NIL IS JUST THE BEGINNING

Katie Lever

July 1, 2021 marked what will perhaps be remembered as one of the most important days in the history of college sports—for the first time ever, college athletes were able to profit from their names, images, and likenesses (NILs) without violating NCAA rules. The stark policy change came after years of activism and proves what scholars have long argued: sports and politics are inseparable.

College athletes wasted no time in taking advantage of their NILs this past summer—from billboards in Times Square to supporting family businesses, they hit the ground running with NIL deals the day these restrictions were lifted, and these moves were widely celebrated. However, what the celebratory discourse ignores is the fact that, beneath the surface of sweeping reform, not much has changed—the legislators behind NIL laws have been reading from the NCAA's playbook this whole time. Rather than empowering athletes to call the shots when it comes to their NIL rights, these laws, however well-intended, are implicitly paternalistic in that they are dictating what college athletes can and cannot do.

The concept of paternalism, where authority figures infantilize subordinates by controlling their conduct under the guise of protection, isn't new—for example, it's the principle that guided the steel mill industry in the 1950's. Judge Elbert H. Gary, former chairman of the Board of the United States Steel Corporation was notorious for implementing paternalistic values into business in an effort to solidify the twelve-hour workday, insisting it was what the workers wanted, rather than paying steelworkers a higher wage for a more reasonable eight-hour day.

Robin Bernstein further discusses the consequences of paternalism and infantilization in her book, *Racial Innocence: Performing American Childhood from Slavery to Civil Rights*, where she grapples with an important question: "How did childhood acquire so much active weight that the exhortation to 'protect the children' seems to add persuasive power to almost any argument?" For example, in 2009, Keith Bardwell, the justice of the peace in Louisiana's Tangipahoa Parish refused to perform a marriage ceremony for an interracial couple out of his so-called concern for their future children. Bardwell's defense was that their hypothetical children would "suffer" because he believed there would be "a problem with both groups accepting a child from such a marriage." Bardwell later resigned, but held fast to his belief that he was acting altruistically. "I'm not a racist," he said. "My main concern is for the children."

However, Bernstein points out that Bardwell refused to perform the ceremony "to protect children *who did not exist*," and further contends that in Bardwell's mind, "imagined children deserve protection more than living adults

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"March Madness" is the NCAA's largest and most profitable media event.

deserve constitutional rights." As the Supreme Court wrestles with women's reproductive rights due in large part to similar protective discourse on behalf of unborn children, the stakes of this dynamic cannot be overstated. And similarly, in the modern-day NCAA, college athletes constitute both the imagined children and the living adults—they are conceptualized and treated as children while they are legally of age, which obligates them to all kinds of guardrails ranging from frivolous to downright insulting.

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Large crowds (like this one at Ohio Stadium) are part of the spectacle of college athletics.

When it comes to NIL policies, paternalism is subtle, but consistent. For example, California's "Fair Pay to Play Act" requires athletes to sign with agents that are licensed in the state. Florida's NIL law prohibits athletes from signing with brands that conflict with their team's contract. It's happening at the university level, too—BYU's NIL policy prohibits athletes from signing with coffee companies and many others loosely prohibit deals with organizations that violate the university's code of conduct. To top it off, the NCAA's interim NIL policy states that adherence to such rules is necessary to "protect and enhance student-athlete well-being."

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This isn't to say that NIL expansion isn't both welcome and historic—it certainly is. But the principle behind NIL policies and laws is nonetheless infantilizing, and it doesn't stop with NIL. There's also the practice of housing football teams at hotels for home games to keep athletes out of trouble, assigning "class trackers" to ensure class attendance, and enforcing team rules that govern their conduct from appearance standards to relationship disclosure policies. These products of paternalism—guardrails, rules, and regulations—point to what is arguably its most insidious aspect: its ideological component, which legitimizes and justifies normative behavior. In other words, the normalization of athletes as controllable renders them childlike and strips them of agency in matters both small and large. But this dynamic could soon change.

On September 29, 2021, NLRB General Counsel, Jennifer Abruzzo released a memo stating that "certain players" at American educational institutions should be considered employees and that she considers the term "student-athlete" to be a mischaracterization and a violation of the NLRA. Although Abruzzo doesn't speak for the entire Board, her memo will soon be put to the test. Upon learning that people who don't work for an organization can still file a complaint against it, College Basketball Players Association co-founder, Michael Hsu, decided to put the ball in Abruzzo's court and challenge the NCAA.

NIL has been a much-needed development for college athletes, but the real battle lies in labor rights. If college athletes are one day treated like legal adults and gain the right to organize and negotiate, they'll really be able to put on a show. ■

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