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With NIL, College Sports Enters the Gig Economy

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Abstract

With the arrival of name, image, and likeness (NIL), the college sports labor market has distinctly taken on similar characteristics to the gig economy, with athletes able to earn extra compensation through external NIL-based independent contractor 'gigs.' But with this comparison comes comparable issues, and scholarship and litigation examining and challenging gig economy structures have identified several legal and ethical concerns both individual to each worker and more broadly affecting labor markets. Building off this literature, we conceptualize the NIL phenomenon within the gig economy space, exploring the legal and ethical concerns that have plagued companies like Uber and applying those same concerns to the brave new world of NIL-fueled college sports. We not only find similar issues in college sports but also find even deeper concerns based on new and existing challenges unique to the novel space of college sports, particularly given the increased proliferation of NIL collectives.

Keywords: intercollegiate athletics, law, ethics, sport economics

Introduction

The emergence of name, image, and likeness (NIL) in college sports has ushered in a new era, where college athletes are permitted to earn compensation, but in a peculiar way. Rather than engaging in a traditional employment relationship where the college athlete's labor is exchanged directly with their employer in exchange for compensation, the college athlete now has the right—if he or she wishes—to earn compensation by performing additional labor outside of their athletic exploits through independent contractor work with third parties.

The notion of one exchanging labor for compensation in a flexible non-employment context is certainly not new. In fact, the manner by which college athletes are now permitted to earn income has a strong parallel in broader economic markets. With the advent and expansion of the Internet, many algorithm-based entrepreneurial platforms—including, for example, the driving platforms Uber and Lyft—have vastly increased access to independent contracting jobs. This proliferation has led to a sharp increase in alternative work relationships and the rise of the so-called 'gig economy' (McFeely & Pendell, 2018; McCue, 2018).

The proliferation of the gig economy within the broader labor market has been swiftly followed by outcries and concerns regarding the treatment of labor within those markets. Critics have pointed both to legal concerns in structuring employment schemes in ways that do not allow for important employment benefits like worker's compensation, discrimination protections, and minimum wage, and also point to ethical concerns related to underemployment (see, e.g., Malos et al. 2018). Others have framed gig economy labor models as "bogus self-employment" and an insincere "forced entrepreneurship" experience that merely puts a positive spin on worker misclassification (MacDonald & Giazitzoglu, 2019, p. 731).

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With the arrival of NIL, the college sports labor market has distinctly taken on similar characteristics to the gig economy. As with gig economy laborers, college athletes who choose to engage with NIL opportunities through paid social media posts, sponsorship and endorsement deals, and entrepreneurial efforts are considered as flexible gig contractors, including for the purpose of self-employment taxes (Crabtree, 2022). Indeed, while the initial vision of NIL for many had athletes largely finding NIL gigs on their own—unlike gig economy labor driven by platforms like Uber and Lyft—the increased proliferation of NIL collectives further adds to the gig economy comparison. Many of these collectives largely act like NIL platforms, where athletes who sign with that collective are then directed to NIL opportunities by that collective. In fact, many NIL opportunities provided by collectives to their signed athletes are either internal to the collective (where the athlete is performing labor for the collective, e.g., engaging with fans who subscribe to the collective) or the collective is the entity who ultimately pays the athlete for performance in external NIL opportunities where that external entity has pooled its resources within the collective (see Brown, 2022a; Staples, 2022).

Given the similar structure, many similar problems with the gig economy model can also be applied to the new NIL-dependent labor landscape in college sports. As such, the purpose of this conceptual paper is to center the current labor landscape of college sports post-NIL within the framework of the gig economy to identify potential issues which may emerge in this new era of intercollegiate athletics. Taking a similar dual-pronged approach as Malos et al. (2018), we analyze both legal and ethical dimensions of the NIL landscape while identifying common parallels to gig economy structures, discussing how these common points and concerns yield instructive lessons for sport managers working within and in conjunction with NIL gigs and intercollegiate athletics more generally.

We first review the present literature on NIL and the gig economy writ large to better conceptualize the role of college athlete NIL opportunities relative to the gig economy system of labor relationships. Second, we elaborate the parallels and complications between the gig economy and the college athlete NIL environment. We then discuss two prongs of concerns which emerge from drawing this parallel, being the ongoing legal uncertainty as to whether athletes can be deemed employees—particularly after the addition of athlete NIL collectives to the calculus —and the broader ethical concerns about the proliferation of athlete NIL opportunities without also allowing for athlete employment under federal wage-and-hour law. In doing so, we consider various longstanding ethical issues unique to the college sports labor market alongside new concerns raised by gig economy models, debating whether NIL fixes the inequities that have plagued college sports for decades or whether it merely shifts the compensation burdens inherent to the employment relationship from the employer to labor.

Background and Literature Review

The Rise of Name, Image, and Likeness Opportunities in College Sports

Following a wave of litigation challenging the NCAA's restrictions on athlete compensation, in 2019 the California legislature passed the Fair Pay to Play Act which specifically forbade the NCAA from sanctioning college athletes for earning compensation for the use of their name, image, and likeness (NIL), with an original effective date of January 1, 2023. Soon after, however, several states followed suit with more aggressive timelines with laws that had effective dates as early as July 1, 2021 (Jessop & Sabin, 2021). On June 21, 2021, the U.S. Supreme Court delivered a 9-0 decision in *NCAA v. Alston* affirming lower courts' findings that limits on athlete education-related compensation violate the Sherman Antitrust Act while also rejecting the association's call for antitrust immunity for restrictions that "fall at the intersection of higher education, sports, and money" (NCAA v. Alston, 2021, p. 2159).

The NCAA had hoped that a favorable ruling would provide some sort of antitrust immunity protecting the association in legal battles against various proposed guardrails on athlete NIL rights deemed necessary to protect athletes. Proposed guardrails in a draft NIL policy offered as a response to state NIL laws included nationwide bars on NIL deals tied to athletic participation or performance, NIL deals with industries deemed to have a history of encouraging recruiting violations, and NIL deals involving certain vice products like alcohol, tobacco, and gambling. However, *Alston*'s unanimous unfavorable ruling forced the NCAA to quickly abandon this draft policy. Instead, just over a week after the *Alston* ruling and mere hours before many state NIL laws were to go into effect the NCAA released an interim NIL policy that provided minimal guidance for this new era of amateurism and essentially only offered that NIL payments cannot be used as recruiting inducements or as part of a pay-for-play scheme. The NCAA also, in puzzling and unnecessary fashion, stated that athletes and schools must follow state law where applicable and

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necessary. Aside from these relatively minute guidelines, the NCAA entirely left NIL regulation at a local level, allowing states and schools to largely set policies on their own (Jessop & Sabin, 2021; Ehrlich & Ternes, 2021; Salvador, 2021).

The effect of the NCAA's long standing prohibition on athlete NIL rights was substantial. For instance while Kunkel et al. (2021) found that while only a few athletes—mostly in football and men's basketball—had social media accounts with annual engagement value exceeding $5,000, they found that even less-followed athletes could earn extra income through monetizing their NIL on social media, in large part due to athletes being much more engaged than traditional influencers on their social media accounts. They also discredited a frequent NCAA talking point that athletes' brandpower came solely from the athlete's association with the program or institution for which the athlete competes. Similarly, in criticizing a decision by the Indiana Supreme Court holding that use of athlete NIL by sports gambling and fantasy sports platforms fit within the newsworthy value exception to Indiana's right of publicity legislation (see Daniels v. Fanduel, 2018), Conrad (2020) found instead that this use of athlete NIL had significant commercial value for those platforms and that athletes should be compensated for that use.

Adding to these calculations, the college athlete NIL market boomed in the immediate months following its July 1, 2021, start date. *Bloomberg* reported in March 2022 that the NIL market was on pace to reach more than $500 million within its first year with potential to rise to $1 billion depending on continued competition for athlete services (Boudway & Bhasin, 2022). But the unregulated nature of the market by the NCAA has led for many within college athletes to call for the NCAA to step in, especially after several NIL deals clearly tied to an athlete's recruitment or transfer to a particular school came to light. Many of these objectionable deals were tied to new entities, NIL collectives, which—as the name implies—are set up by boosters at a particular school in order to pool their money and offer athletes at that school NIL opportunities, and therefore money. As Kirshner (2022) noted, the money paid by collectives is tied only to "what is nominally promotional activity" and "the amounts paid to some players have made it obvious that the collectives engage in pay-for-play disguised as endorsement or sponsorship money from detached third parties" (para. 6).

The NCAA did step in to approve a new set of guidelines in May 2022, but many commentators have noted that these new guidelines only serve to reinforce its existing barebones guidelines while also leaving the association open to further litigation should they actually seek to enforce their new directives (Christovich, 2022a; Dellenger, 2022; Kirshner, 2022). The enforceability of these guidelines—both practically and legally—remains to be seen. Indeed, Mandel and Auerbach (2022) reporting on the guidelines noted not only that athlete-agents were already gearing up for a quick lawsuit if the NCAA were to attempt to enforce these guidelines but also noted a comment from Ohio State University athletic director and NCAA NIL subcommittee member Gene Smith saying that he knows that the NCAA could get sued over enforcement of its rules.

The Gig Economy

As defined within the literature, the gig economy is a process where short-term discrete jobs, called 'gigs', are advertised by companies through online platforms. On some of these platforms like Freelancer, Upwork, and Craigslist, these workers bid for posted gigs with the platforms merely facilitating communications between the worker and the hiring party. On the other hand, there has been a sharp rise of gig economy platforms like Uber, Lyft, Grubhub, Uber Eats, and Instacart, where the platform sets prices and assigns gigs on their own, usually via algorithmic decision-making (Donovan et al., 2017; MacDonald & Giazitzoglu, 2019).

While in the past a freelancer may have had to start a business and advertise services through more traditional means, gig economy platforms have provided easy access to such opportunities on both short-term and long-term bases. Indeed, a 2018 *Gallup* poll found that 29 percent of all workers in the U.S. had an alternative work arrangement as their primary job and 36 percent of all U.S. workers had at least some sort of work arrangement in the gig economy (McFeely & Pendell, 2018; McCue, 2018).

The increased proliferation of these alternative work formats has led to significant debate as to whether such changes are ultimately good for the U.S. workforce—and if such arrangements conform with existing state and federal employment law. A 2017 Congressional Research Service (CRS) report noted several court cases challenging the contractual assignment of independent contractor status where the plaintiffs claimed that they instead should be classified as employees for the purposes of two federal labor laws—the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA)—and state-level equivalents. Such a distinction is significant under those laws,

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as the FLSA (which generally requires the payment of a minimum wage and overtime compensation for hours worked beyond 40 hours in a given week), the NLRA (which grants protections to most private employees seeking to unionize and collectively bargain employment terms with their employers), and their state-level equivalents only apply to those legally deemed as 'employees' under the law and do not apply to independent contractors. To that end, distinction of whether the challenging worker is an employee or independent contractor is considered by courts to be a threshold question that must be answered before any merits-level questions (e.g. whether the employer did in fact fail to compensate at the minimum wage) can be answered (Donovan et al., 2017, pp. 11-15).

At the same time, distinctions between employers and independent contractors are essential even beyond the confines of the FLSA and NLRA. In fact, the law boasts numerous employment protections that, by definition, only apply to statutory employees. For example, the Family and Medical Leave Act (FMLA), which entitles workers to "unpaid, job-protected leave for qualifying family and medical reasons," only applies to employees as "eligibility for FMLA benefits is tied to an individual's work history with an employer and uses the FLSA concept of employment." Similarly, whereas in traditional employment relationships employers are responsible for paying an employer's share of Social Security and Medicare taxes (and for withholding the employee's share of the same taxes), independent contractors are responsible for paying these taxes on their own as they are deemed to be self-employed. On a more macro level, federal and state unemployment structures are financed by employer taxes and do not extend eligibility to independent contractors (Donovan et al., 2017, pp. 11-15).

A final key distinction between employee and independent contractor status comes in an essential social area: protection against discrimination. Title VII, the cornerstone federal statute protecting against employment discrimination based on race, color, religion, sex, or national origin,[1] only applies to employees, as does the Age Discrimination in Employment Act (ADEA) (see, e.g., Brown v. J. Kaz, Inc., 2009; Garrett v. Phillips Mills, Inc., 1983). Such issues are of ongoing concern in the gig economy space, as a federal lawsuit filed in 2020 has alleged that Uber's use of its passenger "star rating system" to determine which drivers can remain on the platform "constitutes race discrimination, as it is widely recognized that customer evaluations of workers are frequently racially biased" (Liu v. Uber Technologies, 2020, p. 2).[2]

There is significant debate in legal scholarship as to whether workers on gig economy driving platforms should be deemed by courts to be statutory employees for the purposes of these laws. Ultimately, however, the brunt of this scholarship has only led to more questions, concluding that current models of employment law tests are unable to effectively answer the question. For example, Crank (2016) noted that courts in two early employment law cases "plainly advocated for legislative or [higher] court intervention on the issue" with one court "explain[ing] its reservations with applying 'California's outmoded test' for determining employment status" and another court saying that "some factors point in one direction, [while] some point in the other, and some are ambiguous." (pp. 627-628) Ultimately, this author called on the Department of Labor to resolve the ambiguity and "provide courts with uniform direction" and "eliminate the ambiguity caused by the outmoded common law tests" (p. 631).

Bales and Woo (2017) found similarly, arguing that the two traditional employment law tests—the control and economic reality tests—both lead to what can only effectively be deemed a split decision. Ultimately, they felt that the question could only be resolved on a case-by-case basis as the swing of legal opinion depends heavily "not on Uber's app, but how its drivers use the app" where drivers who use Uber more full time are much more likely to be employees than those who use Uber on only a part-time basis (p. 485).

Adding to the ambiguity is the fact that in many cases courts have not even had the opportunity to render a decision on the issue. Kaltner (2018) summed up the issue of whether Uber and Lyft drivers are employees as "unsettlingly settled," arguing that while application of relevant law would seemingly point towards employment status, the presence of presumptively ironclad arbitration clauses in worker contracts and the political unwillingness of federal agencies to intervene has largely prevented courts from reaching the merits in these cases (pp. 51-54). Indeed, after a 2018 California Supreme Court decision and subsequent state legislation created a presumption that gig economy workers are to be deemed employees under California wage and hour law, Uber and Lyft were able in the next year

[1] Additionally, the Supreme Court recently held in *Bostock v. Clayton County* (2020) that such protections were also applicable to LGBTQ status (as under the umbrella of sex discrimination).

[2] It must be noted that Uber's defense in this suit has not rested on the employee/independent contractor question despite the threshold nature of that distinction. Instead, Uber has pointed primarily to a failure by the plaintiff to adequately plead disparate impact as required under Title VII precedent (Motion to Dismiss, Liu v. Uber Technologies, 2022).

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to secure victory on a ballot initiative overturning that presumption after threatening to pull out of the state (Singletary, 2021, pp. 531-535; see also Dynamex Operations West, Inc. v. Superior Court of L.A. County, 2018).

The effects of the classification of gig economy workers like Uber and Lyft drivers as independent contractors rather than employees cannot be understated. A key example of this is in California with Uber and Lyft. The Uber and Lyft-funded ballot proposition in California facially contained several worker protections, including a net earnings floor of 120 percent of minimum wage (Thornberg, et al., 2020). However, in analyzing loopholes contained within the ballot initiative Jacobs and Reich (2019) found when waiting time is included in calculations, the pay guarantee for Uber and Lyft drivers was actually only the equivalent of a wage of $5.64 per hour—which is both below the federal minimum wage of $7.25 per hour and well below California's 2021 minimum wage of $13.00 per hour.

Malos et al. (2018) dissected the overall legal and ethical impacts of the proliferation of gig economy platforms like Uber from both micro and macro perspectives. After noting the "patchwork quilt of differing standards and tests in various jurisdictions" within case law, these authors then noted the more macro impact that an independent contractor-focused gig economy scheme has on the overall labor market. They first frame it as an issue of underemployment, or where workers who are qualified for higher-level positions take lower-level jobs because of job loss, career setbacks, or simply a desire to have more flexibility in their careers.

Malos et al. (2018) note several issues with this underemployment phenomenon. First, they reasoned that gig workers are placed in between social service nets, where they are unable to qualify for unemployment insurance and COBRA health insurance coverage but still must rely on social safety nets like Medicaid if they are unable to work enough hours to qualify for a living wage. Second, Malos et al. argue that as higher qualified workers continue to avail themselves of gig economy opportunities, either as a full-time career or as a side gig, it displaces low-wage workers, including in competing services like more traditional taxis. This problem is exacerbated due to the unpredictability of when workers on platforms like Uber receive gigs, meaning workers on that platform must also concurrently drive for other platforms like Lyft at the same time, further decreasing all-around opportunities. Finally, Malos et al. focused on the psychological problems that arise when higher-qualified workers engage with gig economy work, noting research applying frameworks like relative deprivation theory in underemployment circumstances that has found decreased psychological well-being and decreased physical health due to feelings of exploitation and job-fit mismatch (see also Maynard et al., 2006).

The underemployment effects that Malos et al. (2018) observed are shared throughout the gig economy literature. MacDonald and Giazitzoglu (2019) framed the rise of the gig economy squarely within a growing rise in employment insecurity and labor market deregulation more generally. They describe gig economy work as zero-hour contracts which give no guaranteed hours or income, affording flexibility at the cost of employment security and month-to-month predictability. Moreover, MacDonald and Giazitzoglu note that the rise of the gig economy has been paired with a growth in self-employment, which they frame as "forced entrepreneurship" and "bogus self-employment," which they characterize as worker misclassification dressed up as an opportunity for worker flexibility and growth (p. 731).

Applying the Problems of the Gig Economy to NIL

Structural Parallels Between the Gig Economy and the NIL Space

The new form of independent contractor relationship defined within what is referred to as the gig economy is a particular form of a tripartite relationship. Diaz-Granados and Sheehy (2021), who define this new form of independent contractor relationship as a platform operator-user-provider model (or 'PUP' model), argue that such a model works to "aggregate previously disaggregated information, consolidate it, and form a market which in turn [is targeted] towards a larger audience: Users" (p. 1001). As Diaz-Granados and Sheehy argue, the PUP economic model "inserts an intermediary, a third party into what were previously private, personally based one-on-one transactions and interactions" (p. 1027).

While the economy surrounding the college athlete NIL market is still new, a similar tripartite relationship has already begun to take shape in many NIL-related relationships. As with the gig economy—the roots of which are based on traditional independent contractor relationships between independent businesses—NIL relationships are on their face no different than the athlete endorsement deals that have been ever-present in professional sports for decades. But while in professional sports athletes set up such deals themselves (or through an agent representative), college NIL

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has, like the gig economy, been transformed into a PUP economic model. The differences are that instead of a technological platform like the apps used by Uber and Lyft drivers, business entities known as NIL collectives facilitate gig relationships between college athletes and entities that would hire them.

NIL collectives are entities separate from a university but exist to support athletes at a particular university by setting them up with NIL deals and, as a result, financial compensation. Collectives are operated by athletic boosters—a term of art defined by the NCAA as "any individual, independent agency, or corporate entity who is known by a member of the institution's athletics administration to have participated in, or to be a member of, an agency or organization promoting the school's intercollegiate athletics program" (Nakos, 2022).

As noted by Nakos (2022), three types of booster-driven[3] NIL collectives have emerged. The first form of collective, marketplace collectives, bring together athletes and third-party businesses and sometimes even act as an agent representative for the athlete in negotiations with these third-party businesses. Booster funds for this form of collective are used to support logistics, including sometimes paying staff members to help facilitate these NIL opportunities. A second type, termed by Nakos as donor-driven collectives, pool together money from donors to themselves create endorsement opportunities for the athletes and pay the athletes themselves for their performance endorsing activities by collective members or the collective itself. This form of collective, according to Nakos, is the most common form of collective. The third form of collective, dual collectives, simply combines the two models: functioning to both facilitate NIL deals between athletes and third parties and to create such opportunities themselves.

The first and third forms of collectives, by helping to facilitate NIL deals between athletes and third parties, arguably most closely resemble gig economy platforms like the Uber and Lyft apps. When one takes a closer look, the second form, the donor-driven collectives, perhaps resemble the Uber and Lyft business model even more. After all, while Uber and Lyft claim that their customers are the drivers, not passengers, rides are booked by drivers through their apps with Uber and Lyft issuing payment to the drivers themselves (after taking a cut) rather than having the passengers pay the drivers directly. The donors of donor-driven and dual-model collectives are in a sense the passengers in this analogy, with the collective both creating economic opportunities and facilitating them to the athletes. The "platform operator-user-provider" model formulated by Diaz-Granados and Sheehy (2021) for the gig economy is relatedly a "collective-donor-athlete" model in the NIL space.

The sharp similarities between the emerging NIL economy and the gig economy model exist even beyond their economic structure. Indeed, the NIL relationship between athletes, collectives, and third parties give rise to significant legal and ethical debate in the same way that the ethics and legality of the gig economy models are under constant debate. Those legal and ethical congruences are discussed further below.

Parallel Legal Concerns Between the Gig Economy and the NIL Space

Shifting Views on the Employment Status of College Athletes

Paralleling the gig economy, college sports also has a rich history of claims to athlete employment status—albeit against defending claims by the NCAA and schools that athletes are "amateurs" or "student-athletes" rather than simple independent contractors (see Abruzzo, 2021). But as with the gig economy, there has yet to be a clear answer on the question of whether college athletes are employees.

Employment law challenges to amateur college sports structure first arose in the worker's compensation context with claims by athletes made following disabilities suffered during games and practices, and found some early success. In an early case, *Van Horn v. Industrial Accident Commission* (1963), the mother of a Cal State Poly football player killed in a plane crash while returning to California from a game in Ohio prevailed on her application for death benefits. The rationale in this case was relatively straightforward, with the California state appellate court finding that the payment of an athletic scholarship clearly constituted a contract of hire under relevant state law.

Two years after this decision, however, the California legislature amended its worker's compensation law to explicitly exclude athletes who receive "no compensation for such participation other than the use of athletic equipment,

[3] There are also some collectives that are run by the players themselves, including those at Auburn, Kansas State, and Texas (Nakos, 2022). These collectives are outside the scope of review for this article, as the player-driven nature of these collectives place them outside the PUP model under review herein.

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uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto" (Graczyk v. Workers' Compensation Appeals Board, 1986, p. 1005). Additionally, the NCAA around this time began ramping up usage of the term "student-athlete" as a framing mechanism in order to cast college athletes not as laborers but instead as students participating in intercollegiate sports as a voluntary, extracurricular activity (see, e.g., Lonick, 2015; Harry, 2020; Abruzzo, 2021).

After these changes, courts in worker's compensation cases would universally disfavor a finding of an employment relationship between college athletes and schools. In *Graczyk v. Workers' Compensation Appeals Board* (1986), the California Court of Appeals relied on California's legislature's shift in denying a football player's worker's compensation claim for numerous head, neck, and spine injuries suffered while playing at Cal State Fullerton despite the earlier *Van Horn* precedent. And these attitudes would be evident even outside of California. In *Rensing v. Indiana State University Board of Trustees* (1983), the Indiana Supreme Court reversed a lower court finding that the plaintiff varsity football player who was left a quadriplegic after an injury in a spring football practice could receive these payments, finding that college athletes are not employees in part due to the NCAA's strict rules "against 'taking pay' for sports or sporting activities." This court found that an athlete could "be considered only as a student athlete and not as an employee" as defined under relevant state law given these and other rules "designed to protect [the athlete's] amateur status" (pp. 1173-1175).

Following the Supreme Court's 1984 decision finding that the NCAA's limits on television exposure violated antitrust law, college sports financially flourished, with revenue in NCAA Division I football and basketball jumping from $922 million and $41 million respectively in 1985 to a combined $13.5 billion in 2016 (NCAA v. Alston, 2021; Ehrlich, 2022). But as noted by Baker and Brison (2016), "none of these new monies have been passed directly into the hands of college football [and basketball] players" (p. 332). Due to this growing disparity, athletes and advocates would take steps towards the start of the 21st century to unionize football and basketball athletes with an eye on collectively bargaining for both a share of this revenue and for increased health benefits (Edelman, 2017).

In 2013, former UCLA basketball player Ramogi Huma and former University of Massachusetts basketball player Luke Bonner formed the College Athlete Players Association (CAPA), a union created to directly represent athletes in their attempts to unionize and collectively bargain with universities. CAPA was shortly thereafter able to recruit football players at Northwestern University to seek union status on their behalf by petition to the National Labor Relations Board (NLRB). This petition was, unsurprisingly, contested by Northwestern University itself, who asserted that college football players were not employees of the university as defined under the NLRA (Edelman, 2017).

At first, the Northwestern football players were able to claim significant victory, as Region 13 of the NLRB ruled that the athletes did in fact constitute employees under the NLRA. Supporting this ruling, the regional board found that the football athletes performed services for Northwestern in exchange for the compensation of a free education and living stipends and that Northwestern benefited from the exchange to the tune of $235 million over a prior nine-year period. Turning to the all-important issue of control, the regional board found that Northwestern coaches had substantial managerial influence on their athlete, providing them with daily hour-by-hour itineraries of their activities from 5:45 AM to 10:30 PM and that the athletes devoted 40 to 50 hours per week on football-related activities for the university. As a result, the regional board found that the athletes did in fact constitute employees under the NLRA definition of the term and were thus eligible to unionize and collectively bargain (Edelman, 2017).

Northwestern University would appeal this ruling to the full NLRB, who in April 2014 agreed to hear the case. After a sixteen-month delay, the NLRB would reverse the regional board's ruling, but on different grounds than the merits of the case. Instead of finding that college athletes were not employees under NLRA, the full NLRB would instead decline to assert jurisdiction over the football players' appeal. Their reasoning was based on the limits of the NLRA and their given administrative authority under the statute; the NLRA only applies to private employers, not public, government employers. As Northwestern University was the only private university in their conference, the board argued that asserting jurisdiction over this one employer while unable to assert jurisdiction over similarly situated employers in the industry would not serve to promote stability in the college sports labor environment (Edelman, 2017).

The NLRB's reasoning in *Northwestern University* would be sharply criticized among legal commentators, with many deeming the decision to be a "punt" to avoid deciding the college athlete employment issue (Edelman, 2017, p. 1640; see also, e.g., Pollack & Johns, 2015; McCann, 2015; Foster, 2016). But regardless of these critiques, the NLRB decision would represent a second area of the law that refused to recognize college athletes as employees.

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Undeterred by this setback, college athletes and their advocates would swing the legal battlefield over college athlete employment rights to a third area of the law, shifting from state worker's compensation rights and unionization to federal wage-and-hour law. Challenges under wage-and-hour law began with *Berger v. NCAA* (2016) where two women's track-and-field athletes at the University of Pennsylvania sued their school, the NCAA, and the other NCAA Division I institutions claiming that they had violated the FLSA by not paying their athletes a minimum wage. The Seventh Circuit Court of Appeals denied this claim, relying in large part on the body of case law in the worker's compensation space rejecting athlete employment.

But not all of the judges on this Seventh Circuit panel were fully convinced. While he joined in the majority's decision relative to Ivy League (and thus non-scholarship) track-and-field athletes, one judge on the panel wrote in a separate opinion that the calculus used in the instant decision may not so apply to athletes in the "revenue sports" of men's basketball and football. Seemingly inviting challenge from plaintiffs in these cases, this judge wrote that in the revenue sports "economic reality and the tradition of amateurism may not point in the same direction" because "[t]hose sports involve billions of dollars of revenue for colleges and universities" (p. 294).

Shortly thereafter, another court had an opportunity to decide such a claim in *Dawson v. NCAA* (2017; 2019), a case involving a similar challenge but this time involving a plaintiff who played college football at the University of Southern California (USC), a prominent high-revenue football program. The trial court would diverge from Judge Hamilton's reasoning, finding that all college athletes were not employees for largely the same reasons expressed in *Berger* and that revenue generation did not matter (Dawson v. NCAA, 2017, p. 406). On appeal, however, the lower court decision was narrowed significantly, though for a very specific reason: the plaintiff in this case had only sued his conference and the NCAA while neglecting to sue the most direct purported employer, his school.[4] Given this deficiency, while the appellate court found that the athlete was not an employee of his conference or the NCAA, they explicitly left "the pure question of employment . . . for another day" (Dawson v. NCAA, 2019, p. 907).

While the narrow *Dawson* decision certainly did not make a conclusion on athlete employment one way or another, another court case ongoing at the same time did come very close to such a conclusion—favoring the athlete. In *Livers v. NCAA* (2018) a court left open the possibility of athlete employment status under the FLSA writing that the plaintiff's complaint "detailing the reliance on the financial benefits he received as a Scholarship Athlete, including his personal economic dependence on his scholarship" delineated an employment claim seen as "plausible on its face" (p. 5). While *Livers* was voluntarily dismissed by the plaintiff before trial for unknown personal issues, these two decisions combined represented to one commentator an "open window" that "left open the idea that revenue-sport college athletes may be employees of their colleges and universities under FLSA definitions of employment" (Ehrlich, 2020, p. 3).

These apparent shifts in attitudes towards athlete employment would be strongly buoyed in the summer of 2021 when the Supreme Court issued their long-awaited decision in *NCAA v. Alston* (2021). While *Alston* dealt with antitrust law, not employment law, both *Berger* and the district court's decision in *Dawson* heavily cited another Supreme Court antitrust decision dealing with the NCAA: *NCAA v. Board of Regents* (1984). While the Court in *Board of Regents* had ruled against the NCAA, Justice John Paul Stevens writing for the majority noted in his conclusion the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports" and wrote that there "can be no question but that [the NCAA] needs ample latitude to play that role" (p. 120A).

In both *Berger* and the lower court's decision in *Dawson*, this "ample latitude" had played out in affirming the amateur characteristics of college athletes, with the Seventh Circuit in *Berger* holding that the "long-standing tradition" of amateurism noted in *Board of Regents* "defines the economic reality of the relationship between student athletes and their schools" and that traditional employment law tests favoring an employment finding fail to "take into account this tradition of amateurism" (Berger v. NCAA, 2016, p. 291). In *Alston* (2021), however, the Supreme Court explicitly rejected this "ample latitude" language, finding it to be an unbinding "passing comment" that could no longer be sustained in today's environment given the fact that "the market realities [of college sports] have changed significantly since 1984" (p. 2158).

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[4] Ehrlich (2019) speculated that the plaintiff's failure to include USC was that he "did not want to harm his alma mater" but found no evidence to support that conjecture (p. 86). In a later article written after the appellate court decision, Ehrlich (2020) again noted a lack of evidence explaining the deficiency, finding that while the appellate panel "focused heavily on USC's absence at oral argument as a potentially critical failure of Dawson's case, the panel never directly asked why USC was not included (nor was it unilaterally offered by council [sic])" (p. 10).

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It would not take long for the Supreme Court's shift in attitude towards the NCAA to be reflected in employment and labor settings. Just over three months after *Alston* NLRB general counsel Jennifer Abruzzo (2021) released a memo stating her opinion that NCAA Division I football and basketball athletes should be deemed employees under the NLRA. Citing *Alston*, Abruzzo wrote that the decision "is likely a precursor to more changes to come in collective athletics" including additional shifts in compensation rules that could bring athletes "more fully within 'employee status' under the law" (p. 5).

A district court in Pennsylvania would then take this one step further, finding that a class of college athletes—including athletes in non-revenue sports like swimming and diving, tennis, and soccer—could plausibly be held to be employees under the FLSA. The court in this case explicitly rejected the prior reasoning of *Berger* and *Dawson*, tying them to the attitudes of *Board of Regents* explicitly repudiated in *Alston*. In *Alston*, the court reasoned, the Supreme Court "rejected the NCAA's argument that *Board of Regents* 'expressly approved its limits on student-athlete compensation—and [that] this approval forecloses any meaningful review of those limits today'" (Johnson v. NCAA, 2021, p. 5).

This district court case is under appeal as of this writing (see Chen, 2022), so it remains to be seen whether its findings in favor of athlete employment will be retained moving forward. Still, the shifts by the NCAA to allow NIL payments have been seen as moving the needle even further towards a finding of athlete employment. Further activity in this regard—including athlete success in the ongoing *House v. NCAA* (2021) litigation attempting to recover likeness payments for television broadcast agreements or movement in California's new bill seeking to force universities in the state to share revenue with revenue sport athletes (Libit, 2022)—could continue to shift the calculus towards a determination of athlete employment.

Indeed, NLRB general counsel Jennifer Abruzzo (2021) also pointed towards the NCAA's (forced) allowance of NIL rights as additional evidence to support her rationale that athletes are statutory employees, writing that "[t]he freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income" (p. 6). Others—including high-level federal courts—have expressed similar opinions. For instance, to justify rejecting a district court remedy requiring yearly $5,000 payments to athletes in exchange for their NIL the Ninth Circuit Court of Appeals in *O'Bannon v. NCAA* (2015) wrote:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status. (pp. 1078-1079)

As Corrada (2020) argued, this language makes it "hard to imagine what rules the NCAA might devise that will not further dilute their claim that student athletes in revenue generating sports are amateurs and not employees of a college or university" (p. 198). Now that, as the Ninth Circuit prophesied, the plaintiffs have "captured the full value of their NIL" through litigation and legislation forcing NCAA action on the issue, it seems that the line in the sand drawn by the Ninth Circuit has been crossed, belying their conclusion that the NCAA has "surrendered its amateurism principles entirely" and transitioned "to minor league status" (O'Bannon, 2015, p. 1079).

At this juncture, however—and parallel to similar remaining questions in the gig economy space—the question of whether college athletes function as employees while participating in intercollegiate sports remains uncertain and unresolved by the courts. Moreover, as relationships between athletes, schools, and compensation schemes become more complex, more questions about who may employ athletes may continue to arise.

NIL Gigs and College Athletes as Employees: The Issue with Collectives

Of course, with the proliferation of NIL deals schools are no longer the only employers of college athlete labor. The firms, brands, and individuals who hire college athletes for NIL deals employ those athletes in service of a cause, particularly given the NCAA's interim guidance that any NIL deals signed by athletes must have an NIL-based "quid

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pro quo" rather than simply to induce that athlete to attend a particular school or to operate as "pay for play" in disguise (NCAA, 2021a).

The traditional NIL arrangement—one where an athlete markets services as an endorser to businesses—is unquestionably an independent contractor relationship. However, there is a question whether a certain type of NIL deal could fit into the employment context: the newer trend of NIL deals signed by athletes with NIL collectives. The NIL collectives formed thus far vary wildly in form and structure, but all serve one primary goal: to aid college athletes at a particular affiliated school in securing NIL contracts. As Brown (2022a) explains, most athletes—particularly those in non-revenue sports—are likely not famous or successful enough to secure professional representation to track down NIL deals, and for this reason the NIL marketplace is very inefficient: athletes have limited information about what to charge and brands have limited information about how to actually use athletes' services. As such, collectives function in part to simplify the NIL dealmaking process by serving as brokers connecting athletes to NIL opportunities and vice versa (see also Dodd, 2022).

At the same time, collectives also exist to serve another group of stakeholders: fans. Per Brown (2022a), "[v]irtually all" collective models also create NIL opportunities themselves by pooling money from different brands, fans, and boosters, and then allocate that money to athletes who "opt into the collective" (para. 11). In exchange, the athletes engage in work for the collective and the fans who engage with it, including brand work and social media appearances.

As an illustrative example, Success With Honor, one of two NIL collectives formed to support athletes at Pennsylvania State University (Penn State), was formed with the primary goal of creating economic opportunities for all Penn State athletes. The collective functions as a monthly subscription service where subscribers receive access to a variety of different athlete services. Subscriptions start at $10 per month, where fans receive exclusive athlete interviews and content, access to exclusive supporter events, access to athlete meet-and-greet sessions, and an entry to a raffle for autographed memorabilia. However, fans can pay up to $500 per month, where they also receive an autographed team calendar, custom athlete video shoutouts, and both virtual and in-person one-on-one athlete training sessions. Subscribers can, upon election, choose specific sports to focus their financial contributions and received services. As of early April 2022, the collective has already raised over $120,000 in subscription revenue—despite only being launched in late March 2022 (Wogenrich, 2022; Success With Honor, n.d.).

Other collectives have more specific focuses. Indeed, while many collectives have been formed under nonprofit designations—despite questionable nonprofit bonafides (see Brown, 2022b)—many have been formed to be charitable endeavors, connecting and compensating athletes for community engagement opportunities. For example, the Notre Dame-affiliated Friends of the University of Notre Dame (FUND) compensates athletes for appearances and social media posts in support of a local charity, with FUND simultaneously donating a portion of its proceeds to the charity. Players who sign with FUND are "expected to engage with the organization, not simply clock in for an hour and then leave" (Sampson, 2022, para. 8).

While there are several legal tests within the law to differentiate between independent contractor and employment relationships depending on jurisdiction (i.e. which state) and applicable statute or regulatory authority (i.e. the FLSA versus the NLRB versus the IRS), they all generally boil down to several common factors that are weighed by courts under a balancing test scheme. To this end, several federal appellate circuits have crafted their own multi-factor balancing tests in an attempt to establish firm doctrine distinguishing between employees and independent contractors. These tests are generally derived from the Supreme Court's holding in *United States v. Silk* (1947), where the Court laid out a few factors for the Social Security Agency and the courts to use, including "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation" as "important for decision" (pp. 716-719).

While the wording of the various appellate court FLSA tests varies between the circuits, due to this common origin there is significant overlap. Indeed, arguably the most prevalent version of the test comes from the Third Circuit Court of Appeals in *Donovan v. DialAmerica Marketing* (1985). That test balances six factors: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and, (6) whether the service rendered is an integral part of the alleged employer's business.

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Based on these tests, regardless of the form or purpose, the subscription model utilized by collectives like Success With Honor does raise certain employment-related questions particularly since, per reporting, some of the contracts entered into by athletes with these collectives garner exclusive access. In March 2022, *The Athletic* reported that a five-star football recruit signed a deal with an unnamed collective that would pay him more than $8 million by the end of his junior year in college, including $350,000 in upfront compensation. In return, the athlete gave the collective exclusive rights to use of his NIL, allowing the collective to negotiate outside opportunities on his behalf. Of note, the contract was reportedly written in a way to dissuade the athlete from transferring to a different institution, as the exclusive rights would follow him and prevent him from making paid appearances at his next school (Mandel, 2022).

This exclusive access would seemingly fit right into the right-to-control test relied upon by many courts as a threshold determination of employment status. If the collective in question has the right to exclusive control of the athlete's NIL opportunities and is able to negotiate opportunities on behalf of the athlete (presumably then directing the athlete to engage in those opportunities), they exercise a significant amount of control over the athlete's activities. As noted, exclusivity is not the only factor employed by courts to distinguish between employees and independent contractors. But many of the other aspects of the collective/athlete relationship yield comparable conclusions, given that the structure of the relationship is similar—if not identical—to a traditional employment relationship even without exclusive access and control over the athlete's NIL rights.

While in some ways the right of the collective to negotiate opportunities on behalf of the athlete resembles an agent-principal relationship (e.g., the relationship between a sports agent and his or her signed athlete), in an agent-principal relationship the agent would be compensated by the athlete by receiving a cut of the appearance fee. But here, the compensation arrangement is flipped on its head; the collective receives all of the money from the athlete's appearance after paying the athlete for salary-like payments irrespective of how many appearances the athlete makes for the collective. For example, the structure of the $8 million collective deal reported by Mandel (2022) has set monthly payments outlined via contract rather than set per-appearance payouts better befitting an independent contractor relationship. Similarly, Staples (2022) found in a profile of Texas A&M collective The Fund that the collective pays each athlete on an agreed-upon schedule with all money for each individual appearance going directly to The Fund's LLC formation. In fact, athletes who want to keep their own marketing agent are required to have revenue from deals set up by that outside agent go through The Fund's LLC with The Fund—not the athlete—paying the agent's commissions.

Moreover, the agent here—the entity being directed by the principal—is the athlete, not the collective, as the collective is the party negotiating opportunities and directing the athlete to perform in those opportunities on behalf of the collective. This is counter to non-collective NIL models, where the athlete is engaged on their own behalf to find NIL opportunities and are paid per appearance. The differences in terms of who controls where and when the athlete engages in NIL opportunities are stark.

Turning back to the six-part employment test from *Donovan v. DialAmerica Marketing* (1985) outlined above, these facts would seem to suggest that the first factor, the degree of the alleged employer's right to control the manner in which the work is to be performed, leans in favor of an employment relationship. And the second favor, the alleged employee's opportunity for profit or loss depending upon his managerial skill, also leans towards employment for related reasons. While in standard NIL arrangements the athlete's own managerial skill leads to opportunities, and therefore profit or loss, when the collective acts as a broker—especially when that engagement is on an exclusive basis—the athlete's own managerial skill is removed from the equation entirely. The only managerial skill that matters is that of the collective, as they are the entity engaged in managing the athlete's NIL engagement.

One factor that could seemingly be found to lean against a finding of an employment relationship is the fifth factor, the degree of permanence of the working relationship. NIL deals are generally limited in length, often to the period of time that the athlete is in school. Moreover, courts are clear that this factor is not solely dependent on the duration of the working relationship and in fact relies more on the number of hours worked and the exclusivity of the working arrangement. For exclusive NIL arrangements like the infamous $8 million deal reported by Mandel (2022), that subfactor could lean slightly towards employment. However, the vast majority of athletes' time is not spent engaging in NIL activity, as the athlete's primary labor is in the performance of athletic services for their schools. This certainly shows nonexclusive access to the athlete, pushing this factor towards independent contractor status.

Other factors are less clear. The third factor, the alleged employee's investment in equipment or materials required for his task, or his employment of helpers, for instance, depends entirely on the individual athlete and the tasks asked

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of him and her by the collective. For most athletes, the collective will remove the necessity of needing to hire an agent or manager to assist with NIL-related tasks, and for the social media services that make up a large portion of athlete NIL engagement (see Opendorse, 2022), athletes will likely use their own equipment (i.e. computers and cellphones) to provide services. Similarly, the fourth factor, whether the service rendered requires a special skill, is wholly dependent on the service performed. Social media popularity and engagement does not necessarily require a special skill, just special status, and thus that activity would push this factor towards employment. On the other hand, the virtual and in-person one-on-one athlete training sessions offered to $500 per month subscribers by the Penn State Success With Honor collective would absolutely require special skills in a particular sport, thus favoring an independent contractor relationship (Success With Honor, n.d.).

The final factor, whether the service rendered is an integral part of the alleged employer's business, is perhaps the most fascinating to discuss in the context of NIL collectives—and may push the calculus strongly in favor of employment. In some ways, this would be a case of first impression for courts, as the NIL collective business model is so radically different than most conceptions of a traditional business model. Rather than to make money by employing labor, the stated purpose of an NIL collective *is the labor itself*, given that the primary purpose of each collective is to funnel money to athletes through NIL opportunities. As such, the precise wording of this factor does not seem to fit; the service rendered—the performance of the NIL opportunity—is not an integral part of the alleged employer's business, as it seemingly does not matter much what service the athlete provides, so long as they are paid for doing so.

But this is where the placement of NIL opportunities within the gig economy yields an especially productive comparison, as a similar business model does actually exist in gig economy platforms like Uber and Lyft. Collectives, like gig economy platforms, provide opportunities for workers to engage in NIL 'gigs' by directing them to engage in specific opportunities. This is functionally identical to how the Uber and Lyft platforms direct drivers to pick up certain passengers for rides. Indeed, Uber and Lyft have frequently argued in court that their business model is not to provide rides, but instead to provide a platform to give drivers opportunities to run their own driving businesses (Rosenblatt, 2019). This interpretation replicates the NIL collective model almost precisely; as with collectives, Uber and Lyft's interpretation of their role makes the actual services provided by their laborers immaterial, as what matters instead is that the laborers are connected with customers and are paid for providing services.

Notably, a court has addressed this argument in relation to Uber, finding this factor to favor employment. In *O'Connor v. Uber Technologies* (2015), a court noted that "it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers" (p. 1142). Pointing to the revenue sources as a defining factor, the court concluded that despite its platform-based argument, Uber's revenues did not come from its platform but rather from the generation of rides by its drivers. Along these lines, this court noted that Uber billed riders directly for the entire amount of the fare charged rather than billing drivers for a promised cut of the fare later. Moreover, the court found when looking at the service agreement contracts that Uber only made money if its drivers actually transported passengers, rather than from use of the platform.

There are some differences here between the court's findings in relation to Uber and the facts of the NIL collective model. Like Uber, NIL collectives do collect revenues—as they need to in order to distribute money to the athletes—but for those collectives engaging with a subscription service model those revenues are not entirely dependent on nor directly tied to the athletes performing services for subscribers. Rather than receiving a cut of each performed service, collective subscriptions are paid up front. Subscribers would presumably be upset and may unsubscribe if they do not receive promised services from the opted-in athletes, but the transaction is not nearly as direct as the transaction with Uber.

Taken as a whole, the similarities between the models outweigh the differences. Like Uber, the revenues received by NIL collectives are inextricably tied to the athletes and the NIL services they provide. After all, the NCAA's NIL rules require some sort of quid pro quo arrangement; NIL collective models that simply collected subscription revenue and distributed it to athletes without documented performance of labor in exchange would compromise the athlete's eligibility (NCAA, 2021a). Furthermore, like Uber the collectives directly receive subscription revenue and later distribute shares to athletes, rather than the other way around.

Overall, the balance of the six factors would seem to at least lean towards employment, as at least three of the factors—including the ever-important control factor—seem to lean towards showing an employment relationship. At the same time, however, the wide variance of NIL collective models makes generalization difficult; most challenges would

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have to be made on a case-by-case basis. Moreover, other questions arise regarding schools' potential role as joint employers, particularly in states like Tennessee and Mississippi where NIL laws have been explicitly amended to allow more direct involvement between NIL collectives and their affiliated schools (see Dosh, 2022). Given the extreme recency of the NIL collective trend—and thus the understandable lack of actionable litigation giving any sort of guidance—it remains to be seen whether courts would be receptive towards the idea that NIL activity changes the calculus on college athlete employment with their schools, their NIL collectives, or both.

Parallel Ethical Concerns Between the Gig Economy and the NIL Space: Transferring the Duty of Compensation from Employer to Labor

The gig economy relationship between athletes, schools, and entities hiring athletes to NIL deals is deeply complicated from an ethical perspective. In some ways, the relationship is vastly different than other gig economy models due to the simple fact that unlike with platforms like Uber and Lyft, who provide compensation for their drivers in exchange for giving passengers rides, the primary employer of athlete labor is their schools, not those providing NIL opportunities. But in some ways there is a similar tripartite relationship with Uber and Lyft, as a driver is not paid until a customer pays the platform for the services. But with NIL deals, there is a distinct separation between an athlete's school and the NIL deal where the NIL deal can (and often does) exist independently without any involvement by the athlete's school.

This level of separation is part of the problem. A fundamental aspect of any labor relationship is the duty of compensation: a worker performs work for an employer, and the employer provides contractual consideration through compensation. Even with NIL, the primary portion of the athlete's labor—participation in sports—is still price fixed by the primary employer of that labor to in-kind benefits like scholarships (see Ehrlich, 2020). More direct monetary compensation is now allowed, but is only available through NIL deals—which require *additional labor* from the athlete. Put another way, the NIL market in practice is roughly equivalent to a scenario where Uber workers are not permitted to receive a wage for their driving, but are allowed to make money selling self-created merchandise to their passengers.

For this reason, while NIL may have opened doors for athletes to realize some aspects of their value, the structure still empowers colleges and universities to extract economic rent from the athletes competing at their institutions. While there are various definitions of the term, economic rent can be considered the amount of revenue a product or service generates beyond what would be expected in a world with no market imperfections. In college athletics, this difference is equivalent to the discrepancy between the cost of labor (which, due to imperfections in the markets for athletes' labor, would nominally be the cost of a college athletic scholarship) and the revenue generated by the athlete's performance (see, e.g., Brown, 1993; Sanderson & Siegfried, 2018). For highly marketed sports such as football and men's basketball, prominent athletic teams can extract significant sums of economic rent by virtue of limiting direct compensation to athletes despite their athletic performances generating billions in combined revenue from television and ticket sales. NIL has not changed this reality.

Of course, while not framed as such by internal stakeholders within college sports, many athletes do receive some compensation in exchange for this original labor: a scholarship to the school that they attend and play for in intercollegiate athletic competition. Yet the nominal value, or listed cost, of an athletic scholarship can be misleading. Unless colleges are operating classrooms and dormitories at capacity, the opportunity cost of an athletic scholarship to the university is close to zero since the athlete is not replacing a tuition paying student (see Rascher et al., 2019). Furthermore, research shows that over half (60%) of men's basketball players produce more revenue for their institutions than the maximum possible nominal value of a scholarship—with higher profile players generating up to 80 times the value of a scholarship (Lane et al., 2014, p. 253). Similarly, research shows that the value for starting football players at BCS (now Power Five) institutions ranges from $120,000 to $1.4 million per year, with some star players being worth up to $4 million per year (Goff et al., 2016). Allowing athletes to profit from NIL does not mitigate the reality that scholarships, as compensation, routinely fall well short of realizing the economic value of athletes in high profile sports.

Moreover, not all athletes receive scholarships to compensate them. According to the NCAA, only 57 percent of athletes at the Division I level receive athletics aid—a number that merely "includ[es] some who receive full scholarships and additional cost-of-attendance stipends" (NCAA, 2021b). Full athletic scholarships are only available in six sports: football, men's basketball, women's basketball, women's gymnastics, tennis, and volleyball (Eytel, 2020). Regardless of revenue, these athletes do provide both significant labor and benefits for their universities. The

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2021 Women's College World Series (softball) averaged 1.2 million viewers across the tournament, with its most viewed game reaching 2.1 million viewers (Brennan, 2021). Simply because athletic departments have historically chosen to support football and men's basketball more than other sports does not mean that other sports or athletes do not or cannot generate value for their institutions.

As with the gig economy, NIL is often framed by college sports stakeholders as creating entrepreneurial opportunities, where athletes can in effect start their own business through the use of their name and likeness (see, e.g., Birkle, 2021). And in many cases, these opportunities do take the form of true entrepreneurship; for instance University of Iowa men's basketball star Jordan Bohannon started a t-shirt store for his various catchphrases (Davis, 2021) and two football players were co-founders of the popular NIL platform Dreamfield (Adelson, 2021).

More often than not, however, the NIL opportunities afforded to athletes—particularly those afforded to them by NIL collectives—take the form described by MacDonald and Giazitzoglu (2019) as "forced entrepreneurship" or "bogus self-employment" (p. 731). For example, the opportunities offered within most collectives where athletes are directed to engage with subscribers can by no means be considered an entrepreneurial type of position, particularly the salary-like nature of the compensation agreements. And for athlete NIL arrangements that do not involve a collective, NIL opportunities in general are true zero-hour contracts where athletes are given the flexibility to only work if and when they desire, but have no guarantee of income—even if they put in the unpaid labor to seek out opportunities and fail.

Additionally, shifting the duty of compensation from the schools—the purported employers of the athletes—over to the athletes themselves also adds a significant transfer of risk and adds layers of potential exploitation. Such a transfer is a standard issue in the gig economy, as independent contractors shoulder a significant level of responsibility that employers generally bear for their employees, including workplace injuries (which would be covered by workers compensation), ensuring that proper taxes are paid, and avoiding nonpayment by less forthright clients (Husak, 2019).

Just as with gig economy structures, NIL does not afford athletes much needed societal employment benefits like workers' compensation or long-term health care coverage (Blackistone, 2022). Under the current model athletes are left without the protections afforded to them as employees under the various federal and state statutes protecting employees from harassment, injuries, and general mistreatment. As LeRoy (2020) notes, the few statutes and common law principles that apply similar safeguards to students (e.g., Title IX and negligence claims) are flimsy, allowing school administrators to "exploit a school's internal complaint system to ignore or hide complaints" (p. 107). Instead, responsibility for athlete health-and-safety has started to be picked up by NIL collectives in limited cases; Penn State collective We Are NIL announced in September 2022 that they are attempting to raise $6-10 million to provide permanent total disability insurance, though that offer will only be extended to top football athletes with NFL potential (Christovich, 2022c). This allows colleges, conferences, and the NCAA to profit from athlete labor while avoiding significant responsibilities and government oversight that could benefit athletes.

Lack of employment status for college athletes is also important because it allows universities and coaches to continue playing a gatekeeping role in disseminating information about participation in college athletics. An NCAA funded study found in May 2022 that nearly half of college athletes want more resources on tax literacy, financial education, and how generally to navigate NIL opportunities (Johnson, 2022; Christovich, 2022b). However, commentators have noted in criticizing the NIL and NIL collective models that the worker in college sports is a college student who is not equipped to independently research and evaluate such risks (see, e.g., Moglia, 2021). In a study of former college athletes, Horner, Ternes, and McLeod (2016) noted that whether athletes reflected positively or negatively on the return on investment from college sports was largely determined by coaches and administrators who were often the only sources of information about athletic participation, and whose advice often reflected their college's short-term athletic goals. Athletes relied on coaches and administrators to guide them on scholarships, playing requirements, and academic eligibility—and in some cases these athletes reported being misled by university officials (Horner, Ternes, and McLeod, 2016). NIL adds a potentially insidious layer of exploitation to this already problematic information delivery system, as decisions on information sharing by coaches, administrators, and now booster collectives may have implications on an athlete's ability to monetize their NIL. Without the protection of employment status and potential collective bargaining it is difficult to imagine athletes not being at the mercy of schools and boosters for this information—significantly increasing the chances for exploitation.

For professional athletes, the player's agent would be a key source of information on the endorsement market. In college sports, the utter lack of regulatory authority over agent representation in most states—and the lack of appetite by states who do have agent laws to enforce them (Associated Press, 2010)—only serves to exacerbate the problem.

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Journalist and frequent NIL employer Brown (2022c) noted that in his experience many of the agents purporting to represent athletes in proposed NIL arrangements end up being unlicensed and underqualified undergraduate students. Others have noted that certified agents find the profit margins in the market to be generally not worth the effort (Holden et al., 2022). Representation issues recently led to problems for Miami men's basketball player Isaiah Wong, who was forced to quickly backtrack from comments made by his agent that Wong would transfer if his NIL deal with local company LifeWallet were not renegotiated with increased compensation (Givony & Borzello, 2022).

Thus, with how it is currently crafted, NIL adds more risk and responsibility for athletes to bear—all of which could be lessened through an employment model where their school or NIL collective shoulders more of this burden. In this regard, the ethical concerns attached to gig economy structures merely add additional burdens to those already existing in the athlete-school relationship. These concerns on balance call into question whether NIL truly allows for flexible entrepreneurial opportunities or instead simply reframes athlete labor as the same sort of "bogus self-employment" represented in the gig economy (MacDonald & Giazitzoglu, 2019, p. 731).

Conclusion and Suggestions

NIL in college sports is an exciting development for athletes. Athletes are now permitted to earn compensation in a wide variety of deals that in many ways increase connections to fans and other stakeholders, creating a beneficial symbiotic relationship that may also overall raise awareness of sports like women's basketball that have suffered inequities in the past (see, e.g., Jessop & Sabin, 2021; Schafer, 2022).

However, paralleling the arguments by scholars that gig economy work is a poor substitute for traditional employment structures (Webster, 2016; Donovan et al., 2017; Jacobs & Reich, 2019; MacDonald & Giazitzoglu, 2019), we urge college sports stakeholders not to view NIL as sufficient gains to counter the long-held inequities between the level of compensation provided to athletes and the labor they provide to their institutions, conferences, and the NCAA at large. This exhortation extends to state and federal legislatures as well; for example, an NIL bill introduced by two Maine state senators in January 2022 would forever bar the NCAA from prohibiting athletes in the state from engaging in NIL opportunities but would state that athletes cannot be deemed employees and cannot receive the benefits that would be entitled to them as employees (Heitner, 2022). Such an act to cut off future gains for athletes while granting them what is by comparison only a cursory benefit should be against public policy.

Just as with gig economy jobs, when NIL is treated as simply a 'side hustle' and as affording opportunities for true entrepreneurship there can be many benefits for athletes, schools, athletic departments, and outside businesses. But also as with the gig economy, when NIL is treated as a facsimile for an employment relationship, straddling the line between a 'side hustle' and the athlete's only source of income, the downsides may outweigh the benefits. With a NIL system that replicates and represents gig economy structures, athletes join gig economy workers in facing the potential mental health issues related to underemployment while absorbing the risk and responsibility normally handled on an organization-wide level, and organizations face the wide legal exposure that gig economy platforms have faced for nearly a decade. Indeed, future literature should explore whether college athletes also experience the negative psychological effects related to underemployment faced by traditional gig economy workers (Malos et al. 2018; Maynard et al., 2006).To conclude—and to suggest an alternative path forward that avoids the mistakes already made by the gig economy—we raise the overarching suggestion already recommended by many as means of jumpstarting broad reform to the NCAA system (see, e.g., Nygren, 2002; Parasuraman, 2007; Berry, 2014; Ehrlich, 2019; Edelman, 2022) an embrace not only of college athlete employment but of the benefits of collective bargaining with those athlete-employees. Such a system would, as Ehrlich (2019) explained, allow the NCAA to craft rules needed to protect competitive balance in recruiting that are in line with both wage-and-hour laws like the FLSA while giving itself the antitrust protection that it very much needs after *Alston* through the non-statutory labor exemption. And by allowing athletic departments to absorb collectives, thus combining the labors of athletic performance and NIL into one broader employment package, a new NCAA collective bargaining agreement (or set of NCAA collective bargaining agreements) can allow athletes, athletic departments, and the wider NCAA overseeing authority to work together to solve all of the legal and ethical problems raised in each field in one fell swoop.

Needless to say, accomplishing this would require a monumental shift in how the NCAA and its stakeholders envision college sports at large and the role of the college athlete within that system. But with a new NCAA presidential regime on the horizon (see Williams, 2022), the setting is right to allow for such a change. As this conceptual paper outlines, such changes are necessary if the NCAA and college sports are to avoid the mistakes of the gig economy in this new era of college sports labor rights.

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