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Leveling The Score: The Effect of Modernization on Women's College Athletics

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Introduction:

The 2024 NCAA Women's Basketball Tournament has catapulted women's college basketball to unprecedented heights, thanks to budding rivalries like LSU vs. Iowa, and star power that the women's game had never seen before, with LSU's Angel Reese and Iowa's Caitlyn Clark leading the charge.

The Elite Eight matchup between Reese's LSU Tigers and Clark's Iowa Hawkeyes on April 1, 2024, a rematch of the 2023 national championship, averaged 12.3 million viewers on ESPN, becoming the most-watched women's college basketball game ever, the most-watched men's or women's college basketball game ever on ESPN, and the most-watched basketball game of any kind on ESPN since the 2018 NBA Eastern Conference Finals.¹ These records lasted not even a week, as they were broken by the 14.2 million viewers that tuned in to watch Iowa take on Connecticut in the Final Four on Friday, April 5, 2024.² Just two days later, the championship game between Iowa and South Carolina, drew 18.9 million viewers, making it the most-watched basketball game at any level since 2019.³

These staggering statistics are encouraging for women's college basketball and women's sports in general, which have historically trailed men's sports in overall popularity and media coverage. This surge in popularity towards women's college sports has been made possible due to the modernization of women's college sports.

¹ Islam, A. (2024) *Iowa v LSU smashes women's college basketball record with 12.3M viewers*, *SportsPro*. Available at: <https://www.sportspromedia.com/news/iowa-lsu-tv-viewership-audience-record-espn-ncaa-march-madness-clark-reese/> (Accessed: 13 May 2024).

² Lev, J. (2024) *Iowa women's basketball sets another ratings record in Final Four win over UConn | CNN business*, *CNN*. Available at: <https://www.cnn.com/business/iowa-womens-basketball-ratings-record/index.html> (Accessed: 13 May 2024).

³ *Women's College Basketball Championship Game draws record-breaking 18.9 million viewers (2024) Nielsen*. Available at: <https://www.nielsen.com/news-center/2024/womens-college-basketball-championship-draws-record-breaking-18-9-million-viewers/> (Accessed: 13 May 2024).

The modernization of women's college sports has given women greater platforms to broadcast their opinions, grow their own personal brands, and make money like never before through Name, Image, and Likeness (NIL) opportunities. However, along with these benefits of modernization come some downsides as well. Modernization has also led to new mental health obstacles for student athletes, criticisms of how some athletes are using NIL, and questions as to whether NIL rules comply with Title IX.

This article aims to explore how the modernization of college athletics has impacted women's college athletics overall and argues that modernization has had a net positive effect on women's college sports due to the opportunities it has created and can continue to create. Through analysis some of the top NIL earners in women's college athletics and media coverage of women's college sports throughout the years, this paper examines how modernization has changed how these athletes are seen and what they are able to do.

Because of improvements in media coverage of women's college athletics, the growth of social media and the internet, the implementation of NIL rules that allow student-athletes to profit from the use of their Name Image and Likeness, and transcendent athletes, modernization has had a net positive effect on women's college sports, and it will continue to create opportunities for women college athletes in the future.

I. Name, Image, and Likeness (NIL) Rules Have Been Beneficial to the Top Earners in Women's College Sports but Must Comply with Title IX to Benefit More Women College Athletes and.

a. Caitlin Clark

Caitlin Clark graduated high school as the fourth ranked prospect in her class but was still not good enough to receive an offer from her dream school, UConn.⁴ Her high school's open gyms were filled with many of the best coaches in the country who were there for the sole purpose of seeing Clark in person, but she was never visited by the Hall of Fame head coach of UConn, Geno Auriemma.⁵

Auriemma, who called Clark a “generational player” earlier this year, had no idea during Clark's high school days that she would become the transcendent talent who has brought more attention to women's college basketball than any player in history, or that she would become a millionaire through NIL before she even graduated college.⁶ In fairness to Auriemma, it would have been difficult for anyone to predict the impact that Clark would have on the sport.

Before Clark was able to pack 92,000 fans into a football stadium to watch her play, break the NCAA scoring record for most points scored in a college basketball career, lead Iowa to back-to-back national championship games, or generate the most intrigue of any first pick in the history of the WNBA, Clark was a relatively unknown college freshman at Iowa.

When Clark arrived at the University of Iowa as a college freshman, the NCAA rules that had been around for decades that prohibited college athletes from being paid for endorsements, autographs, or any form of monetization from their name, image, or likeness, were still in place. Then, on June 21, 2021, everything changed regarding NIL with the U.S. Supreme Court's

⁴ Wright Thompson *Caitlin Clark and Iowa find peace in the process*, *ESPN*. Available at: https://www.espn.com/womens-college-basketball/story/_/id/39740282/caitlin-clark-iowa-2024-ncaa-women-basketball-tournament-ready-march (Accessed: 13 May 2024).

⁵ *Id.*

⁶ Polacek, S. (2024) *UConn's Geno Auriemma Talks not recruiting Caitlin Clark, potential Bueckers pairing*, *Bleacher Report*. Available at: <https://bleacherreport.com/articles/10115573-uconns-genno-auriemma-talks-not-recruiting-caitlin-clark-potential-bueckers-pairing> (Accessed: 13 May 2024).

decision in Alston v. NCAA in which the court unanimously ruled that the NCAA is not allowed to limit education-related benefits to athletes.⁷

In Justice Kavanaugh's concurrence, he criticized the NCAA harshly:

Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.⁸

While Alston did not involve NIL directly, it set the stage for future legal challenges to rules that limit athletes being compensated. Just nine days after the decision in Alston was issued, the NCAA announced an "interim name image and likeness policy" that allowed student athletes to "engage in NIL activities that are consistent with the law of the state where the school is located."⁹

In the years since the NCAA changed these rules, arguably no women's college athlete in the country has benefitted from NIL more than Clark. Clark was selected as the top pick in the WNBA Draft in April 2024, thus ending her incredible career as a college athlete. She is also closing in on an endorsement deal with Nike for a signature sneaker that is reportedly worth over \$20 million.¹⁰

⁷ Tucker, T. (2022) *Nil Rules for college athletes: A timeline of how we got here and what's next*, *ajc*. Available at: <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/> (Accessed: 13 May 2024).

⁸ NCAA v. Alston, 141 S. Ct. 2141, 2169 (2021)

⁹ NCAA.org (2021) *NCAA adopts interim name, image and likeness policy*, *NCAA.org*. Available at: <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (Accessed: 13 May 2024).

¹⁰ Vorkunov, M., Charania, S. and Pickman, B. (2024) *Caitlin Clark nearing endorsement deal with Nike*, *The Athletic*. Available at: <https://theathletic.com/5424729/2024/04/17/caitlin-clark-nike-endorsement-indiana-fever-wnba/> (Accessed: 13 May 2024).

When she was a college athlete, Clark was second on the list of women NIL earners behind LSU gymnast Livvy Dunne. With 2.1 million followers on X, Instagram, and TikTok combined and an NIL valuation of \$3.4 million as a college athlete, Clark was as well-known as any college athlete in the country.¹¹

Clark likely would not have the same level of stardom that she currently does if it weren't for her major endorsements that the NIL rules allowed her to have during her college career. During her time at Iowa, Clark had deals with major companies such as Nike, State Farm, and Gatorade.¹²

In one of Clark's State Farm commercials that has been broadcast nationally for months, Clark, sporting her Iowa jersey, is joined by basketball superstars Reggie Miller and Jimmy Butler.¹³ Jake from State Farm, wearing his signature red, was also present at the WNBA Draft and was among the first to embrace Clark after her name was called by the commissioner.¹⁴ It is undeniable that the NIL opportunities available to Clark significantly helped her to build her brand to the point where even as a college student, she was arguably State Farm's second biggest star athlete behind only NFL superstar Patrick Mahomes.

Clark's NIL money also allowed her to rent a yacht for her teammates while on a team trip in Dubrovnik during the summer of 2023 following the team's first of two consecutive runs

¹¹ *On3 women's nil 100 On3.com*. Available at: <https://www.on3.com/nil/rankings/player/womens-nil-100/> (Accessed: 13 May 2024).

¹² Treacy, D. (2024) *Caitlin Clark's nil deals, explained: How much money iowa star makes from Nike, other sponsors in 2024*, *Sporting News*. Available at: <https://www.sportingnews.com/us/ncaa-basketball/news/caitlin-clark-nil-deals-money-iowa-nike-sponsors-2024/e58534cad3b2960663a36cb> (Accessed: 13 May 2024).

¹³ Ehrlich, M. (2023) *Iowa Star Clark Stars in New State Farm Commercial, Sports Illustrated NIL on FanNation News, Analysis and More*. Available at: <https://www.si.com/fannation/name-image-likeness/news/iowa-star-clark-stars-in-new-state-farm-commercial-michael9> (Accessed: 13 May 2024).

¹⁴ *Caitlin Clark hugs Jake from State Farm before her parents after WNBA draft (2024) The Independent*. Available at: <https://www.independent.co.uk/life-style/caitlin-clark-jake-state-farm-tiktok-b2529659.html> (Accessed: 13 May 2024).

to the national championship game.¹⁵ Clark and her teammates enjoying the sun on a yacht in Europe starkly contrasts former UConn men's star, Shabazz Napier's experience of life as a star college basketball player prior to players being able to make money from NIL.

In 2014, Napier, during what would end up being the height of his career marketability, carried UConn to a men's basketball national championship. He made headlines months after the championship when he claimed that sometimes he went to bed "starving" as a college athlete because he could not afford food.¹⁶ Napier made no money throughout his college career even though he was one of the biggest stars of the sport when he was at UConn.

NIL rules are beneficial for both the top-earning athletes and the NCAA because they keep stories like those of Napier's from surfacing, which make the NCAA look particularly bad considering the amount of money that Napier and the 2014 UConn Huskies were able to generate for their school and the NCAA.

b. Livvy Dunne

While Clark's endorsement opportunities and superstardom were generated primarily by her incredible performance on the court rather than growing her brand through the extensive use of social media, Livvy Dunne, the only woman ahead of Clark on the NIL list, rose to popularity via a different route. Dunne, who is a gymnast good enough to earn a scholarship to LSU but is nowhere near the level of Clark in their respective sports, was able to rise to the top of the NIL list by her consistent, strategic use of making content on TikTok that went viral and boosted her popularity significantly.

¹⁵ Wright Thompson *Caitlin Clark and Iowa find peace in the process*, *ESPN*. Available at: https://www.espn.com/womens-college-basketball/story/_/id/39740282/caitlin-clark-iowa-2024-ncaa-women-basketball-tournament-ready-march (Accessed: 13 May 2024).

¹⁶ Ganim, S. (2014) *UConn guard on unions: I go to bed 'starving'*, *CNN*. Available at: <https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html> (Accessed: 13 May 2024).

Dunne tops the list of the highest paid women in NIL history, with a NIL evaluation of \$3.6 million and deals with major brands such as American Eagle Outfitters, Motorola, Nautica, and Grubhub.¹⁷ Dunne's success in monetizing on brand deals has not negatively impacted her performance in her sport, as she helped LSU win the SEC Championship on March 24, 2024, earning a 9.800 for her routine on the bars.¹⁸ Dunne has been a strong proponent for women athletes capitalizing on their NIL abilities while in college, noting that there are far more professional leagues for men than there are for women after college.¹⁹

In addition to personally benefitting from her stardom and marketability under NIL, Dunne has also worked on deals to help her teammates at LSU monetize, reaching a partnership with Accelerator Active Energy through her Livvy Fund that would benefit eight of her teammates with them serving as ambassadors for Accelerator. The Livvy Fund, part of LSU's official NIL Collective, Bayou Traditions, is "the hub for brands and fans to contribute to and support our Lady Tigers," according to LSU.²⁰

While Dunne has received some positive coverage for topping the NIL list, she also has received criticism for relying on her looks to achieve NIL success. Dunne was featured in the *Sports Illustrated* Swimsuit Edition in 2023 and will be featured in the 2024 edition in May 2024.²¹ *Sports Illustrated* Swimsuit editor in chief MJ Day stated that it was an easy decision to

¹⁷ Maniece, M. *Caitlin Clark is one of college sports' top earners. here are the 10 student-athletes with the highest nil valuations.*, *Business Insider*. Available at: <https://www.businessinsider.com/top-nil-earners-in-college-sports-ranked-2024-3#3-lsu-gymnast-livvy-dunne-is-the-highest-paid-woman-in-nil-history-with-a-nil-valuation-of-3-6-million-8> (Accessed: 13 May 2024).

¹⁸ *Id.*

¹⁹ Postins, M. (2024) *LSU's Dunne stresses importance of nil for women, Sports Illustrated NIL on FanNation News, Analysis and More*. Available at: <https://www.si.com/fannation/name-image-likeness/news/lsus-dunne-stresses-importance-of-capitalizing-on-nil-for-women-matt9> (Accessed: 13 May 2024).

²⁰ *Id.*

²¹ Bleness, C. (2023) *Olivia Dunne to appear in 60th anniversary si swimsuit issue next may, Sports Illustrated Swimsuit*. Available at: <https://swimsuit.si.com/swimnews/olivia-dunne-to-appear-in-60th-anniversary-si-swimsuit-issue-next-may> (Accessed: 13 May 2024).

feature Dunne, as she is a “well-established, industrious entrepreneur who is here to stay, who continues to break barriers, continues to work hard and forge an unforgettable path for herself and future generations of female athletes.”²²

The *New York Times* described Dunne as a “petite blonde with a bright smile and a gymnast’s toned physique.”²³ Dunne sees her social media presence as empowering for women, stating that “It’s just about showing as much or as little as you want.”²⁴

Stanford women’s basketball head coach Tara VanDerveer, the winningest coach in N.C.A.A. women’s basketball history, was one of the most outspoken critics of Dunne and the trend of women college athletes selling their appearances in exchange for NIL money. VanDerveer claimed that the focus on appearances of women athletes as a result of NIL deals is “regressive” and “a step back” for women in sports.²⁵

Regardless of opinions on Dunne’s social media presence, it is undeniable that her focus on social media translates into money and opportunities for her. With 13.2 million followers on Instagram, TikTok, and X combined, she has more than double the followers of any other woman in the top 100 NIL earners, which puts her atop the list of earners.²⁶

²² *Id.*

²³ Streeter, K. (2022) *New endorsements for college athletes resurface an old concern: Sex sells, The New York Times*. Available at: <https://www.nytimes.com/2022/11/08/sports/ncaabasketball/olivia-dunne-haley-jones-endorsements.html> (Accessed: 13 May 2024).

²⁴ *Id.*

²⁵ *Olivia Dunne responds after coach calls her social media a ‘step back’ for female athletes* (no date) *Yahoo! News*. Available at: https://news.yahoo.com/olivia-dunne-responds-claim-her-173617146.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAIRTpr62dMeksmsD6kNn23V5Ae3z_ZmMTAn3u-VRw_EBNlhCTLCHfREQiR8agH4LXePhCOT5UjCZj3PrPRI-R6Elf8DDT24aExofiB_caLoe6Bqy4SqCYn75OB_RM2rZyHIEbgAsCMiNH7jW3tHgd8XlWB_GXdlNsOruByJ-tDDz (Accessed: 13 May 2024).

²⁶ *On3 women’s nil 100 On3.com*. Available at: <https://www.on3.com/nil/rankings/player/womens-nil-100/> (Accessed: 13 May 2024).

As is evident from the analyses of the top two women NIL earners, there is no one “right” way to profit off NIL. Some top earners want to brand themselves as sexier, while others want to focus on other aspects to attract endorsement opportunities. Through excellence in their respective sports, both strategies can lead to lucrative opportunities.

c. Angel Reese

During the 2023-24 NCAA women’s basketball season, the LSU women’s basketball team had three players in the top 10 of women’s NIL earners in the country. Angel Reese was third on the list behind Dunne and Clark, with a valuation of \$1.8 million and 6 million followers on TikTok, Instagram and X combined.²⁷ Not far behind her on the list, sitting at fourth and seventh respectively, were her teammates, Flau’jae Johnson and Hailey Van Lith.²⁸ An analysis of Reese’s rise to stardom following the 2023 NCAA basketball tournament can be helpful to illuminate some key patterns about the impact of media coverage on college athletics in the age of NIL.

The 2023 NCAA Women’s Basketball National Championship game between LSU and Iowa turned Angel Reese from a name not known by many people outside of avid women’s college basketball fans to a household name and one of the biggest stars in college sports. Reese led LSU to a victory and was named Most Outstanding Player of the Final Four after averaging 21 points and 15 rebounds throughout the tournament.²⁹

²⁷ *On3 women’s nil 100 On3.com*. Available at: <https://www.on3.com/nil/rankings/player/womens-nil-100/> (Accessed: 13 May 2024).

²⁸ *Id.*

²⁹ Rapp, T. (2023) *Angel Reese named 2023 Women’s Final Four most outstanding player as LSU wins title, Bleacher Report*. Available at: <https://bleacherreport.com/articles/10070982-angel-reese-named-2023-womens-final-four-most-outstanding-player-as-lsu-wins-title#:~:text=LSU%20W%20Basketball-,Angel%20Reese%20Named%202023%20Women’s%20Final%20Four,Player%20As%20LSU%20Wins%20Title&text=Angel%20Reese%20held%20it%20down,to%20win%20a%20national%20championship>. (Accessed: 13 May 2024).

Reese's fame, however, came just as much from reactions to her antics on the court and comments following the team's win than it did from her athletic performance. As Iowa's Clark was walking off the court at the end of the game, Reese pointed to her ring finger in Clark's face, alluding to the championship ring that LSU had just won.

This gesture by Reese sent the internet into a frenzy, with some calling it tasteless, and others considering any backlash that Reese got to be racially motivated by the double-standard that a White superstar like Clark could showboat, but that when Reese, a Black player did so, she was chastised far too harshly.³⁰ Reese was outspoken about the criticism she received for the gesture, highlighting the racial double-standard that she believed was in play.

"I don't fit the box that y'all want me to be in. I'm too hood. I'm too ghetto. Y'all told me that all year. But when other people do it, and y'all don't say nothing," Reese stated following the win.³¹ She continued, acknowledging the attention she knew she would receive, claiming, "this is for the girls that look like me. For those that want to speak up for what they believe in. It's unapologetically you. And that's what I did it for tonight. It was bigger than me tonight. And Twitter is going to go into a rage every time."³²

Following the controversy of taunting Clark, the spotlight on Reese intensified as she rejected First Lady, Jill Biden's invitation for LSU to come to the White House to celebrate the championship. Jill Biden initially invited both LSU and Iowa to the White House, a gesture that Reese took issue with since an invitation to the White House has historically been reserved for

³⁰ Treisman, R. (2023) *How a hand gesture dominated a NCAA title game and revealed a double standard*, NPR. Available at: <https://www.npr.org/2023/04/03/1167704651/angel-reese-caitlin-clark-you-cant-see-me-gesture> (Accessed: 13 May 2024).

³¹ Morse, B. (2023) *Biden press secretary clarifies White House invitation is just for LSU after player calls it 'a joke'*, CNN. Available at: <https://www.cnn.com/2023/04/04/sport/angel-reese-jill-biden-white-house-invite-spt-intl/index.html> (Accessed: 13 May 2024).

³² *Id.*

only the winning team.³³ Jill Biden walked back the initial invitation to both Iowa and LSU following the controversy, but Reese continued to rebuke the First Lady:

Stuff like that, it bothers me. Because you are a woman, at the end of the day. White, black, it doesn't matter, you're supposed to be standing behind us before anything, so it's hard to see things like that and not to comment on it. But at the same time, I have the platform right now where I can speak out and a lot of people have had my back through it. I'm proud to be in a situation like this. Nobody is giving her grace right now. Trust me, nobody is giving her grace and that's why she's trying to back track on what she said.³⁴

Eventually, Reese changed her tune, and the LSU team did end up visiting the Bidens at the White House.³⁵ By this time, though, Reese had already become a superstar and had proven a few things when it came to using her platform in the age of NIL.

First, Reese recognized the power of her voice, the platform that she had in the national championship playing against Clark, arguably the most famous women's college basketball player ever, and seized the moment. Reese turned what some thought would be her fifteen minutes of fame into millions of dollars in endorsements and sponsorships by being unapologetically outspoken.

Comparing Reese to Clark and Dunne, the two women ahead of her on the NIL earnings list, Reese is somewhere in the middle of the two when it comes to her activity on social media. She is far more active on TikTok than Clark but is not referred to as a 'social media star' the way some would characterize Dunne.

³³ Reyes, L. (2023) *LSU's Angel Reese rejects Jill Biden's White House invite explanation: 'I don't accept that'*, *USA Today*. Available at: <https://www.usatoday.com/story/sports/ncaaw/tourney/2023/04/05/angel-reese-rejects-jill-biden-explanation-white-house-invite-lsu-iowa/11606621002/> (Accessed: 13 May 2024).

³⁴ *Id.*

³⁵ *LSU White House visit turns into Slam Dunk for Jill Biden, Angel Reese - Politico*. Available at: <https://www.politico.com/news/2023/05/26/lsu-tigers-white-house-00099059> (Accessed: 13 May 2024).

Regarding Reese's on-the-court performance, she was an excellent college basketball player, good enough to be selected seventh overall in this year's WNBA Draft, but she was nowhere near the transcendent player that Clark was. Reese had to be a good enough player to earn the platform that she had, but the distinguishing feature that shot her up the NIL earnings list was her outspokenness. Her confidence was polarizing and her soundbites initiated conversation about things much larger than sport to the point that not only was ESPN writing articles on her, but CNN, NPR, and Politico were as well. This strategy can be successful to gain NIL money, so long as the performance on the court backs up the comments off the court, which Reese did successfully.

The other thing that Reese proved by attracting the spotlight is that the presence of a leader like Reese can attract attention and NIL dollars to teammates. Hailey Van Lith, who already had a large social media following prior to transferring from Louisville to LSU, increased her NIL valuation when she transferred in to join Reese and LSU for the 2023-24 season.³⁶ With attention on Reese and fellow teammate Flau'jae Johnson, who in addition to being a star on LSU, has a recording deal with Roc Nation as a hip-hop artist, Van Lith benefitted from the cameras and attention in terms of NIL dollars even though Van Lith's statistics declined on the court. Reese's story shows that having an outspoken polarizing player like herself as the centerpiece of a program can not only be a formula to win a championship but can also be a significant boon to recruiting other players who are looking to increase their NIL potential.

d. NIL For the Other 99% of Women

While most of the paper thus far has been spent analyzing how the top women

³⁶ *On3 women's nil 100 On3.com*. Available at: <https://www.on3.com/nil/rankings/player/womens-nil-100/> (Accessed: 13 May 2024).

college athletes in the country have been benefitting from the NIL rules, the current rules in place are not nearly as lucrative for the rest of women college athletes throughout the country. Changes must be made to ensure that the NIL rules comply with Title IX.

The plain language of Title IX is simple:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.³⁷

This simple yet powerful paragraph has benefitted women's college athletics tremendously for decades but did not anticipate the days of NIL when it was written. The types of NIL deals that the top earners like Dunne, Clark, and Reese may not violate Title IX, but a substantial portion of NIL deals throughout the country do.

The types of NIL compensation that violate Title IX come from groups that are referred to as "donor-driven collectives," or "Collectives" in which groups of university boosters raise money and funnel money directly to student athletes.³⁸ While this type of compensation on its face may not seem to violate Title IX, in practice it does. The recipients of this type of NIL money are overwhelmingly men's college football players and men's college basketball players.

These deals have received criticism from many claiming that the payments serve as "inducements" and "pay-to-play" schemes that the NCAA had stated would not result from NIL.³⁹ Examples of these NIL agreements include University of Texas boosters paying \$50,000 to every offensive linemen for charity work to be done in the future through a Texas Collective, 'Horns with Hearts', SMU's 'Boulevard Collective' paying each football and men's basketball

³⁷ 20 U.S.C. § 1681.

³⁸ ARTICLE: NIL COLLECTIVES AND TITLE IX: A PROACTIVE CONSIDERATION OF TITLE IX'S APPLICATION TO DONOR-DRIVEN NIL COLLECTIVES, 57 Ind. L. Rev. 531, 532

³⁹ *Id.*

player \$36,000 for the 2022-23 season, and billionaire, John Ruiz, spending millions of dollars personally on NIL deals to pay University of Miami football players.⁴⁰

Payments like these, usually made possible by Collectives, are very prevalent at the highest Division I level.⁴¹ Ninety-two percent of Power 5 schools, a group of conferences which makes up the most athletically competitive programs in the country, have at least one NIL Collective or are in the process of forming one.⁴²

As of 2023, only thirty-four percent of existing NIL Collectives offered opportunities to women's sports, and most of these Collectives offered compensation that was considerably less than the amounts offered to men's basketball or football programs.⁴³ This disparity is problematic from a Title IX perspective and must be fixed.

Since Title IX was published in 1975, it has been enforced by the U.S. Department of Education's Office for Civil Rights (OCR), overseeing three compliance categories of (1) athletic scholarships, (2) benefits and services, and (3) effective accommodation of students' interests and abilities.⁴⁴ A university's failure to comply with Title IX requirements can lead to termination of federal funding.⁴⁵

In assessing whether a school's athletic department is complying with Title IX, the OCR uses a three-part test.⁴⁶ The first part of the test analyzes whether the percentage of men and women competing on the school's sports teams are substantially proportionate to the proportion

⁴⁰ *Id.*, at 545-546.

⁴¹ ARTICLES: NIL Collectives - Title IX's Latest Challenge1, 41 Cardozo Arts & Ent LJ 799, 801

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Title IX of the Education Amendments of 1972 a Policy Interpretation Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

⁴⁵ Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities, U.S. Dep't. of Educ. (2023)

⁴⁶ *Id.*

of men and women enrolled as undergraduate students at the school.⁴⁷ Secondly, the test examines whether a school is able to show that it has a history and continuing practice of expanding its athletic programs to account for interests of the sex that is underrepresented in the school's athletic programs.⁴⁸ Lastly, the test looks at whether a school is meeting the interests and abilities of the underrepresented sex.⁴⁹

When analyzing Division I athletics under these standards, most Power 5 programs with NIL collectives do not pass the third prong of the test because schools are not meeting the interests and abilities of student-athletes on women's teams who desire the NIL Collective opportunities that their male counterparts are currently enjoying simply by being a part of the men's basketball or football team.

Some schools' athletic departments may try to make the argument that the Collectives that are associated with their school are not a part of the school and therefore do not need to be held to the standards of Title IX, but this argument becomes difficult to make when examining the close relationships between many Collectives and schools.

Head coaches of major programs and athletic departments have made it difficult in many cases to separate the Collective from the university. For instance, the University of Ohio State football coach directly asked members of a Collective for 13 million dollars to keep the school's football roster intact, while a Louisiana State University football coach was quoted telling Collective donors, "We're paying players now: name, image, and likeness. So, if you guys wanna start paying our players, you can go ahead!"⁵⁰

⁴⁷ ARTICLES: NIL Collectives - Title IX's Latest Challenge1, 41 Cardozo Arts & Ent LJ 799, 812

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ ARTICLES: NIL Collectives - Title IX's Latest Challenge1, 41 Cardozo Arts & Ent LJ 799, 814

It becomes even more difficult to treat Collectives like truly independent third parties when universities promote Collectives on their athletic department websites, refer to them in press releases, and greatly benefit from the fundraising efforts of the Collectives.⁵¹ Because of these close relationships and the status of universities as federally-funded institutions that must comply with Title IX, it is the duty of universities to ensure that Collectives also comply with Title IX as well as provide equal opportunities to student athletes of both sexes.

Up until this point, OCR has not ruled donor-driven NIL compensation to be a violation of Title IX. However, this does not necessarily mean that the way NIL Collectives have been operating complies with Title IX. There will likely continue to be challenges alleging that Collectives violate Title IX. From a regulation standpoint, OCR must provide more clarity on the level of school involvement with NIL Collectives that is necessary to trigger a Title IX violation.⁵²

The most straightforward way to fix the problem of donor-driven NIL compensation disproportionately benefitting men compared to women athletes is to amend Title IX directly by adding a section that addresses NIL explicitly so that it is clear and not up for interpretation by OCR that donor-driven NIL compensation must benefit men and women equally.

Even without an amendment to Title IX or a change in how OCR rules on NIL Collectives regarding Title IX, there are still steps that universities should take with their NIL policies to avoid any potential Title IX violations. Universities can distance themselves from Collectives in their online and public relations presence, as well as instruct coaches to refrain from directly asking Collectives for money to pay specific teams. Alternatively, if universities want to remain in the same relationships they currently have with Collectives, they can publish

⁵¹ *Id.*

⁵² ARTICLES: THE NIL GLASS CEILING, 57 U. Rich. L. Rev. 1107, 1151

guidelines that suggest for Collectives to balance their fundraising equally based on sex. While this suggestion would not cure the gender pay gap by itself, it would demonstrate that universities are at least trying to encourage Collectives donations that comply with Title IX.

With universities taking these steps, they help protect their institutions against potential Title IX violations and promote a narrowing of the earnings gap between men and women college athletes.

II. Modernization Has Benefitted Women College Athletes by Providing Them with Tools to Affect Change, Improve Their Mental Health, Amplify Their Voices, and Better Control Their Own Narratives.

a. The Use of Social Media to Affect Change

With the exponential growth of social media and the internet, the sharing of information happens almost instantaneously, and the sheer volume of information being spread has increased substantially. For women college athletes who have grown up with an understanding of social media, many have used their knowledge to grow their own personal brands and affect meaningful change.

The *New York Times* called former Oregon Women's Basketball player, Sedona Prince's video from 2021, the "TikTok that changed the N.C.A.A. forever."⁵³ Prince's 38-second video showed the stark contrast between the women's weight room for the players in the NCAA tournament, and the men's weight room.

The women's "weight room" was comprised of a simple stack of hand weights, whereas the men's weight room contained numerous machines and benches, making up a state-of-the-art facility. Prince's video went viral on TikTok, leading to significant changes in the N.C.A.A.,

⁵³ Nierenberg, A. (2022) *The video that changed the N.C.A.A.*, *The New York Times*. Available at: <https://www.nytimes.com/2022/03/16/us/the-video-that-changed-the-ncaa.html> (Accessed: 13 May 2024).

including an N.C.A.A.-commissioned gender-equity review, and the branding of the women's tournament with the "March Madness" moniker, a name that previously was reserved for only the men. The women's tournaments in the years following Prince's video from 2022-2024 have been undoubtedly the most successful ever, breaking new records for viewership and popularity each year.

While social media is often thought of as an opportunity to grow the popularity and brands of individual players, it also can have the function of exposing inequalities with a quickness and virality that was not possible before the days of TikTok.

b. Mental Health Benefits as a Result of Modernization

While this paper has highlighted several triumphs of women collegiate athletes thus far, there are also significant struggles that women college athletes experience. One major area of concern is mental health. According to a survey conducted by TimelyMD, seventy percent of student athletes said that they were experiencing mental health issues.⁵⁴ These mental health issues at the NCAA level are particularly devastating for women. The NCAA's Student-Athlete Health and Wellness Study demonstrated that female athletes reported disproportionately high rates of struggling with mental health.⁵⁵ 44 percent of female athletes reported feeling overwhelmed, compared to just 17 percent of male athletes.⁵⁶

An important source of strength for women college athletes is the candor and openness of the biggest stars in women's sports when it comes to their struggles regarding mental health.

⁵⁴ *Female College athletes are facing a mental health crisis*. Available at: <https://www.womenshealthmag.com/health/a41696886/female-college-athletes-mental-health-crisis/> (Accessed: 13 May 2024).

⁵⁵ Alonso, J. *The mental health of student athletes has improved-for some*, *Inside Higher Ed | Higher Education News, Events and Jobs*. Available at: <https://www.insidehighered.com/news/students/physical-mental-health/2023/12/15/mental-health-student-athletes-has-improved-some> (Accessed: 13 May 2024).

⁵⁶ *Id.*

Gymnast, Simone Biles, and tennis player, Naomi Osaka are two examples of superstars in their respective sports who have been great mental health advocates and provided the public with great transparency in their mental health journeys. While neither of them was a collegiate star, college players throughout the country look up to both of them as role models on and off the court. The fact that their stories can be shared with such ease and that they have the platforms to speak directly to the public is a benefit of modernization that can help collegiate women who look up to them.

Biles made international headlines at the 2021 Olympic Games in Tokyo when she shockingly withdrew from a number of events due to mental health struggles.⁵⁷ "We have to protect our mind and our body, rather than just go out there and do what the world wants us to do," Biles stated, in explaining her decision to withdraw.

Osaka also withdrew from tennis tournaments due to mental health struggles after winning four grand slams. She advocated on behalf of those who were going through struggles similar to hers, stating "I do hope that people can relate and understand it's O.K. to not be O.K., and it's O.K. to talk about it. There are people who can help, and there is usually light at the end of any tunnel."⁵⁸ With athletes like Biles and Osaka leading the way, women student athletes can feel comfortable to seek help.

College athletics in the most popular sports of football, and men's and women's basketball have dealt with mental health challenges from several sources, but a relatively new source of concern stems from the legalization of sports betting in states across the country over

⁵⁷ 'we're human, too': Simone Biles highlights importance of mental health in Olympics withdrawal (2021) *NBCNews.com*. Available at: <https://www.nbcnews.com/news/olympics/we-re-human-too-simone-biles-highlights-importance-mental-health-n1275224> (Accessed: 13 May 2024).

⁵⁸ Osaka, N. (2021) *Naomi Osaka: 'it's O.K. not to be O.K.'*, *Time*. Available at: <https://time.com/6077128/naomi-osaka-essay-tokyo-olympics/> (Accessed: 13 May 2024).

the past few years.⁵⁹ With bettors able to place bets on the performance of specific college athletes at the click of a button on their smartphones, it has never been easier to gamble. Couple this with the ability for bettors and fans to contact players via social media as easily as ever before, and a dynamic is created that is very dangerous for high profile college athletes from a mental health perspective.

Several players from all over the country have reported receiving death threats from angry bettors who lost money. The bettors lose and then choose to take their anger out on the players who they believe cost them money via angry, threatening direct messages on social media.

The NCAA Basketball Tournament on both the men's and women's sides over the past few years have demonstrated just how prevalent an issue these threats are. LSU women's basketball's Angel Reese claims that she has been receiving death threats ever since leading her team to the national title in 2023.⁶⁰ Gabbie Marshall, a leader on the Iowa women's basketball team that reached the past two national championship games, deleted her social media after she received threats coming from her drawing a controversial game-clinching foul in the team's win against UConn in the Final Four in 2024.⁶¹

Players in the men's tournament have received treatment just as harsh if not worse. Carson Barrett, a basketball player for Purdue who did not play much in meaningful games and was a reserve for most of the season, received terrible death threats for making a seemingly inconsequential three pointer in the end of his team's game. After making the shot, which had no

⁵⁹ *Legal sports betting* (2023) *American Gaming Association*. Available at: <https://www.americangaming.org/policies/hot-issue-sports-betting/> (Accessed: 13 May 2024).

⁶⁰ *Social media and gambling have made death threats routine for college athletes* (2024) *The Guardian*. Available at: <https://www.theguardian.com/sport/2024/apr/10/angel-reese-death-threats-gambling-college-sports-ncaa> (Accessed: 13 May 2024).

⁶¹ *Id.*

impact on which team would win the game, but greatly impacted whether Purdue would cover the point spread that Las Vegas determined was appropriate for the game, Barrett was berated with death threats on social media. In a moment that should have been a highlight of his college career, he instead had to endure a message from an Instagram user telling him to “slit your throat” for “taking that three” and ending the message by telling Barrett “I hope you kill yourself.”⁶²

Messages like these are obviously horrible for the athletes who are forced to deal with them. Considering the revenue that legalized sports gambling has generated in its first few years throughout the country and the pattern of more states legalizing sports gambling each year, it is unlikely that there will be a reduction in these types of threats anytime soon.

With the popularity of women’s college sports growing and more opportunities to bet on women’s college athletics, it is inevitable that women college athletes, a group that was at a heightened risk for mental health problems to begin with, will face an increase in verbal attacks that come from angry bettors as well as sexists who are upset with the rise in popularity of women’s sports.

Due to this trend in addition to all the other causes of women’s mental health obstacles today, it is paramount that the universities and the NCAA prioritize the mental health of student athletes. Fortunately, the NCAA has placed an emphasis on mental health in recent years. Under its current constitution, it states that “each member school – regardless of division – must facilitate an environment that reinforces physical and mental health within athletics by ensuring

⁶² *Id.*

access to appropriate resources and open engagement with respect to physical and mental health.”⁶³

The NCAA has also reported that mental health concerns among women college athletes had decreased in 2023 in nearly every category compared to the levels seen in 2020 and 2021.⁶⁴ While it remains to be seen ultimately how universities and the NCAA will handle new challenges related to mental health, it is an encouraging sign that they are acknowledging mental health as an important issue and are putting forth the resources for student athletes to get the help they need.

c. The Use of Platforms to Control the Narrative and Combat Sexism and Racism

i. Don Imus and Rutgers Women’s Basketball

In April of 2007, following the Rutgers women’s basketball team’s surprise run to the national championship game during the 2007 NCAA Tournament, radio host Don Imus, a 66-year-old White man at the time, referred to the players on the team as “some nappy-headed hos.”⁶⁵ Imus’ comments caused immense controversy, as his comments became a national news story much larger than the 2007 NCAA Tournament itself.

Less than a week after Imus’ incendiary comments, Vivian Stringer, the Rutgers Women’s Basketball head coach stood with the entire Rutgers team, before beat reporters and

⁶³ NCAA.org (2024) *How the NCAA is Prioritizing Mental Health*, NCAA.org. Available at: <https://www.ncaa.org/news/2024/5/1/media-center-how-the-ncaas-prioritizing-mental-health.aspx> (Accessed: 13 May 2024).

⁶⁴ NCAA.org (2023) *Student-athletes report fewer mental health concerns*, NCAA.org. Available at: [https://www.ncaa.org/news/2023/12/13/media-center-student-athletes-report-fewer-mental-health-concerns.aspx#:~:text=Among%20women’s%20sports%20participants%2C%20reported,exhausted%20\(down%20from%2038%25\).](https://www.ncaa.org/news/2023/12/13/media-center-student-athletes-report-fewer-mental-health-concerns.aspx#:~:text=Among%20women’s%20sports%20participants%2C%20reported,exhausted%20(down%20from%2038%25).) (Accessed: 13 May 2024).

⁶⁵ *Crossing the line: Don Imus and the Rutgers women’s basketball team* (no date) HKS Case Program. Available at: <https://case.hks.harvard.edu/crossing-the-line-don-imus-and-the-rutgers-women-s-basketball-team/> (Accessed: 13 May 2024).

TV cameras to deliver a response to Imus' comments.⁶⁶ Stringer referred to the women on her team as "valedictorians of their class, future doctors, musical prodigies, and, yes, even Girl Scouts. These young ladies are the best this nation has to offer."⁶⁷ She continued to say that as a result of Imus' comments, the team's "accomplishments were lost, our moment was taken away," and that "We were stripped of this moment by the degrading comments made by Mr. Imus last Wednesday."⁶⁸ Kia Vaughn, one of the stars of the team stated, "I'm a woman, and I'm someone's child," adding " . . . I achieve a lot. And unless they have given this name – a 'ho' – a new definition, then that is not what I am."⁶⁹

The effect of the comments by Stringer and her players was devastating for Imus. CNN referred to the women as "the personification of young womanhood," while *The Wall Street Journal* stated that, "without a hint of professional polish, their remarks came across as heartfelt."⁷⁰ Imus' show, *Imus in the Morning*, was ultimately let go by MSNBC and cancelled by CBS Radio.⁷¹

Looking back at Imus' costly comments and the media coverage following them, the way the comments spread in addition to the response from national media represented a shift in power away from traditionally powerful media figures like Imus, and towards the subject of his comments as well as smaller media figures. In 2007, social media was still in its infancy, but the reach of the internet was nonetheless able to spread Imus' comments to a point where he was taken down, which may not have been occurred without social media and the internet.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

In the late afternoon on the same day that Imus made his initial comments, Media Matters for America, an organization focusing on “comprehensively monitoring, analyzing, and correcting conservative misinformation in the US media,” posted on its website a transcription of Imus’ comments with an accompanying video.⁷² Additionally, Media Matters sent out an email blast to hundreds of reporters with the video attached.

Shortly after, Jemele Hill, an ESPN reporter at the time, sent out an email blast of the Media Matters link to several members of the National Association of Black Journalists (NABJ) which caught the attention of the association’s president, Bryan Monroe. Monroe followed up by posting on the NABJ website chastising Imus, demanding an apology, and calling for him to be fired on behalf of the NABJ.⁷³ Imus began his show with an apology the same morning Monroe’s comments were posted.

Only after these comments did more traditional, established media outlets such as *The New York Times*, *The Washington Post*, *The Los Angeles Times*, and the *New York Daily News* produce articles covering Imus’ comments and the response to the comments up until that point.⁷⁴

It is very possible that without the initial sharing of Imus’ comments by Media Matters, that Imus’ comments would have come and gone without any substantial media attention or repercussions, and without Stringer and the Rutgers team ever getting the opportunity to have their voices heard on the national stage that they did.

Debacles like the Imus situation in 2007 in addition to advancements in technology and accessibility to the internet and social media all played a part in ushering in a movement for the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

“new media” to have a voice. Today, there are countless podcasts that athletes own and operate in addition to platforms like The Players Tribune that give players a chance to reach fans directly, giving athletes agency that they did not have in the past.

ii. LA Times LSU Women’s Basketball Article

17 years after Imus’ comments, as recently as late March of 2024, another controversy involving comments made by a journalist about the LSU women’s basketball team made headlines. Comparing and contrasting the controversy to the Imus situation is worthwhile in assessing how times have changed when it comes to journalists and media personalities making sexist and racist commentary about women college athletes.

Prior to LSU Women’s Basketball’s Sweet Sixteen showdown with UCLA in the 2024 NCAA Women’s Basketball Tournament, *LA Times* staff writer Ben Bolch published a controversial column previewing the matchup. In the article, he referred to the UCLA team as “milk and cookies” and “America’s sweethearts,” while describing the LSU team as “basketball villains,” “Louisiana hot sauce,” and most controversially, “dirty debutantes.”⁷⁵

The LSU team has been a lightning rod for hot takes from countless media outlets since winning the N.C.A.A. championship in 2023, receiving more media attention than any women’s sports team in recent memory. Their coach, Kim Mulkey, as well as their star player, Angel Reese, are polarizing figures who are not afraid to let their voices be heard.

Mulkey and her players were quick to criticize Bolch’s article, with Mulkey calling the piece “awful,” “sexist,” and encouraging the room of reporters at her press conference to Google

⁷⁵ Cohen, D. (2024) *L.A. Times writer is sorry for calling LSU ‘dirty debutantes’*, *The Cut*. Available at: <https://www.thecut.com/article/la-times-writer-apologizes-lsu-column.html> (Accessed: 13 May 2024).

the term “dirty debutantes,” a search that yields primarily pornographic results. LSU player Hailey Van Lith also called the piece racist.⁷⁶

Following these comments, the *LA Times* removed the terms “dirty debutantes” and “milk and cookies” from the article and added an editor’s note stating that “the original version of this commentary did not meet *Times* editorial standards” and apologizing “to the LSU basketball program and our readers.”⁷⁷ Following these statements, Bolch issued his own personal apology posted on his X account.

While Bolch was not fired from his job like Imus, his apology indicates that he did receive the message from Mulkey that his comments were not appropriate. Mulkey’s comments rebuking Bolch’s article were clipped and shared throughout social media, garnering millions of impressions overnight.

Hailey Van Lith has 1.1 million Instagram followers while Angel Reese has 2.8 million followers. While neither of these women posted a response to the article on their socials, if they wanted to do so, they would have access to an enormous audience, and would not require email blasts from groups like Media Matters or the NABJ to have their voices heard and amplified the way that Rutgers did in 2007.

Articles like Bolch’s show that sexist, racist comments are still made by journalists and media personalities from major publications in 2024. The difference between 2024 and 2007 is that now the women athletes have the media coverage and platforms to shut this commentary down swiftly rather than have their “moments stolen” the way that the Rutgers team did in 2007.

Conclusion:

⁷⁶ *Id.*

⁷⁷ *Id.*

In conclusion, modernization gives women college athletes the opportunity to build a greater platform to express themselves, stand up for themselves against racism and sexism, affect change, and creates opportunities to monetize from their name, image and likeness.

Modernization will continue to provide more opportunities to women in the future and has been beneficial to women's college sports.