of the Commerce Clause test where Congress has power); see also *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (listing three categories where Congress may regulate interstate commerce).

154. See Born, *supra* note 118, at 1241 (questioning how the NCAA mental health resources could fall under commerce power due to rapidly changing development of the Commerce Clause “tests”).

runs its own business.<sup>155</sup> In fact, college athletics is a \$14 billion industry.<sup>156</sup> As such, it is apparent that an industry that profits off the success of individuals who cross state lines to compete, would undoubtedly fall under the Commerce Clause.<sup>157</sup> Further, university athletic departments and the NCAA could also be considered “instruments of interstate commerce” within the meaning of the “test.”<sup>158</sup> By using this power, Congress can promptly pass regulatory legislation that has enforcement over all states and organizations—including the NCAA.<sup>159</sup> This would be an extremely fruitful and inexpensive means of initiating change.<sup>160</sup> Thus, Congress should use its Interstate Commerce power to oversee and regulate NCAA mental health resources for athletes.<sup>161</sup>

### III. NOT TIME TO THROW IN THE TOWEL: THE FUTURE OF STUDENT-ATHLETE MENTAL HEALTH

This Comment recognizes the lack of protective action toward the student-athlete mental health crisis.<sup>162</sup> The NCAA—as the leading organization in college athletics—must create stronger guidelines and standards for schools to follow.<sup>163</sup> Furthermore, the federal government should utilize the Interstate Commerce Clause to regulate mental health initiatives.<sup>164</sup> In the meantime, it is vital that campuses make mental health resources accessible for student-athletes, implement pre-participation screenings to monitor at-risk athletes, and openly debunk

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155. *See id.* (“The NCAA is often said to be running its own business.”).

156. *See Booker, Senators Announce College Athletes Bill of Rights, supra* note 111 (discussing how student-athletes are fueling the \$14 billion industry of college athletics).

157. *See Born, supra* note 118, at 1242 (discussing how the NCAA could fall under federal regulation because of athletes crossing state lines and the amount of revenue schools are making off of them).

158. *See id.* (fitting the NCAA, athletic departments, and athletes into the three component “test” of the Interstate Commerce Clause).

159. *See id.* at 1237 (discussing how Congress can use broad authority of commerce power to pass “swift-acting legislation in the public interest”).

160. *See id.* (discussing how this as an efficient and cost-saving way to create change and would cause minimal disruption to the NCAA).

161. *See id.* at 1242 (concluding that Congress using its commerce power to enforce student-athlete mental health regulations on the NCAA and colleges will not violate federalism nor the Constitution).

162. *See Gonzalez, supra* note 129 (providing statistics on student-athletes’ perceptions of and attitudes towards the NCAA resources). Forty-nine percent of those surveyed felt that the NCAA was not providing enough resources for student-athletes to treat their mental health issues, *id.* (identifying statistics on how athletes felt about the NCAA resources).

163. *See Born, supra* note 118, at 1224 (stating that students “deserve an aggressive approach to providing greater mental health resources” from the NCAA and they can no longer wait).

164. *See id.* at 1237 (considering how Congress could regulate student-athlete mental health resources through the Interstate Commerce Clause).



the stigma so that student-athletes feel comfortable opening up about their mental health.<sup>165</sup>

The NCAA has admitted that there is a mental health epidemic.<sup>166</sup> On the surface, it seems the best approach is to leave initiatives to the NCAA because of its mission statement and the research and recommendations of its Sport Science Institute.<sup>167</sup> However, if its movement to implement mental health initiatives is anything like its handling of concussion protocols, there may not be any effective solutions to the crisis anytime soon.<sup>168</sup> In fact, Mary Wilfert, Associate Director for the Sport Science Institute, declared that mental health intervention “cannot come out of the national office” because the NCAA is “not a medical organization.”<sup>169</sup> Clearly, the NCAA has more work to do.<sup>170</sup>

Although the NCAA provides some guides and educational tools for students and schools, it lacks stringent training for athletic departments.<sup>171</sup> Training coaches and trainers in addressing mental health concerns are essential because of the close relationship between trainers and athletes.<sup>172</sup> Athletic trainers serve as “confidants, motivators, encouragers, and even friends,” and there is a unique level of trust that is built between trainers and athletes.<sup>173</sup> Accordingly, given their important role, it is essential that these athletic trainers quickly catch any mental

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165. See *Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22 (providing the NCAA’s guide of recommendations to athletic departments “for supporting and promoting student-athlete mental health”); see also Lindberg, *supra* note 7 (sharing USC student-athletes’ stories on struggles with mental health and a sport psychologists’ strategy for fighting the stigma).

166. See *Interassociation Consensus Document: Mental Health Best Practices*, *supra* note 22 (providing the NCAA’s recommendation guide for addressing student-athlete mental health). This guide as well as the other resources on the NCAA’s website indicates that the NCAA understands there is a student-athlete mental health issue, *id.* (identifying numerous mental health resources the NCAA provides).

167. See Born, *supra* note 118, at 1231–33 (discussing why NCAA would be the best organization to take lead because of its role in college athletics and its resources).

168. See *id.* (discussing the NCAA’s reluctance to take serious action on mental health is a serious downfall and students cannot wait around for litigation to kick NCAA into action).

169. See *id.* at 1232 (quoting Associate Director’s opinion on NCAA’s role in student-athlete mental health).

170. See *id.* at 1231 (calling NCAA to action).

171. See *id.* at 1242–43 (discussing need for more education and training in college athletics).

172. See Rachel Sharpe, *Solving the mental health puzzle*, NCAA, <https://www.ncaa.org/sports/2014/9/23/solving-the-mental-health-puzzle.aspx> [<https://perma.cc/6UMH-FXWE>] (last visited Sept. 6, 2022) (discussing the close relationship formed between athletes and coaches that “leads to a unique level of trust”). Locker rooms are a place of “comfort and camaraderie” where athletes can let their guards down for a moment, *id.* (explaining the relationship formation and vulnerability of athletes).

173. See *id.* (quoting language of relationship formed between trainer and athlete).

health issues with athletes.<sup>174</sup> To adequately assist the NCAA, collegiate schools should follow the NCAA's *Best Practices* guide.<sup>175</sup> However, this is only the bare minimum and schools should also follow the lead of other institutions like USC.<sup>176</sup> This includes developing and training a team of sports psychologists in providing therapy sessions and educating coaches and players on mental health.<sup>177</sup>

Moreover, the NCAA suggests using pre-participation screening questionnaires to better identify at-risk student-athletes by proposing the use of nine specific questions.<sup>178</sup> However, these questionnaires leave great discretion to athletic departments which can create an inadequate and ineffective screening process across the board.<sup>179</sup> A better solution is to enforce pre-participation biannual or triannual screening across campuses to ensure that all athletes' mental health concerns are being caught.<sup>180</sup> This is especially important because athletes tend to ignore their mental health concerns.<sup>181</sup>

Finally, mental health screening should be combined with mental health education for athletes, families, and athletic departments because of the stigma surrounding mental health.<sup>182</sup> Athletes constantly struggle

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174. *See id.* (discussing how those dedicated to student-athlete wellness must “keep our eyes and ears open for conversations or changes in behavior suggesting that a deeper mental or emotional issue may be present”).

175. *See Interassociation Consensus Document: Mental Health Best Practices, supra* note 22, at 6 (“[T]his practitioner should be easily accessible to student-athletes, which includes being accessible through establishment of a self-referral process. Ensuring that all student-athletes receive mental health care . . . may require hiring relevant personnel, or helping support the dedicated service of an on-campus practitioner . . .”).

176. *See Lindberg, supra* note 7 (discussing USC's success in addressing mental health concerns).

177. *See id.* (listing USC's current initiatives).

178. *See Interassociation Consensus Document: Mental Health Best Practices, supra* note 22 (discussing that primary athletic providers and licensed practitioners should implement pre-participation screening questionnaires).

179. *See id.* (discussing that providers should implement screening of their choice).

180. *See Emily Kroshus, Variability in Institutional Screening Practices Related to Collegiate Student-Athlete Mental Health, NAT'L LIBR. OF MED.* (May 5, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5013708/> [<https://perma.cc/P4EN-JRFS>] (identifying fewer than half of U.S. colleges have written plans for identifying mental health concerns of student-athletes). A 2005 study found that pre-participation screening varied widely among NCAA institutions with only thirty-two percent of schools requiring returning athletes to complete a questionnaire, *id.* (arguing that more investigation needs to be done into whether institutions follow up with student-athletes who have a positive screen for mental illness).

181. *See Lindberg, supra* note 7 (discussing the stigma of mental health and student-athletes' reluctance to speak out about their issues).

182. *See Athletes and Mental Health: Breaking the Stigma, CLEVELAND CLINIC* (Aug. 10, 2021), <https://health.clevelandclinic.org/mental-health-in-athletes/> [<https://perma.cc/34NR-LUZZ>] (discussing the stigma of mental health and the idea that you cannot be tough if you ask for help). The author shares that parents should keep an eye out on their children by listening with

with performance-based anxiety and their physical health usually takes precedence over their mental health.<sup>183</sup> Athletic departments and coaches must be aware of all the ways players are struggling—mentally and physically.<sup>184</sup> Once the stigma is eliminated and all those involved are educated more, teams and families can become better resources for struggling student-athletes.<sup>185</sup>

Just three months after the tragic suicide of their daughter, Katie Meyer's parents have proposed a new policy at Stanford that could save other students' lives.<sup>186</sup> 'Katie's Save' would allow students to opt into a program that notifies an advocate if they are struggling with mental health or physical injury.<sup>187</sup> College students—especially student-athletes—juggle numerous responsibilities and may feel like they can handle everything on their own.<sup>188</sup> However, like Katie, student-athletes could benefit from extra support.<sup>189</sup> Furthermore, to ensure the protection of the lives of student-athletes, the NCAA and colleges need to provide more resources and enforce more standards for athletic departments to follow.<sup>190</sup> Mental illness is not disappearing anytime soon, and especially for student-athletes who are balancing numerous responsibilities, the issue will only become more prevalent unless stricter measures are taken.<sup>191</sup> While the NCAA has created guides and procedures, they still had a slow start.<sup>192</sup> Perhaps, the proposed federal legislation can be

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an open mind and encouraging them to talk, *id.* (discussing the parental role within student-athlete mental health).

183. See Andrea Nguyen, *Stigma Surrounding Mental Health in College Athletics*, THE OBERLIN REV. (Apr. 22, 2022), <https://oberlinreview.org/26787/sports/stigma-surrounding-mental-health-in-college-athletics/> [<https://perma.cc/5AHY-K3LS>] (reasoning why athletes struggle and how their mental health is being ignored because of focus on their physical bodies).

184. See Lindberg, *supra* note 7 (discussing the importance of collaboration within an athletic department to better address mental health concerns).

185. See *id.* (sharing stories of student-athletes who struggled with mental health but who came out the other side because of athletic department's focus on breaking stigma).

186. See Bonagura, *supra* note 5 (discussing the 'Katie's Save' policy).

187. See *id.* (explaining how the program would allow students to choose whom their advocate is to notify in times of crisis).

188. See *id.* (discussing Katie's mom's thoughts on the struggles of college students).

189. See *id.* (discussing Katie's parents' belief that a program like 'Katie's Save' could have saved their daughter's life).

190. See Born, *supra* note 118, at 1243 (discussing the need for NCAA to do more and how federal legislation should focus on education and training for trainers, coaches, and student-athletes).

191. See Lindberg, *supra* note 7 (discussing the numerous responsibilities of college athletes and the seriousness of addressing their mental health concerns).

192. See Born, *supra* note 118, at 1224, 1242 (stating the NCAA acknowledges mental health crisis but cannot wait for litigation because students "deserve an aggressive approach to providing greater mental health resources.").

pushed through Congress.<sup>193</sup> The Interstate Commerce Clause may be an even stronger solution.<sup>194</sup> By regulating resources through the commerce power, Congress can create uniformity and increase support across all athletic departments in the way they address and treat athletes' mental health.<sup>195</sup> Together, all of the resources, organizations, and people who care about student-athletes can show them that mental illness is a contender they can face as a team.<sup>196</sup>

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193. See *Booker, Senators Announce College Athletes Bill of Rights*, *supra* note 111 (discussing the senators' proposed legislation); but see *Good Question: Why Is It So Hard To Pass A Law?*, *supra* note 150 (describing Congress as a graveyard because of extreme difficulty in passing laws in partisan system).

194. See *Born*, *supra* note 118, at 1242 (discussing how the NCAA could fall under federal government regulation because of athletes crossing state lines and the amount of revenue schools are making off of them). Athletic departments and the NCAA could be considered "instruments of interstate commerce" and as such, Congress could have a strong chance at using its commerce power to regulate the NCAA's mental health resources for athletes, *id.* (explaining how the NCAA could fall under Congress's commerce power based on the "test").

195. See *id.* at 1245 (discussing how the use of the commerce power on regulating mental health resources will create uniformity at a minimum cost to the NCAA).

196. See *id.* (discussing how the use of the commerce power and increasing support and change from the NCAA and organizations will show student-athletes that they are not alone in the battle against mental illness).



## NAVIGATING THROUGH THE INFLUENCER ERA

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### I. COMMENTARY OVERVIEW

Danielle Garno is a Fashion, Beauty, & Luxury Goods Attorney and Partner at Holland & Knight in Miami, Florida. Danielle focuses primarily on issues faced by the fashion industry, including but not limited to intellectual property, advertising, marketing, social media, and influencers. Throughout Danielle's career, she has collaborated with and represented fashion brands of all sizes from start-ups to multi-national and even global brands. Danielle helps these brands navigate through arising legal issues and counsels brands on expanding and sustaining a successful public image. In this Commentary, Danielle provides advice based on her experience with how to carefully proceed through the new influencer era.

### II. BACKGROUND

#### **1. Based on your expertise in the fashion industry, how do you define influencers? Are influencers advertisers?**

An influencer can be anyone who has the ability to impact and inspire others. Influencers, as the term is used today, can absolutely be advertisers and are often used to promote products. "Micro influencers" tend to have anywhere between 1000 to 100,000 followers and focus on a specific niche. They tend to be industry experts, and brands utilize them to reach a specific and engaged consumer set. Alternatively, "macro influencers" have followers in the six and seven figures, and brands often use them to target the masses. Over the years, there has been a trend towards the micro influencers to reach a specific consumer. The industry has moved away from inauthentic advertising to the masses by using

celebrities or macro influencers who have become celebrities in their own right.

**2. Is whether someone is an “influencer” predicated on their photos and videos being posted for the sole purpose of advertisement or sales?**

Not necessarily, although most are today. I think the ultimate influencer creates a connection with his/her/their followers because the content resonates with the influencer’s followers without the posts/videos being an ad. That is what brands are striving for—authenticity—with the influencers they use. I think that Meghan Markle is a good example because she purportedly pays for her own wardrobe.

**3. Where do we draw the line between someone who is an “influencer” and someone who is just influential? For example, if a professional athlete with 250,000 followers on Instagram decides to go live after a workout to talk with their fans and is drinking a Gatorade throughout the live video, do they need to comment on the sponsorship deal that they have with Gatorade even if there is no intention to advertise or sell the product?**

The Federal Trade Commission (FTC) regulations don’t really draw a distinction.<sup>1</sup> If there is a material connection between the brand and the influencer that a consumer would not necessarily be aware of, then a disclosure must be made. Every time there is a post without a disclosure, it would constitute a new violation of FTC regulations. Here, there is a material connection between Gatorade and the athlete that a consumer may not be aware of, and therefore, a disclosure that Gatorade sponsors the athlete should be made. This applies even if the influencer/athlete has become an actual fan of the product and posts about it after his/her/their contract is over.

**4. There has been a flurry of recent lawsuits related to athletes getting in legal trouble as influencers. In your opinion, will recent lawsuits filed against athletes like Stephen Curry and Tom Brady based on their endorsements of FTX, the cryptocurrency exchange company, set a precedent that requires athletes and influencers to be responsible for the products they endorse?<sup>2</sup> Will it make athletes more cautious about the companies and products they endorse?**

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1. 16 C.F.R. § 255.5 (2023).

2. Complaint at 2, *Garrison v. Bankman-Fried*, 2023 U.S. Dist. LEXIS 66369 (S.D. Fla. 2022).

Yes, it should make influencers more cautious. We first saw this when Molly Sims was sued for contributory trademark infringement in connection with a cosmetic, when she was merely promoting the product as a celebrity/influencer.<sup>3</sup> To protect themselves, influencers should request that the brands indemnify them for any fees and costs in defending themselves in connection with the promotion of the brands' products.

### III. FEDERAL TRADE COMMISSION EFFORTS AND ACTIONS

**1. Overtime, as the influencer industry has evolved, so has litigation involving deceptive advertisement and product infringements. The FTC has attempted to cease deceptive advertisements by drafting a “Disclosures 101 for Social Media Influencers” that sets forth Endorsement Guides that go further into detail about how advertisers and endorsers can stay on the right side of the law.<sup>4</sup> What are some things you would add to their list of recommendations for influencers to better protect themselves and their sponsor brands from FTC enforcement actions? Are there any specific clauses or indemnifications that influencers should be looking out for?**

Influencers should always follow the guidelines to prevent them from violating Section 5 of the FTC Act.<sup>5</sup> The disclosures should be clear and conspicuous and, if on Instagram, before the “more” link. Influencers can also be held liable—not just the brands—so it's important they follow the rules as well. As an influencer, I would require an indemnity provision (as mentioned above) and a reverse morals clause in case the brand does something that is not in line with the influencer's image and could potentially harm the influencer. These types of clauses allow the influencer to terminate the contract and disassociate with the brand—ideally without suffering any financial harm.

### IV. SHIFTING THE BURDEN TO THE COMPANIES

**1. The FTC takes the position that it is the influencer's responsibility to incorporate disclosures, abide by their Endorsement Guides, and comply with laws against deceptive advertising.<sup>6</sup> Is there an**

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3. *Petunia Prods. v. Rodan & Fields, LLC*, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. 2022).

4. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> [https://perma.cc/8V EG-XMJ4] (last visited Apr. 13, 2023).

5. *Id.*; 15 U.S.C. § 45.

6. 16 C.F.R. § 255.5 (2023); *Disclosures 101 for Social Media Influencers*, *supra* note 4



**argument to be made that this responsibility should be placed on the company, considering the company's resources and expertise (e.g., Legal and Marketing Department)? Do you think requiring influencers to shoulder this legal responsibility seems inequitable and places influencers at significant financial and legal risk?**

The influencer has the responsibility to incorporate the disclosure in the post because the influencer is the person posting the content, but the brands are required to communicate those requirements to the influencer.<sup>7</sup> Practically, the FTC is more likely to take action against the brands than against the influencer, since it is the brand who is the advertiser, so it's important for the brands to monitor their influencers to make sure that (1) they are making claims that are accurate about the product, and (2) that the requisite disclosures are being made and that they are clear and conspicuous.

Again, an indemnity provision can help protect an influencer from exposure if the brand does not adhere to the FTC's regulations.

**2. How can advertisers and brands better clarify their expectations or educate influencers to avoid potential legal issues? How much of an obligation do advertisers and brands have to make their expectations as clear as possible to influencers? What are best practices when drafting influencer agreements to protect a company from liability if an influencer fails to comply with FTC requirements?**

Brands have an obligation to ensure that their influencers follow the regulations. Best practices are to have a compliance program that includes a written contract, monitoring, training of influencers, etc. Compliance programs need to be specifically tailored to each company since they all work somewhat differently and tend to have different social media marketing program objectives. The contract should have a provision that allows the brand to terminate the contract if the influencer violates the regulations. The brand should have the ability to counsel the influencer, train the influencer, and terminate, if necessary. Monitoring influencers' posts is essential to the compliance program, so the brand can take immediate action if necessary. Brands should also have an indemnity provision as well as a morals clause.

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("As an influencer it's your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads.").

7. 16 C.F.R. § 255.1 ("Advertisers are subject to liability . . . for failing to disclose material connections between themselves and their endorsers.").

## V. SHIFTING THE BURDEN TO THE PLATFORMS

**1. Social media networks like Instagram and Tik Tok profit from influencers using their platform for marketing, not only because it encourages people to consume more content, but also because brands and influencers pay to “boost” sponsored posts. What role, if any, do these social media networks play in policing the posts on their networks and enforcing the FTC guidelines within their own network? Should they play more of a role?**

The platforms have tried to be helpful with their sponsored content disclosure tools, but the FTC has said that they don't think that the platforms' built-in disclosure tools are adequate for making the requisite disclosures which still need to be made by the influencer—like #ad.<sup>8</sup> It would be nice if the platforms would police the posts for sponsored content and deceptive advertising, but the platforms have done a good job of shielding themselves from any liability by claiming they are merely a third-party platform.<sup>9</sup>

## VI. WHAT'S NEXT?

**1. Throughout your career, you have undoubtedly witnessed many changes in the fashion industry. With technology and social media evolving at a pace we have never seen before, there will surely be many more changes to come. What changes do you predict will occur in this industry in the future? How can brands and influencers start preparing?**

The advent of Artificial Intelligence (AI), deep fakes, and the metaverse is a game changer. There are many influencers now who aren't even human and who are being represented by traditional talent agencies. Regulatory enforcement agencies are going to need to enhance their monitoring technologies to ensure the public at large isn't being deceived (see Pope in Balenciaga jacket).<sup>10</sup> It's a good time for brands to make sure they have an adequate compliance program in place while they explore these new technologies.

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8. *Disclosures 101 for Social Media Influencers*, *supra* note 4 (“Don't assume that a platform's disclosure tool is good enough, but consider using it in addition to your own, good disclosure.”).

9. 47 U.S.C. § 230(c)(1).

10. Erin Keller, *Pope Francis in Balenciaga Deepfake Fools Millions*, N.Y. POST (Mar. 27, 2023, 8:00 PM), <https://nypost.com/2023/03/27/pope-francis-in-balenciaga-deepfake-fools-millions-definitely-scary/> [<https://perma.cc/HS8W-6N79>].

