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WHITE PAPER

Reform of Sports Gambling in the United States: Lessons from Down Under

Stephen F. Ross, James Gorman III & Ryan Mentzer*

Americans love sports. Sporting events give millions of Americans a brief reprieve from the difficulties of life. Sporting events give millions of Americans the chance to watch their heroes live out the dreams that nearly all Americans shared growing up as children in backyards and parks with their family and friends. For many, an important part of the experience is wagering against the market on the outcome of sporting competition.

At the same time, sports gambling, as well as gambling in general, has long been viewed as a major problem in our society.¹ Betting has been perceived as a form of corruption affecting the integrity of American sports. The ill-effects of sports gambling date at least from the infamous Black Sox scandal during the 1919 World Series between the Chicago White Sox and the Cincinnati Reds. Following the series, several White Sox players were accused of intentionally losing games in exchange for money from gamblers.² College basketball was rocked by point-shaving scandals in the 1950s.³ In order to combat these problems, over the years Congress has enacted legislation including, most notably, the Professional and Amateur

* Ross is Director of the Sports Law Institute and Professor of Law; Gorman and Mentzer are currently Research Fellows at the Sports Law Institute and J.D. candidates at the Dickinson School of Law of the Pennsylvania State University, 2016.

¹ NCAA v. Governor of N.J., 730 F.3d 208, 215 (3rd Cir. 2013); Erica N. Reib, Comment, *Ante Up or Fold: What Should Be Done About Gambling in College Sports?*, 21 MARQ. Sports L. Rev. 621, 621 (2011).

² NCAA, 730 F.3d at 215; Editors of Encyclopædia Britannica, *Black Sox Scandal*, ENCYCLOPÆDIA BRITANNICA (Mar. 4, 2014), <http://www.britannica.com/EBchecked/topic/68298/Black-Sox-Scandal>.

³ See Joe Goldstein, *Explosion II: The Molinas Period*, ESPN.com, Nov. 19, 2003, http://espn.go.com/classic/s/basketball_scandals_molinas.html at 27.

Sports Protection Act (PAPSA).⁴ This act makes it illegal to run or operate a sports book on any amateur or professional athletic event.

In recent years, however, states such as New Jersey have softened their stance on sports gambling, and enacted laws that would regulate gambling in their state. Twice, in 2012 and in 2014, the New Jersey legislature enacted laws aimed at legalizing sports gambling.⁵ However, these efforts have been met with staunch opposition and were successfully challenged by both the NCAA and the professional sports leagues. Federal judges twice found that these state laws are impermissible under PAPSA.⁶

Not all countries have responded to the integrity concerns raised by sports betting by banning it outright as in the United States. In many countries, sports wagering is legal and regulated, with scandals more readily exposed and violators punished. Sports in two such countries, the United Kingdom and Australia, are generally seen as fair and clean.⁷ In contrast, the two nations with the largest population of sports consumers — China and India — outlaw all forms of sports gambling. Gambling thrives unregulated in these markets, and corruption has flourished.⁸ The Singaporean and Malaysian soccer leagues folded in the 1990s, and the Chinese football league disbanded after sponsors Pirelli and China Central TV pulled out due to endemic match-fixing.⁹ One of the fastest-growing leagues in world sports, the Indian Premier League in cricket, has also been rocked by ongoing match-fixing scandals.¹⁰

⁴ Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (1992).

⁵ N.J. STAT. ANN. §§ 5:12A-1-4, 5-6 (2012); S. 2460, 216th Leg. (N.J. 2014).

⁶ See generally *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013); *NCAA v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014).

⁷ See Adrian Anderson & Stephen F. Ross, Strong Regulation Could Inject Integrity Into Sports Regulation, *Street & Smith's Sports Business Journal*, February 16, 2015, pg. 25

⁸ Adrian Anderson, *Match-fixing, not drugs, is sport's biggest threat*, (Melbourne) Herald Sun, Sept. 16, 2013, available at <http://www.heraldsun.com.au/news/opinion/matchfixing-not-drugs-is-sport8217s-biggest-threat/story-fni0ffsx-1226719582273>.

⁹ *Id.*

¹⁰ *Id.*

In the Australian state of Victoria, sports betting is legal and regulated.¹¹ Australians have adopted the view that it is better to bring betting out of the dark shadows of back alleys and smoky bars, and into the hands of regulators and corporations.¹²

American sports leaders are beginning to re-evaluate their predecessors' implacable hostility to sports gambling. As recently as a May 2014 sports lawyers convention, a senior counsel to Major League Baseball — perhaps reflecting the views of his then-boss, Commissioner Bud Selig — expressed skepticism over renewed efforts to consider expanding legalized betting on major sports beyond Nevada sports books. Alluding to the Black Sox scandal, he suggested that MLB was not interested in experimenting with changes in its unalterable opposition to any connection with sports wagering, given the damage to the national pastime's integrity from that unfortunate event. Later that fall, new NBA Commissioner Adam Silver wrote a *New York Times* op-ed calling for legislative reforms that would couple modification of current federal prohibition on sports gambling with tighter regulation.¹³ Even MLB's new commissioner, Rob Manfred, has acknowledged the movement toward legalized gambling: "I think it's important for there to be a conversation between me and the owners about what our institutional position will be."¹⁴

Commissioner Silver called for some basic and appropriate regulatory standards, including licensing of sports bookmakers and monitoring of unusual betting-line movements. The latter is one of the key benefits of sports gambling, allowing potential scandals to be nipped in the bud. We would go further, however, and propose that — in addition to fine bottles of shiraz, a few marsupials for American zoos and quality wool — American imports from the

¹¹ NAT'L GAMBLING IMPACT STUDY COMM'N REPORT, 15 (1999)[hereinafter COMM'N REPORT].

¹² See Anderson & Ross, *supra* note 7, at 2.

¹³ Adam Silver, Legalize and Regulate Sports Betting, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0

¹⁴ *Outside The Lines: Rob Manfred* (ESPN television broadcast Feb. 5, 2015)

Australian state of Victoria include what we think is close to a model for sports gambling regulation.

This paper demonstrates the value for the United States in using the Victorian legislation as a model for legalizing sports betting in American sports leagues. In Part I, we review the scope of illegal gambling in the United States, the need for policy changes, and the fiscal benefits to legalized gambling. Part II provides an overview of relevant American law, and demonstrates the need for federal legislative reform. Part III casts our gaze Down Under, providing an overview of Australian sports gambling regulation and detailing how Australian law responds to American concerns about legalized gambling. Part IV analyzes the ways in which current American law would need to be changed in order to import the Victorian regime successfully, and builds upon reforms publicly advocated by Adam Silver.

I. THE PROBLEM WITH ILLEGAL SPORTS GAMBLING IN THE UNITED STATES

A. *The Scope of Illegal Gambling*

Illegal gambling is a major problem in the modern United States. Each year an estimated \$400 billion is illegally wagered,¹⁵ which dwarfs the amount that is legally gambled in Nevada's sports books.¹⁶ Taking the 2014 Seattle Seahawks v. Denver Broncos Super Bowl for example, "300,000 Americans traveled to Nevada for Super Bowl weekend to wager a record \$119 million, yielding a \$19.7 million recorded profit for Las Vegas sports books."¹⁷ The

¹⁵ COMM'N REPORT, *supra* note 11, at 2-14; Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0; Matthew T. Mierswa, Note, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HALL LEGIS. J. 447, 449 (2010).

¹⁶ COMM'N REPORT, *supra* note 15, at 2-14; Will Hobson, *Sports Gambling in the U.S.: Too Prevalent to Remain Illegal*, WASH. POST (Feb. 27, 2015), http://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html; Mierswa, *supra* note 11, at 449.

¹⁷ Associated Press, *Fans Bet Record \$119M on Super Bowl*, ESPN (Feb. 4, 2014), http://espn.go.com/nfl/playoffs/2013/story/_/id/10399019/super-bowl-xlvi-fans-bet-record-119m-game-

illegal gambling on this event was obviously exponentially more, as indicated by an American Gambling Association (AGA) study of the 2015 Super Bowl between the Seattle Seahawks and the New England Patriots, which estimated that Americans wagered \$3.8 billion illegally on that single sporting event.¹⁸ All of this money is untaxed, unregulated, and a fair portion of it is related to organized crime.¹⁹

The scope of illegal gambling and the problems associated with it were further magnified by the NBA's game fixing scandal in 2007.²⁰ Over the course of four years, NBA referee Tim Donaghy bet on "probably over 100 games" that he refereed. The FBI took notice and determined the Donaghy won between seventy and eighty percent of the games he bet on, which was an obvious indicator of game fixing. He was federally charged and convicted as having been part of an illegal gambling operation.²¹ This scandal was a huge black eye for the NBA and shed light onto the ugly world of illegal sports gambling that exists without taxation and without regulation.

Problem gambling adds another layer to the problems associated with illegal sports gambling.²² The number of compulsive gamblers has steadily increased over the past few

nevada-casinos; Michael Welsh, Article, Betting On State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals of the Demise of the Professional and Amateur Sports Protection Act, 55 B.C. L. REV. 1009, 1009 (2014).

¹⁸ Chris Moyer, *Illegal Super Bowl Bets to Total \$3.8 Billion This Year*, AGA (Jan. 22, 2015), <http://www.americangaming.org/newsroom/press-releases/illegal-super-bowl-bets-to-total-38-billion-this-year>.

¹⁹ COMM'N REPORT, *supra* note 15, at 2-14, 2-15.

²⁰ David Purdum, *"I'm Not Pro Sports Gambling. I'm just A Realist."*, ESPN, Feb. 16, 2015 at 56.

²¹ CBSNews, *Ex-NBA Ref Tim Donaghy's Personal Foul*, CBS (Dec. 3, 2009), <http://www.cbsnews.com/news/ex-nba-ref-tim-donaghys-personal-foul/>.

²² See National Council on Problem Gambling, *College Gambling Facts and Statistics*, <http://www.ncpgambling.org/files/NPGAWcollegefactsheet.pdf> (illustrating that about 67% of all college students bet on sports); Bill Bradley & Serene Murphy, *The Professional and Amateur Sports Protection Act – policy concerns behind Senate Bill 474 (proposed legislation to prohibit sports gambling)*, 2 SETON HALL J. SPORT L. 1 (1992); Ante Z. Udovicic, *Special Report: Sports and Gambling a Good Mix? I Wouldn't Bet On It*, 8 MARQ. SPORTS L.J. 401, 404 (1998).

decades, primarily among adolescents.²³ One reason that the number of compulsive gamblers is on the rise is that although gambling was once considered morally wrong, this is no longer the case. Gambling is now a perfectly normal aspect of our American culture. As Rodger Svendsen, former director of the Minnesota Compulsive Gambling Hotline characterizes it, "[w]e're working with the first generation that has been raised when gambling has been seen as a positive thing."²⁴

B. The Need for Policy Changes

The current prohibition on legalized gambling in most states results in a major social problem. To the extent that the laws reveal a policy preference to bar sports gambling, the laws have failed. The vast underground market for illegal sports gambling is free of effective regulation and taxation. Further, the laws are further preventing visibility of the compulsive gambling problem in our society. The problems with the current landscape of sports gambling in the United States are threefold: (1) heavy involvement with organized crime, (2) lack of transparency leading to loss of sporting integrity, and (3) foregone financial opportunities.

Because the massive market for sports gambling is illegal, it has become – like illegal consumption of alcohol during Prohibition – a ready target for organized crime. Although the precise share of the estimated \$400 billion of illegal gambling that can be attributed to organized

²³ Mary K. Wilber, BA & Marc N. Potenza, MD & PhD, *Adolescent Gambling Research and Clinical Implications*, 3 PSYCHIATRY 10, 10 (2006).

²⁴ Tim Layden, Bettor Education Gambling Is The Dirty Little Secret On College Campuses, Where It's Rampant And Prospering. This Si Special Report Reveals How Easy It Is For Students To Bet With A Bookie, Become Consumed With Wagering And Get Over Their Heads In Debt, SPORTS ILLUSTRATED (Apr. 3, 1995), <http://www.si.com/vault/1995/04/03/8093095/bettor-education-gambling-is-the-dirty-little-secret-on-college-campuses-where-its-rampant-and-prospering-this-si-special-report-reveals-how-easy-it-is-for-students-to-bet-with-a-bookie-become-consumed-with-wagering-and-get-over-their-heads-in-debt>.

Layden's article illustrates the seriousness of the problem with the case of Keith Tubin. After having lost tens of thousands of dollars gambling, Tubin robbed eight Las Vegas banks for over \$89,000 to pay off his gambling debts. *Id.*

crime is uncertain, organized crime exhibits a considerable amount of influence over the illegal market. New Jersey Senator Raymond J. Lesniak outlined the reach of organized crime families, such as the Genovese family, on the illegal market. Senator Lesniak laments that “federal laws . . . essentially give organized crime and overseas interests a virtual monopoly on sports wagering in the 46 states that are prohibited from setting up legal sports wagering.”²⁵ The National Gambling Impact Study Commission Report, which was issued 16 years prior to Senator Lesniak’s comments, shows that the organized crime issue is a longstanding issue. This report indicated that in 1999 there was an “increase in the involvement of organized crime groups on sports wagering.”²⁶

In many cases, violence accompanies the operation of illegal gambling rings. One well-documented example comes from the illegal gambling in South Philadelphia during the late 1980s and early 1990s. During this time, in an effort to remove competition from other bookmakers, the Scarfo crime family used force to put a stop to their competitors’ businesses. In one instance, associates of the Scarfo family broke into the home of a competing bookmaker, bound him to a chair, and beat him repeatedly with a handgun in an effort to scare him out of their illegal gambling market.²⁷

In addition to organized crime, a lack of transparency results in an unacceptable risk to the sporting integrity of American competitions. When gambling is underground, this increases

²⁵ See Raymond J. Lesniak, *If You Outlaw Sports Betting, Only Outlaws Will Have Profits*, U.S. NEWS (June 15, 2012), <http://www.usnews.com/debate-club/should-sports-betting-be-legal/if-you-outlaw-sports-betting-only-outlaws-will-have-profits> (outlining a case in New Jersey where 13 members of the Genovese organized crime family were charged in a scheme to use an overseas betting website to run an illegal online sports gambling operation); see also Brett Wolf, *U.S. Treasury Warns Casinos on Illegal Sports Betting*, REUTERS (Jan 16, 2015), <http://www.reuters.com/article/2015/01/16/us-gambling-sports-casinos-idUSKBN0KP2I020150116>.

²⁶ COMM’N REPORT, *supra* note 15, at 2-14, 2-15.

²⁷ SEAN PATRICK GRIFFIN, *GAMING THE GAME: THE STORY BEHIND THE NBA BETTING SCANDAL AND THE GAMBLER WHO MADE IT HAPPEN*, 42-43 (Barricade Books Inc., 2011).

the risk of fixed sporting events being. Under the current legal framework, although there is no statutory basis directly mandating the lack of transparency, the fact that federal statutes drive the gambling to the illegal market is what creates the opacity.²⁸ This is illustrated with the widely reported NBA's officiating scandal with Tim Donaghy. Donaghy was able to bet on "probably over 100 games" and win his bets at a nearly 80 percent rate in the illegal gambling market.²⁹ Had there been a system in place that promoted transparency, Donaghy would've been caught much sooner, and the NBA could have avoided the huge black eye incurred by the scandal.

In order to fix this transparency problem and avoid game fixing scandals like Tim Donaghy's, a new legal framework that legalizes the gambling with authorized bookmakers is required to protect sporting integrity. Bringing visibility and legality to the gambling would allow for government oversight, which would deter attempts at match fixing, and allow for quicker action against corruption.

C. Fiscal Benefits to Legalized Gambling

Moreover, without actually eliminating behavior that Congress might view as anti-social, federal law prevents cash-strapped states, such as New Jersey, from enacting their own sports gambling policies. Legalized gambling will provide three fiscal benefits: (1) it will generate tax revenues; (2) it will provide jobs; and (3) it will keep money in this country.

First, legalized gambling will generate large tax revenues in the United States. For example, the Australian state of Victoria (with less than six million people) realized A\$57.6

²⁸ See Silver, *supra* note __, at 1; Moyer, *supra* note __, at 1; Layden, *supra* note __, at 1 (citing collectively the problems associated with illegal sports gambling market).

²⁹ CBSNews, *supra* note 19, at 1.

million in tax revenue relating to sports betting in 2013-14.³⁰ Because Australia taxes only sports betting providers, meaning that bettors' winnings are not taxed,³¹ and the United States would likely tax both the profits made by the sports betting industry and the winnings from ordinary sports bettors,³² the U.S. will likely find sports betting to be a significant source of tax revenue.³³ Nevada was able to tax an estimated \$19.7 million in recorded profit by Las Vegas casinos on the 2014 Super Bowl alone. In addition, due to the draw of this major sports gambling event, Las Vegas visitors spent an estimated \$106.2 million in nongaming activities and accommodations.³⁴ In contrast, other states did not benefit from these and other major sporting events because federal law outlaws sports gambling outside of Nevada. There was, no doubt, a large amount of sports gambling throughout the United States for the Super Bowl and other events, yet all of it was untaxable and on the illegal market.

Another fiscal benefit is an influx of new jobs for regulators and sports betting providers. These include key "licensed" bookmaking employees,³⁵ officials within sports leagues to assist with information sharing with the sports betting providers, and more government employees to help regulate and enforce any new regulatory legislation. New Jersey has sought to overcome

³⁰ Victorian Commission for Gambling and Liquor Regulation, Annual Report 2013-2014, pg. 56, available at <http://www.vcglr.vic.gov.au/utility/about+us/about+the+vcglr/annual+reports>.

³¹ Australia's Future Tax System: Final Report, Part 2: Detailed analysis, Chapter E: social and market outcomes, E7-2, Existing Gambling Taxes, available at http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/Papers/Final_Report_Part_2/chapter_e7-2.htm

³² This reflects current U.S. tax treatment of gambling income. See IRS, "Tax Topic 419--Gambling Income and Losses," available at <http://www.irs.gov/taxtopics/tc419.html>.

³³ See Robert Ferris, *These 13 States Raked in 34B in Gaming Revenue*, USA TODAY (April 27, 2014), <http://www.usatoday.com/story/money/business/2014/04/27/top-gambling-states/8168681/>.

³⁴ See Associated Press, *supra* note 13, at 1.

³⁵ In the relatively small state of Victoria, there are 208 such employees. Victorian Commission Report, *supra* note __, at 55.

federal legislation precisely because its officials perceive that sports gambling can be an important source of jobs and maintenance for Atlantic City's struggling casinos.³⁶

The United States will also benefit by keeping current illegal gambling money inside the country. Currently, it is estimated that billions of dollars are wagered yearly on offshore websites.³⁷ If sports betting were legalized, the billions that are lost to foreign websites will remain in the United States, increasing the money in the economy, while increasing tax revenue at the same time.

II. SUMMARY OF U.S. LAW AND THE NEED FOR FEDERAL LEGISLATIVE REFORM

Sports gambling has been driven underground largely because of two federal statutes: the Wire Fraud Act and the Professional and Amateur Sports Protection Act (PASPA). In this section, we summarize the key provisions of these statutes, analyze a critical loophole that permits the widespread participation in fantasy sports, and review recent legal challenges. The current legal framework demonstrates that Congress will need to act to amend these statutes in order to implement an effective scheme of legalization, regulation, and taxation of sports wagers.

A. *The Federal Wire Fraud Act*

For practical purposes, the Federal Wire Fraud Act³⁸ makes sports wagering illegal. Enacted in 1961, the Wire Act was part of a crime bill that recognized the need for independent federal

³⁶ Seth McLaughlin, *Chris Christie Bets Legalized Sports Gambling Will Boost Atlantic City, 2016 Hopes*, WASH. POST (Jan. 29, 2015), <http://www.washingtontimes.com/news/2015/jan/29/chris-christie-backs-legalized-sports-betting-in-b/?page=all> (outlining Christie's hopes that sports gambling jobs would bring relief to the 11.5 percent unemployment rate in Atlantic City).

³⁷ See Anderson, *supra* note 8, at 2.

³⁸ 18 U.S.C. § 1084 (1961).

action to combat interstate gambling operations.³⁹ The Wire Act was the federal government's first initiative aimed at eliminating gambling operations. The Wire Act states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.⁴⁰

The Act contains two essential elements: "(1) the information transmitted by wire must have assisted in the placing of bets or wagers, and (2) the defendant must have been engaged in the business of wagering or betting during the time of transmission."⁴¹ The language of this statute suggests that all forms of gambling would be covered, but recent judicial trends indicate that sports gambling is being targeted specifically.⁴²

B. The Professional and Amateur Sports Protection Act (PASPA)

PAPSA makes it unlawful for a governmental entity or person to sponsor, operate, advertise, promote, license, or authorize a lottery, sweepstakes, or other gambling scheme based on amateur or professional athletic events.⁴³ The goal of this legislation was to ban the gambling that "threatens the integrity and character of, and public confidence in, professional and amateur sports, and instills inappropriate values in our Nation's youth."⁴⁴ As part of this legislation, Congress enacted a grandfather clause that would allow states, such as Nevada, to

³⁹ See, e.g., *Martin v United States*, 389 F.2d 895 (5th Cir. 1968).

⁴⁰ 18 U.S.C. § 1084 (1961).

⁴¹ *Truchinski v. United States*, 393 F.2d 627, 630 (8th Cir. 1968); Megan E. Frese, Note, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 547, 560-61(2005).

⁴² For example, the Fifth Circuit has ruled that the Wire Act applies only to sports betting and not to other kinds of gambling. *In re Mastercard Int'l Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2012).

⁴³ 28 U.S.C. §§ 3701-3704 (1992).

⁴⁴ 137 Cong. Rec. S2, 256-04 (daily ed. Feb. 22, 1991) (statement of Sen. Dennis DeConcini).

keep their sports gambling while also allowing other states that wanted to enact their own sports gambling laws to do so within a year grace period.⁴⁵

C. The Fantasy Sports Exception

While these provisions would seem to outlaw all forms of sports wagering, and reflect the view that any sports wagering threatens sporting integrity, participation in fantasy sports leagues in most cases is completely legal under federal law, even if the leagues provide monetary compensation for the winners.⁴⁶ An express fantasy sports exception in the Unlawful Internet Gambling Enforcement Act of 2006 deems this conduct to be legal when it meets the following three criteria: “(1) the value of the prizes is not determined by the number of participants or the amount of fees paid;(2) all winning outcomes reflect the relative knowledge and skill of the participants; and (3) the fantasy game’s result is not based on the final scores of any real-world games.”⁴⁷ Based on this language, most traditional versions of fantasy football seem to comply with federal law.⁴⁸

There are some issues that arise when evaluating the legality of fantasy sports under state law. Under most state laws, fantasy leagues are deemed illegal if there is consideration to play, a reward, and chance.⁴⁹ The exact definition of chance is what varies from state to state. Some

⁴⁵ 28 U.S.C. § 3704 (1992). Ironically, New Jersey thought about pursuing its own law under the grace period, but ultimately never acted, causing them to fall under the rigors of PAPSA. Intense debate between New Jersey Senators Frank Lautenberg and Bill Bradley prevented state legislation during the federal grace period. The state ultimately sided with Senator Bradley’s PAPSA favored views. 138 Cong. Rec. S7, 300-01 (daily ed. June 2, 1992) (statement of Sen. Frank Lautenberg); Joseph F. Sullivan, *Gambling Debate Rages Anew Over Sports*, N.Y. TIMES (Nov. 20, 1991), <http://www.nytimes.com/1991/11/20/nyregion/gambling-debate-rages-anew-over-sports.html?pagewanted=all&src=pm>. See generally Bradley, *supra* note 22.

⁴⁶ Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 34, 37-38 (2012) (discussing the “fantasy sports games” carve-out provision found in the Uniform Internet Gambling Enforcement Act of 2006).

⁴⁷ 31 U.S.C. § 5362 (2006).

⁴⁸ Marc Edelman, *Is it Legal to Play Fantasy Football for Money?*, FORBES (Sept. 3, 2013), <http://www.forbes.com/sites/marcedelman/2013/09/03/is-it-legal-to-play-fantasy-football-for-money/>.

⁴⁹ See *Geis v. Cont’l Oil Co.* 511 P.2d 725, 727 (1973)(Utah 1973)(stating that “the statutory elements of a lottery are: (1) prize; (2) chance; and (3) any valuable consideration.”); see also *Valentin v. La Prensa*, 427 N.Y.S.2d 185,

states use the “predominant purpose test”, which allows for fantasy sports if the games involve more skill than chance.⁵⁰ Others, however, use the “any chance test”, which is much more stringent because it states that the presence of any chance at all renders fantasy sports illegal.⁵¹ Ultimately, with the exception of the “any chance test” states, the vast majority of fantasy sports are completely legal.

The legality of fantasy sports stands in stark contrast to the illegality of sports gambling otherwise. In particular, there seems to be little expressed concern about the risks of corruption as prize money increases, despite the lack of regulatory safeguards that characterized regulated sports gambling in other countries.

D. Unsuccessful Efforts to Implement Legal Sports Gambling under Current Federal Law

New Jersey is the most prominent state that has sought to secure the benefits of legalized gambling in spite of the aforementioned federal statutes. In 2012, New Jersey’s Governor Chris Christie signed state legislation aimed at allowing sports gambling at casinos in the state.⁵² This was the first instance of a state directly attempting to circumvent PAPSA. This legislation would have allowed casinos and other gambling proprietors to “operate a sports pool” and apply for “a license to operate a sports pool.”⁵³ The legislation was immediately challenged by all the professional sports leagues and the NCAA. They claimed that this law would damage their reputation and goodwill due to “the fact that the proliferation of sports gambling will adversely affect the way that the public views amateur and professional sports.”⁵⁴

186 (N.Y. Civ. Ct. 1980)(stating that three elements are needed to constitute an illegal lottery: (1) consideration, (2) chance, and (3) a prize).

⁵⁰ Edelman, *supra* note ____, 3 Harv. J. Sports & Ent. L. at 29.

⁵¹ *Id.* at 31.

⁵² N.J. STAT. ANN. §§ 5:12A-1-4, 5-6 (2012).

⁵³ *Id.* at § 5:12A-2(a).

⁵⁴ Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, (No. CV124947), 2012 WL 3171566, at 1 (D.N.J. Aug. 7, 2012).

New Jersey's legal response to the claim of inconsistency between PAPSA and its new regulatory regime was to argue that PAPSA exceeded Congress' authorized powers under the Constitution's Commerce Clause. The district court rejected New Jersey's argument and granted the plaintiffs' request to declare the state law illegal and to enjoin the state from sponsoring, operating, promoting, licensing or authorizing any betting on competitive sports events.⁵⁵ The court reasoned that Congress enacted PAPSA to prevent the spread of state-sponsored sports gambling and to protect the integrity of professional and amateur sports.⁵⁶ This concern provided Congress with the constitutionally-required rational basis to conclude that legalized sports gambling would affect interstate commerce.⁵⁷ The decision was affirmed on appeal.⁵⁸

In response to this ruling, Governor Christie and the New Jersey legislature amended the statute in an effort to maneuver around the *Christie I* decision. Although the goal of the 2014 statute was, like the invalidated version, to allow casinos and other proprietors in the state to operate sports gambling pools in the state of New Jersey, the 2014 law sought to avoid PASPA's specific prohibition on state operation, licensing, or authorization of sports gambling by partially repealing state laws and regulations prohibiting sports wagering, in certain circumstances.⁵⁹

When this statute was also challenged, counsel for Governor Christie and the New Jersey legislature argued that the 2014 law was in line with the Third Circuit's reasoning in *Christie I*. That court, in rejecting claims that PASPA had unconstitutionally "commandeered" state enforcement of federal policy,⁶⁰ had stated that it did "not read PASPA to prohibit New Jersey

⁵⁵ NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.Y. 2013).

⁵⁶ *Id.* at 576.

⁵⁷ *Id.* at 560.

⁵⁸ NCAA v. Governor of N.J., 730 F.3d 208 (3rd Cir. 2013), *cert. denied sub nom.* Christie v. NCAA, 134 S. Ct. 2866 (2014).

⁵⁹ S. 2460, 216th Leg. (N.J. 2014). Additionally, this statute contains a broad severability clause and repeals provisions of New Jersey law governing criminal and civil penalties for gambling.

⁶⁰ In *New York v. United States*, 505 U.S. 144, 166, 180, (1992), the U.S. Supreme Court held that Congress "lacks the power directly to compel the States to require or prohibit" acts which Congress itself may require or prohibit."

from repealing its ban on sports wagering," and "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be."⁶¹ However, the district court, in *Christie II*, held that despite the new language, the 2014 law remains inconsistent with PAPSA and invalid under the Supremacy Clause,⁶² a decision recently affirmed by the Third Circuit.⁶³

Although *Christie II* reasoned that PASPA does not prevent states from completely repealing any state law constrains on sports gambling, the federal judicial interpretation of these statutes make it clear that any regulatory regime designed to legalize, regulate, and tax sports gambling will be struck down. The only realistic option is federal legislative reform. In determining whether and how to reform current law, American legislators would do well to look Down Under.

III. HOW AUSTRALIAN LAW REGULATES SPORTS GAMBLING IN A MANNER THAT ADDRESSES AMERICAN CONCERNS

Americans' passion for sports and concerns about the dark shadows and perceived risks to sporting integrity associated with sports betting inhibit the widespread legalization of sports betting in this country. The lessons from Australia suggest that this view is near-sighted. The model implemented by the state of Victoria emphasizes information sharing and cooperation between sports betting providers, sports controlling bodies, and law enforcement. Australian observers believe this promotes, rather than endangers, sporting integrity.

A. Overview of Australian federal and Victorian statutory regulation

⁶¹ NCAA v. Governor of N.J., 730 F.3d at 233.

⁶² NCAA v. Christie, 61 F. Supp. 3d 488, at *508.

⁶³ NCAA v. Governor of N.J., Nos. 14-4546, 14-4568, and 14-4569, 2015 U.S. App. LEXIS 14955 (3d Cir. Aug. 25, 2015).

Like the United States, Australia is a federal country. States enjoy plenary regulatory power. In Australia, however, the federal (Commonwealth) government's constitutional authority to regulate interstate commerce⁶⁴ has been interpreted by the High Court of Australia more narrowly than in the United States.⁶⁵ Commonwealth legislation is limited to restrictions on internet gambling.⁶⁶ The Interactive Gambling Bill of 2001 ("IGB") makes it lawful to wage on sporting events or a series of sporting events,⁶⁷ although it bars betting on sporting events after they have commenced.⁶⁸ For example, a bettor cannot place a bet on a tennis match after the first set is completed, a bettor can only bet on the outcome of the entire match before the match begins. The IGB also bars betting on contingencies that may or may not occur during the course of a sporting event after the start of the event.⁶⁹ For example, this would ban Super Bowl prop bets placed after the game's kick-off, such as second quarter score, who scores the first touchdown, and whether or not there will there be a safety. Outside of the preceding stipulations, sports betting regulation is left to the states for regulation.

Sports betting is governed in Victoria by the Gambling and Racing Legislation Amendment (Sports Betting) Act of 2007.⁷⁰ The statute created the Victorian Commission for Gambling and Liquor Regulation. Its responsibilities include approving sporting events, sports controlling bodies and sports betting agencies under the statute for the right to have sports bets placed on sporting events.

⁶⁴ Const. of Australia, s 51(i).

⁶⁵ See, e.g., *Airlines of NSW Pty. Ltd. V. State of New So. Wales (No. 2)*, 113 C.L.R. 54 (1965) (expressly rejecting the American interpretation allowing federal legislation of intra-state activity that substantially affects interstate commerce).

⁶⁶ This legislation is based on the Commonwealth power over "postal, telegraphic, telephonic, and other like services." Aus. Const. s 51(v).

⁶⁷ Interactive Gambling Bill 2001 (Cth) pt 1 s 8A(1).

⁶⁸ *Id.* s 8A(2)(a).

⁶⁹ *Id.* s 8A(2)(b).

⁷⁰ Sports Betting Act 2007,(Vict.), available at <http://www.legislation.vic.gov.au/>.

Under the Sports Betting Act, the Commission may approve a particular event or class of events for betting purposes and approve a betting competition on that event or class.⁷¹ The Commission may approve events that are held “wholly or partly within or outside Victoria.”⁷² Approval considerations for the Commission include (1) whether the event is an unmanageable integrity risk; (2) whether the event is administered by an organization capable of enforcing rules regarding integrity; (3) whether betting on the event is offensive or against the public interest; (4) whether the event is an unreasonable expansion of the scope of gambling in Victoria; and (5) any other matter the Commission deems relevant.⁷³ The Commission also reserves the right to revoke approval at any time for reasonable cause as determined by the Commission.⁷⁴

By way of illustration, the Commission recently approved betting on Badminton.⁷⁵ In its decision, the Commission mentioned that it considered the integrity risks under 4.5.8(1)(a), the capability of the organization holding the event to ensure integrity under 4.5.8(1)(b), and whether allowing betting on badminton would be offensive to the public under 4.5.8(1)(c).⁷⁶

Second, an organization can apply to the Commission for approval as the sports controlling body for a sports betting event, forgoing the need to obtain approval for each individual sporting event.⁷⁷ Considerations for approval by the Commission include, (1)

⁷¹ *Id.* div 3 s 4.5.6(1).

⁷² *Id.* div 3 s 4.5.7.

⁷³ *Id.* div 3 s 4.5.8. Once the Commission approves an event the approval takes effect on the day notice is published, or under a date specified in the notice. *Id.* div 3 s 4.5.6(4). The Commission is required to publish notice of approval in the Government Gazette. *Id.* div 3 s 4.5.10. Additionally, the Commission must maintain a list of all approved betting events on its website. *Id.* div 3 s 4.5.10(3).

⁷⁴ *Id.* div 3 s 4.5.11.

⁷⁵ See Victorian Commission for Gambling and Liquor Regulation, *Approval of Betting Event Sport of Badminton*, <http://www.vcglr.vic.gov.au/utility/about+us/meetings+and+hearings/gaming+decision+-+approval+of+badminton+for+sports+betting>.

⁷⁶ *Id.*

⁷⁷ Sports Betting Act 2007, (Vict.) div 4 s 4.5.12. Upon filing the application with the Commission, the sports controlling body must publish notice in a newspaper “circulating generally throughout Australia.” This notice must also contain a notice stating that objections must be made within 28 days of publication to the Commission. *Id.* div 4 s 4.5.12(1).

whether the applicant has control of the event or administers the event; (2) whether the applicant has adequate rules in place to ensure integrity; (3) whether the applicant complies with international codes relating to integrity in sport; (4) whether the applicant has resources and authority to monitor integrity systems; (5) “whether the applicant has clear policies on the provision of information that may be relevant to the betting market;” (6) whether the applicant has a clear process for reporting the results of the event and hearing appeals relating to the results; (7) whether the applicant has a clear policy of sharing information with sports betting providers in order to investigate suspicious betting activity; (8) whether the applicant is the most appropriate body to be approved as the controlling body for the event; (9) whether approval supports the public interest; and (10) any other objections filed and any other relevant matter the Commission deems appropriate.⁷⁸ The Commission’s website lists those sports controlling bodies approved by the Commission. Currently this includes the Australian Football League, the Australian Rugby Union, Basketball Australia, Cricket Australia, Football Federation Australia Limited, National Rugby League, Netball Australia, Professional Golfers Association of Australia and Tennis Australia.⁷⁹

Third, the Sports Betting Act places requirements on sports betting providers, or bookmakers, that wish to accept bets on sporting events. The Sports Betting Act defines a sports betting provider as one who accepts, offers to accept or invites a person to place a bet or facilitates the placing of a bet.⁸⁰ In order to be accepted as a sports betting provider, a company must meet two prerequisites. First, the sports betting provider must have an agreement with the

⁷⁸ *Id.* div 4 s 4.5.14. As with the previous procedure, the Commission decision is required to be published in the Government Gazette, *id.* div 4 s 4.5.16, and the Commission can revoke approval at any time, *id.* div 4 s 4.5.17.

⁷⁹ A full list of approved sports controlling bodies is available at <http://www.vcglr.vic.gov.au/home/gambling/new+applicants/sports+betting/sports+controlling+bodies>.

⁸⁰ Sports Betting Act 2007, (Vict.) div 5 s 4.5.21.

sports controlling body in charge of the sporting event unless the event is wholly outside of Victoria.⁸¹ Second, the agreement must provide for information sharing between the sports betting provider and the sports controlling body to promote integrity.⁸² Additionally, the agreement must stipulate whether or not the sports betting agency will pay a fee to the sports controlling body and the amount of the fee.⁸³

If the sports betting provider is unable to reach an agreement with a sports controlling body, the provider is able to apply for the right to service bets with the Commission.⁸⁴ The Commission will then make a determination, which must provide for information sharing to ensure integrity.⁸⁵ Additional considerations the Commission analyze include, (1) any integrity-related costs that might face the sports controlling body relating to betting; (2) the integrity of the betting event; (3) the financial benefits to the betting provider; (4) existing legislative rights and liabilities of both the betting provider and the sports controlling body regarding the use and dissemination of information; and (5) any other matters the Commission deems relevant.⁸⁶ It is clear that a key aspect to sports betting in Victoria is the sharing of information between the sports betting providers and the sports controlling bodies. The information sharing helps to enforce integrity by allowing the organizations to flag suspicious betting movements and allowing the organizations to be aware of who is placing the bets.

The statutory considerations the Commission undertakes when determining approval for sports betting events, sports controlling bodies and sports betting providers appear to leave considerable room for discretion and debate. However, there are no landmark court cases that

⁸¹ *Id.* div 5 s 4.5.22.

⁸² *Id.* div 5 s 4.5.23(1).

⁸³ *Id.* div 5 s 4.5.23(a).

⁸⁴ *Id.* div 5 s 4.5.24.

⁸⁵ *Id.* div 5 s 4.5.26(2).

⁸⁶ *Id.* div 5 s 4.5.26(3).

shed light on the statutory considerations. The very fact that such little litigation exists likely signifies a mutual cooperation between the sports controlling bodies, the sports betting agencies and the Commission. All of the aforementioned stakeholders are aware that sports betting is mutually beneficial, both monetary and integrity reasons. As such, the stakeholders are willing to be flexible within the legislation currently in place, happily meeting the statutory requirements because it is good for business. This suggests that, if the United States adopted similar legislation to the Victorian law, it would find similar cooperation between the sports leagues, sports betting providers and regulators for a similar reason.

B. How the Victorian Model Responds to American Concerns Regarding Sporting Integrity

The Australian perspective reflects the famous phrase, used in another context by a leading American jurist, that “sunlight is said to be the best of disinfectants.”⁸⁷ A leading Australia sports executive observed that a few years ago, “an unusual change in strategy by a prominent Australian Rules Football club was improperly disclosed to gamblers; authorities were able to follow the money trail regarding the family of one of the corrupted players, whilst another on was photographed making a wager at a licensed bookmaker.”⁸⁸

Information sharing will enable professional sports leagues and the NCAA, together with sports betting providers, to monitor who is placing bets, how much is being bet on certain games, and any other suspicious betting movements. Further, it will flag any improprieties that could affect the outcome of a sporting event, leaving the leagues to take proper action, whether internally or by enlisting the help of law enforcement. By removing betting from the dark shadows, the illegal betting industry will cease to exist as it operates today, inhibiting unsavory characters from exuding influence over the outcome of sporting events and a recurrence of

⁸⁷ LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914 ed.)

⁸⁸ See Anderson & Ross, *supra* note 7, at 2.

notorious cases of sport betting impropriety. This section considers how a regime modeled on Australian regulated gambling is likely to limit the ability of unscrupulous match-fixers and participants to jeopardize the integrity of American sports contests, by considering how some notorious prior incidents could have been avoided with transparent, legally regulated sports wagering.

In 2007, the NBA was scandalized by revelations that a referee with thirteen years' experience, Tim Donaghy, had bet on NBA games, including games that he was refereeing. Donaghy admitted to betting on "probably over 100 games," over a four-year span.⁸⁹ Donaghy claimed to have won between seventy and eighty percent of the bets he placed on NBA basketball games during that span.⁹⁰ Eventually, word of Donaghy's success reached the mob, leading to his downfall, as more people made bigger bets on Donaghy's advice. One night, two men from the Gambino crime family picked up Donaghy outside of a Philadelphia hotel.⁹¹ The men explained to Donaghy that he would give them picks for NBA games or else men would visit his family in Florida.⁹² According to Donaghy he supplied picks to the mob after the meeting through a high school friend, using code language in case the phone calls were tapped.⁹³ The FBI estimates that the mob made several millions of dollars through Donaghy's picks.⁹⁴ Eventually, the FBI learned of an NBA referee who had inside information for sports gambling via wiretaps on mob phone calls.⁹⁵ Donaghy cooperated with the FBI for a lesser sentence, but still lives in fear of mob retribution to this day.⁹⁶ Donaghy also pointed a finger at the NBA,

⁸⁹ CBSNews, *Ex-NBA Referee Tim Donaghy's Personal Foul*, CBS, Dec. 3, 2009, 1

<http://www.cbsnews.com/news/ex-nba-ref-tim-donaghys-personal-foul/>.

⁹⁰ *Id.*

⁹¹ *Id.* at 4.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

saying it does everything it can to help larger market teams advance in the playoffs, while also trying to make each playoff series go as long as possible.⁹⁷

The revelations caused substantial harm to the NBA. Commissioner David Stern ran a massive campaign to restore the public's faith in the integrity of the NBA's games.⁹⁸ The NBA was concerned that a referee who was betting on games which he refereed would cause fans to believe that games were being fixed, and if one referee could do it, why couldn't others?⁹⁹ Additionally, Donaghy's further accusations regarding alleged league efforts to extend playoff series, and to get large market teams to advance in the playoffs, were troubling assaults on the integrity of the game.¹⁰⁰ The public considered the integrity of the NBA very seriously after the Donaghy scandal broke; it was the main headline on the sports news network, ESPN, for weeks. ESPN consistently asked experts on their shows if they thought if NBA games were being fixed. The answers to the questions were nearly always a resounding no, but the questions still had to be asked.¹⁰¹ In response, David Stern sought to distance the league from Donaghy and to discredit him. Stern and the NBA claimed that Donaghy was not credible, as he was a convicted felon who was trying to save his own skin by making wild accusations.¹⁰² Stern's campaign to save the sports watching public's faith in the integrity of the game seems to have worked, as the NBA is a widely watched league and the dominant basketball league in the United States. The NBA has not had another integrity question since the Donaghy scandal.

⁹⁷ *Id.*

⁹⁸ Howard Beck, *Lawyer Will Examine N.B.A. Gambling Rules*, N.Y. TIMES (Aug. 22, 2007), http://www.nytimes.com/2007/08/22/sports/basketball/22refs.html?_r=0

⁹⁹ Paul M. Anderson, *Gambling On Sports*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 169 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

¹⁰⁰ CBSNews, *supra* note 88, at 5.

¹⁰¹ See Marc Stein, *NBA Has No Quick Fix For Donaghy's Fixing Charges*, ESPN (June 19, 2008), http://sports.espn.go.com/nba/playoffs2008/columns/story?columnist=stein_marc&page=DonaghyStern-080611 (outlining former-NBA Commissioner David Stern's repeated assertions that Tim Donaghy was the only party guilty of criminal activity in this scandal).

¹⁰² Henry Abbot, *Justin Wolfers on the Quality of an NBA Denial*, ESPN (Oct. 20, 2009), http://espn.go.com/blog/truehoop/post/_/id/4970/justin-wolfers-on-the-quality-of-an-nba-denial

A Victorian legal regime would inhibit scandals like Donaghy's. Where gamblers may lawfully wager with betting corporations rather than illegal businesses, the mob would have difficulty finding a person like Donaghy with inside information, because the people taking bets would be legitimate businessmen, not criminals operating illegal sports books, with ties to other criminal organizations. Further, authorized bookmakers would be aware that Donaghy is an NBA referee, and would inform the league that Donaghy, or people close to Donaghy, were placing bets, allowing the NBA to respond quickly.

Pete Rose is Major League Baseball's career leader in hits, yet barred from the Hall of Fame and remains suspended from any official role with Major League Baseball for unlawfully betting on baseball during his time as the manager of the Cincinnati Reds. MLB Rule 21(d) provides for the permanent ban of anyone that bets on a game in which he is participating.¹⁰³ In 1989, MLB released a report by John M. Dowd, who had been appointed as a special counsel to the Commissioner of Baseball, which concluded that Rose had bet on Reds games between 1985 and 1987, including \$2,000 per game between May and July 1987.¹⁰⁴ Rose would even go as far as using hand signals to communicate with his friends in the stands to see how he was doing with his bets during games he was managing. Although at the time of the investigation, Rose was adamant that he never bet on baseball, the investigation uncovered that Pete Rose used friends to place bets with bookies illegally, amassing gambling debts with loan sharks with ties to New York crime families that totaled in the hundreds of thousands of dollars. To support his gambling habits and get out of his debts, Rose at one point resorted to financing cocaine purchases for his friends to sell hoping for a good return on his "investment."

¹⁰³ Major League Rule 21(d), *reprinted at* Paul C. Weiler, et al., *Documentary Supplement to Sports and the Law* 67-68 (4th ed. 2011).

¹⁰⁴ Charles M. Dowd, *Dowd Report*, 3-5, *available at* <http://thedowdreport.com/>.

As a result of the Dowd investigation, Rose was permanently banned from baseball. Rose was also found guilty of tax evasion for the money he received from gambling, spending five months in prison.¹⁰⁵ The Pete Rose scandal is a major black eye on the sport of baseball because he is an icon of the game, but banned from any participation in the game, and subsequently banned from induction in the Hall of Fame. He is currently in the process of trying to be reinstated by Major League Baseball.

The Pete Rose saga well illustrates the problems with illegal gambling. Rose had ready access to a network of illegal gambling run by loan sharks with ties to New York crime families, and resorted to financing cocaine-dealing operations in an attempt to get out of his massive gambling debts. Legalizing sports betting under a Victorian model will remove these people from the sports betting industry. When ordinary bettors are able to wager with legitimate businessmen rather than criminals, unsavory bookmakers will not find it profitable to accept wages solely from the few high-risk gamblers who are unable to place lawful bets. Further, the Victorian model will also inhibit these kinds of scandals by making it more difficult to hide gambling profits from legitimate operations. Because the business of sports betting will be regulated and taxed, the government will be able to track money made and lost by gamblers and bookmakers more effectively than when gambling is conducted in secret by unsavory characters. As such, the government will be able to identify gambling income, acting as a further deterrence for people like Pete Rose thinking about gambling on their own sport. Transparency and information sharing will also inhibit the ability of players and coaches to hide bets, as Rose did, by using friends to place the bets for him. Known associates of Rose placing bets could be tracked, allowing the MLB to take swift action before the scandal could get out of control.

¹⁰⁵ James Pitcher, *Pete Rose's Investigator: Never Let Him Back In Baseball*, available at Cincinnati.com.

Perhaps the most infamous attack on baseball's integrity was the 1919 Black Sox scandal. In an era featuring underpaid players who often searched for additional income from bettors, baseball was littered with gambling corruption; in fact, many baseball historians believe that many teams had at least one player that would influence the outcome of a game at the chance of earning a little extra cash. Starting with White Sox first basemen, Chick Gandil, eight members of the Chicago White Sox came together with a plan to throw the 1919 World Series against the Cincinnati Reds. The fix initially involved Gandil's acquaintance, professional gambler "Sport" Sullivan as the financier of the fix, but as word of a potential fix grew other players came into the fold for a piece of the action. Among the men involved in the fix beyond Sullivan was Arnold Rothstein, who at the time was the most well-known sports gambler in the United States. An associate of Rothstein's and Sullivan met with the players who agreed to throw the series for \$80,000. Rothstein's associate gave Sullivan half of the money the players requested, but Sullivan decided to place \$30,000 on the Reds instead of giving the players the full \$40,000. As the series started, the players managed to throw games one and two, but after becoming frustrated with the lack of money coming to them, they didn't throw game three, which they won. The players demanded \$20,000 before game four, or the fix was over; they received the money and promptly threw game four. They threw game five as well, but after failing to receive their promised money, the players decided the fix was over; the White Sox then won games six and seven, before losing the nine game series in game eight.¹⁰⁶

The Black Sox scandal exemplifies the problem with illegal betting: it is a cloud of complete and utter darkness; no one knows for sure which games were actually thrown, or who actually received money for throwing the games. The entire series has become a large puzzle for

¹⁰⁶ This narrative relies on the useful account of the scandal by UMKC law professor Douglas O. Linder: *The Black Sox Trial: An Account*, 2010, <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html>.

historians, with money changing hands rapidly and men like Arnold Rothstein making large profits. Further, it is difficult for historians to even make an accurate analysis of whether the allegations of complicity by the named eight players were actually true. Historians believe that strong arguments exist that two of the alleged match-fixing players – Joe Jackson and Buck Weaver -- were not involved in the fix. Joe Jackson statistically outperformed his career numbers in the series, but admittedly took money from the gamblers. Weaver on the other hand, never received a dime from the fix, but was present at some of the meetings and he failed to report the fix. In the coming months, all eight players and several of the gamblers were indicted by a federal grand jury. Ultimately, they were found innocent, but newly-designated Commissioner K. M. Landis took action the follow day to permanently ban all eight from the sport.¹⁰⁷

A regulatory regime modeled on the Victorian statute would see legitimate businessmen who must report their financial statements to the government replacing the Arnold Rothsteins of the sports betting world. Criminals would no longer be involved in the inner workings of betting, removing their desire to fix sporting events. Information sharing again would play a key role, by allowing the sports betting providers to identify large bets and convey the information to the league and authorities for proper investigation and monitoring. Monitoring of the betting market by the bookmakers would allow the MLB to put a stop to the series before a fix could be completed. Even if a modern day Arnold Rothstein was somehow able to place enough illegal bets to make it worth his while to try and fix the series, the information regarding the fix would undoubtedly leak into the public realm. Once widespread speculation hit the public, legal bets would be placed based on the knowledge of the fix, causing a highly suspicious shift in the betting lines. The unusual lines would be shared with the FBI and the MLB, who would likely

¹⁰⁷ *Id.*

prohibit the series from continuing. This solves the problem of the 1919 World Series; legalized sports betting creates a paper trail and hard evidence, which can uncover facts, unlike in 1919. It would help show who placed bets and who received money from the bets. There would be no widespread speculation that a fix was on without the ability for bookmakers, law enforcement and the MLB to investigate and report on what was actually occurring.

The college basketball point shaving scandal of the 1950's provides a final example of how sports are corrupted despite the ban on legalized gambling, and how corruption can be minimized by transparency-enhancing regulation. When the scandal was uncovered in 1961, thirty-seven NCAA basketball players from twenty-two different schools, including prominent institutions such as Columbia University, St. John's University, New York University, North Carolina State University and The University of Connecticut, were arrested for conspiring with Jack Molinas and mobster Thomas Eboli to fix games. Later it was discovered that from 1957 to 1961, Molinas and his partner, Joe Hacken controlled 476 players from twenty-seven schools over forty-three games. Together, Molinas and Hacken would orchestrate bribe offers to collegiate basketball players who would accept the money and try to influence the outcome of the games for them. Molinas was arrested in January, 1962 and convicted of bribing the players to fix games. Molinas spent five years in prison and was later murdered in what was likely a mob hit.¹⁰⁸

Information sharing between leagues, betting providers and law enforcement agencies would likely lead to a quick uncovering of a future game fixing ring like the Molinas ring. This conspiracy involved a lot of players. The fear of crossing the mob kept most players silent for fear of retribution, but under a Victorian model, the mob would no longer have the power over,

¹⁰⁸ The textual narrative is based on Joe Goldstein, *Explosion II: The Molinas Period*, ESPN.com, Nov. 19, 2003, http://espn.go.com/classic/s/basketball_scandals_molinas.html.

and access to, bookmakers because the bookmakers would be legitimate businessmen, not criminals. Without the fear produced by criminal organizations, there would be much more talking amongst teammates and more dialogue from players to coaches. Additionally, bookmakers would be able to spot suspicious bets on minor college basketball games. A small time college basketball game is unlikely to have much betting action, and it would be easier to spot suspicious bets. The bookmakers could flag the games and inform the NCAA or law enforcement, which would then investigate certain games for a possible fix. The scandal would be uncovered much quickly than the Molinas scandal.

With information sharing and cooperation between sports leagues, sports betting providers, illegal-betting rings like the preceding can be uncovered much more quickly, before they can grow out of hand. Additionally, the uncovering of these schemes can act as a deterrent to future people considering placing improper bets on sporting events. Legalizing sports betting provides another benefit to ensuring integrity in sports: profits are no longer in the hands of unsavory characters and criminals, but in the hands of legitimate businessmen. As such, much of the temptation to fix matches is removed, because the money can now be monitored by government agencies and the bookmakers have the economic incentives to promote rather than interfere with an honest competition. Information sharing and the removal of influence from unsavory characters under the Victorian model of sports betting, will ease American concerns regarding sports betting and integrity of sports.

IV. NECESSARY MODIFICATIONS OF AMERICAN LAW TO SUCCESSFULLY IMPORT THE VICTORIAN REGIME OF REGULATED SPORTS BETTING

The foregoing analysis suggests that both sporting integrity and government tax revenues, as well as modest job opportunities in the sports wagering industry, would all be enhanced if the

United States were to legalize and regulate sports gambling nationwide. This section considers legislation necessary to accomplish this objective. Certain federal laws will need to be repealed or substantially amended to remove prohibitions on sports gambling. PASPA needs to be modified to impose three critical requirements for legalized gambling: (1) remote gaming needs to be regulated and permitted; (2) information sharing between law enforcement, regulated bookmakers, and sporting organizations must be encouraged and obstacles removed; and (3) leagues need to be given legal and economic incentives to cooperate fully. Given our federal structure, federal legislators are likely to prefer that sports gambling build on the current model where other forms of gambling are regulated by the states, so state implementation is also essential. To facilitate information sharing critical to sporting integrity, Congress may need to adopt modest exceptions to privacy law. Finally, we compare the ideas offered here to those previously articulated in a pathbreaking op-ed column by NBA Commissioner Adam Silver.

A. Needed changes in current federal legislation

In the United States, federal law prohibits sports betting. There are three existing federal laws that would require amendment to successfully implement a regulatory scheme based on the Victorian model. First, Congress would need to repeal the specific section of the Wire Act criminalizing betting on sporting events in which the bettor receives money or credit through wire communications in interstate or foreign commerce.¹⁰⁹ Second, Congress would need to substantially modify PASPA,¹¹⁰ which courts have interpreted to outlaw sports betting in all states except Nevada, Montana, Oregon and Delaware.¹¹¹ Third, Congress would need to reconsider the Unlawful Internet Gambling and Enforcement Act of 2006 (UIGEA).¹¹² UIGEA

¹⁰⁹ 18 U.S.C. § 1084.

¹¹⁰ 28 U.S.C. §§ 3701-3704.

¹¹¹ NCAA v. Christie, 926 F. Supp. 2d 551, 556 (D.N.J. 2013).

¹¹² 31 U.S.C. Ch. 53, §§ 5361-5367.

currently prohibits gambling over the Internet, but it has provisions exempting fantasy sports as well as online gambling where permitted under state law.¹¹³

Sports gambling necessarily involves both interstate commerce and the transfer of money. To function meaningfully, individuals located in one state must be able to place a bet with a bookmaker located in another state. This requires repeal of the current Wire Act provision barring the exchange of money or credit for sports gambling purposes. Similarly, the UIGEA needs to be amended to permit online gambling when consistent with federal and state law.

Congress always has three optional approaches to regulating interstate commerce. It can adopt a uniform rule, which preempts all state law under the Supremacy Clause.¹¹⁴ Or it can take no action, allowing states to regulate as they please (subject to relatively narrow judicially-imposed restraints on protectionist state legislation).¹¹⁵ Alternatively, it can adopt a mixed approach, permitting certain conduct, banning other activity, and authorizing state regulation under general standards.

In our view, sports gambling raises special concerns that make the second option of simple repeal and complete delegation to the states an inappropriate policy choice. The foundational argument for legalization is that it imposes transparency and removes the criminal element from sports gambling. For this to succeed, virtually all adults -- other than proven violators, those with demonstrable compulsive gambling issues, and critical participants in the

¹¹³ 31 U.S.C. §§ 5362(1)(e)(ix), 5363.

¹¹⁴ An illustration is regulation of pharmaceutical products. See Michelle Meadows, *Promoting Safe and Effective Drugs for 100 Years*, FDA Consumer Magazine, Jan. – Feb. 2006, available at <http://www.fda.gov/AboutFDA/WhatWeDo/History/CentennialofFDA/CentennialEditionofFDAConsumer/ucm093787.htm>.

¹¹⁵ See text accompanying notes ___-___, *infra*, for Dormant Commerce Clause analysis.

sports industry -- need to be able to make lawful wagers. This dries up the minimum core of business for illegal bookmaking to thrive.

For practical and political reasons, a uniform federal regime under the auspices of a federal regulator also seems unwarranted. It would make legislative reform more difficult by incurring the wrath of turf-conscious and political powerful state regulators. It also would require duplication of a wide variety of administrative tasks already performed by state regulators. Many if not most of the authorized sports bookmakers would be companies already involved and authorized to offer non-sports gambling.

For these reasons, the most effective way to import the Victorian model would be federal legislation that amends PASPA to permit sports gambling where authorized by state law. However, Congress should set certain specific standards and limit state regulation where necessary to ensure that legalization has the integrity-promoting properties discussed herein.

B. Replacing PASPA with federal standards

PASPA will need to be amended to establish a minimum standard for states to meet in order to regulate sports betting. These amendments should include three specific aspects to ultimately create a successful sports betting regime. First, the statute needs to permit remote online betting from states that do not support sports betting. Second, the statute must require information exchange among law enforcement and gambling regulators, authorized bookmakers, and sports leagues. Third, the law should facilitate league cooperation.

Online sports betting is the future of sports betting, as it will allow bettors to place a bet from the comfort of their own home and give bettors the option to watch their sporting events in private, in addition to the potential communal interest in traveling to a casino with friends or fellow fans and watching it there. The Australian Wagering Council has observed, “[a]n ongoing

shift of wagering spend from traditional offline betting channels (i.e. retail or TAB outlets, on-course bookmakers and with bookmakers over the phone) to online channels (internet, mobile, tablet). This trend is in line with consumer spending patterns in other retail sectors such as books, clothing and electronic goods, which have also seen a very high level of online growth.”¹¹⁶

This shows a need for a federal law to permit online sports betting, including wagers from bettors in states that disallow sports betting with bookmakers based in states that allow sports betting. One federal interest is fiscal: the online aspect of sports betting is important because it will provide increased revenue for the bookmakers and subsequently increased revenue to the federal government. The principal interest is practical, however. Bettors in states where sports gambling remains outlawed will likely, if permitted to do so, place lawful wagers online with regulated bookmakers in other states. This is likely to preclude an illegal gambling market of any size to flourish in states barring sports gambling.

The new statute also needs to emphasize information sharing policies between sports controlling bodies, sports betting providers, state regulators, and law enforcement. There is a significant need for an effective system for sports bookmakers, leagues, gambling regulators, and law enforcement to seamlessly share information if these states were to legalize and regulate the sports gambling market. As shown by the Victorian experience, information sharing is a key aspect to ensure the integrity of sporting events. This view is echoed by American expert observers. American Gaming Association President Geoff Freeman stated, “while casinos routinely look for suspicious bets at sports books and have worked with law enforcement to identify illegal activity – in some cases leading to criminal convictions – no such oversight exists

¹¹⁶ Australian Wagering Council, *Key Industry Facts & Statistics*, <http://australianwageringcouncil.com/policy-representation/industry-statistics>.

for the illegal sports betting market.”¹¹⁷ Currently, outside of Nevada, states without the power to regulate legal gambling lack any infrastructure that would allow them to regulate and monitor sports gambling effectively. Developing this ability should be a federal prerequisite to state authorization of sports gambling.

Relatedly, all bettors should be required to provide information about their identity, to better enforce integrity in the betting marketplace and subsequently integrity in sporting events. This will allow sports controlling bodies and law enforcement to better monitor who is placing bets, ensuring that suspicious betting activity is monitored.

Politically and practically, widespread regulated sports gambling cannot exist without the support and cooperation of sports leagues. Especially in today’s political environment, strong opposition from sports leagues would doom federal legislative reform. On the other hand, enthusiastic support would facilitate implementing legislation at both the federal and state levels. More importantly from a policy perspective, sports league cooperation is critical to the success of the Australian scheme. Sports executives can best identify “spot bets” that have little effect on the outcome of the contest and are the one easiest to compromise sporting integrity (players are more likely to act corruptly regarding conduct that will not affect the outcome of the contest). Their cooperation is essential to identify those close to players who may be involved in a corrupt money trail, and to provide critical information to bookmakers and law enforcement.

C. State implementation

Once Congress makes the necessary changes to federal law to permit sports betting on a federal level, the states will need to enact implementing statutes. Given our view that the Australian system has worked effectively in that country and warrants importation into the

¹¹⁷ Chris Moyer, *American Gaming Association Welcomes FinCEN Guidance on Sports Books, Urges Further Scrutiny of Illegal Sports Betting*, AGA (Jan. 16, 2015), <http://www.americangaming.org/newsroom/press-releases/american-gaming-association-welcomes-fincen-guidance-on-sports-books-urges>.

United States, we believe that the regulatory regime adopted by the State of Victoria ought to be implemented, with appropriate modifications to suit local needs.

As discussed above, a foundational goal of legalized sports betting is to deprive illegal betting markets of enough bettors to allow them to continue, unregulated, in dark shadows where corruption can flourish undetected. In our view, a national policy that accomplishes this goal can be implemented within the traditional scheme of state gaming regulation, but only if online gambling is permitted. That is, states that choose to prohibit sports bookmaking within their boundaries will not frustrate the federal scheme by creating a new market for underground illegal sports gambling, as long as their citizens remain free to engage in online sports gambling with regulated bookmakers in other states.

A potential federalism issue arises if a few states seek to not only preclude “brick and mortar” sports books within their borders, but also to prohibit their citizens from engaging in online sports betting. The best way to effectuate the national policy objective is for federal legislation to preempt any state laws prohibiting online betting with regulated bookmakers in other states, where the other states’ regulation meets minimum federal standards. Because online gambling with bookmakers in other states is clearly interstate commerce, Congress has the undisputed authority to regulate such activity. Congressional regulation under the Commerce Clause includes the power to preempt contrary state laws.¹¹⁸ Absent such legislation, although enforcement may pose problems, most states¹¹⁹ would retain the power to ban online sports

¹¹⁸ This principle dates back to the first Commerce Clause case, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). A New York statute granting a steamship monopoly to inventors Robert Livingston and Robert Fulton was struck down as inconsistent with a federal statute creating a licensing scheme that authorized Thomas Gibbons to operate a ferry in interstate commerce between Elizabethtown, New Jersey and New York City.

¹¹⁹ States that permit gambling (either sports or other) within their borders might be subject to challenge if they sought to preclude their residents from online gambling with out-of-state establishments. The Supreme Court has repeatedly held that state laws violate the “dormant” Commerce Clause when they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,” and that states “may not enact laws that burden out-of-state producers or shippers simply to give a competitive

gambling within its borders, creating an unacceptable opportunity for organized crime and others to evade the transparency and information sharing of regulated gaming by taking advantage of a rich market for would-be sports bettors.¹²⁰

Federal legislation to legalize regulated online gambling is comfortably within the powers that the Supreme Court has recognized under the Commerce Clause. The placing of an

advantage to in-state businesses.” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (striking down Michigan law allowing in-state wineries to sell directly to consumers while prohibiting out-of-state wineries from doing the same), *quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S.93, 99 (1994). The scenario in *Granholm* is similar to a ban on online sports betting that could come from the state of Nevada. Nevada offers in-state in-person sports betting at their numerous casinos. As such, Nevada may want to ban online sports betting out of a fear that it will cannibalize the current market for in-person betting. The challengers would argue that Nevada was barring out-of-state bookmakers to force their citizens to continue to patronize Nevada’s in-person casinos. A court would ultimately decide whether Nevada’s ban on online sports betting burdens out-of-state businesses to create a competitive advantage for in-state businesses.

However, courts may not be sympathetic to claims that state bans on online sports gambling may be motivated by unconstitutionally protectionist objectives. For example, in *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746 (W.D. Tex. 2013), the court held that a Texas ban on out-of-state online horse race betting was not a violation of the Commerce Clause. *Churchill Downs, Inc.*, operates an online horse racing wagering platform that accepts bets on races at Churchill Downs in Kentucky. The races are simulcast to Texas racetracks, where patrons can wager on the races. However, the Texas Racing Act mandated that all wagering on horse racing by Texas residents must be done in-person, thus cutting out Churchill Downs from the Texas market. The court reasoned that in-person gambling is different from online gambling because there are numerous in-person gambling regulations that cannot be effectively transferred to online gambling. *Id.* at 751. The court also considered whether the Texas legislature passed the act for protectionist reasons. Applying a four-factor test articulated in *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007), the court determined that there was no history of discrimination, and the only evidence of discrimination Churchill Downs stemmed from the debate regarding the passage of the act in the Texas legislature, which is insufficient to prove a history of discrimination. 979 F. Supp. 2d at 753

¹²⁰ In *Roussio v. State*, 170 Wash. 2d 70 (2010), the Supreme Court of Washington rejected a Dormant Commerce Clause challenge to a state ban on Internet gambling. The court found that the ban on online gambling in Washington was not discriminatory towards out-of-state business, because *all* online gambling was prohibited in Washington, regardless of its origin. The Court observed that the U.S. Supreme Court had upheld state corporate takeover legislation that applied equally to in-state and out-of-state entities, even though a majority of entities seeking to effectuate a hostile takeover of an Indiana corporation were out-of-state entities. *Id.* at 80, citing *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 87-88 (1987). The court reasoned that online gambling and in-person gambling are two different activities, with different risks and concerns. Finally, the court applied the balancing test articulated by the U.S. Supreme Court in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), to determine if the burden on interstate commerce caused by Washington’s ban on online gambling was excessive compared to the state interests. The court concluded that state regulation of online gambling might not be sufficient to protect the state’s interests, because regulation would be very difficult, and the ban addresses legitimate concerns such as “reducing underage gambling, compulsive gambling, and Washingtonians’ unintentional support of organized crime and money laundering operations.” *Roussio*, 170 Wash. 2d at 89. Likewise, in *Churchill Downs*, the court relied on *Roussio* in holding the Texas ban on online gambling did not violate the *Pike* test. The court reasoned that although the ban places a “meaningful burden” on interstate commerce, the state’s interest in protecting gambling addicts and preventing underage gambling is sufficient to overcome the burden. 979 F. Supp. 2d at 754.

online bet from a state where sports gambling is prohibited to a sports bookmaker operating lawfully in a state where sports gambling is regulated fits both the recognized federal power to regulate person and things in interstate commerce as well as activities that substantially affect interstate commerce.¹²¹

Congress can easily find that if individual states were to prohibit all forms of sports betting, both in-person and online, this would create a black market in those states for people to place bets illegally, just as there are black markets for sports betting under the current federal legislation banning sports betting. This is precisely what the Victorian model would prevent. State prohibitions take its citizens out of a national market for online sports betting, which Congress has the power to regulate. Indeed, the government does not have to prove that a black market in these states actually has substantial effects on interstate commerce for online sports betting (although it likely would); rather, the Supreme Court has stated that it will uphold federal legislation as long as there is a “rational basis” for believing that it has such an impact.¹²² In fact, illegal wagers in states where sports gambling is outlawed come in lieu of the interstate market, because these bettors would otherwise have made online wagers with regulated bookmakers in other states.¹²³

D. Modest privacy law exceptions to facilitate essential information sharing

As previously noted, an essential element of the Victorian regulatory model if it were to be successfully imported to the United States is the active and unimpeded exchange of information among law enforcement agencies, state gaming regulators, sports leagues, and

¹²¹ *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

¹²² *Id.* at 22.

¹²³ While one person who acts in this manner is not making a large dent in the national market for online sports betting, an entire state of people acting in this way, or multiple entire states acting this way will severely hurt the market for online sports betting. This is sufficient to justify federal Commerce Clause regulation. *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

authorized sports bookmakers.¹²⁴ Although current law permits some of this sharing, some modifications in federal and equivalent state law may be necessary.

Consider the importance of ensuring that authorized bookmakers do not employ criminals, or that certain criminals are prohibited from legally gambling. Taking Pennsylvania's limited information sharing system for example, there are two differing data basis that come into play – access to the U.S. Department of Justice's NCIC database¹²⁵ and to the Pennsylvania databases under the Pennsylvania Criminal History Record Information Act (CHRIA).¹²⁶ An agency like the Pennsylvania Gaming Control Board (PGCB) can undoubtedly obtain access to information concerning criminal arrests and convictions.¹²⁷

The difficulties, however, come into play when obtaining access to “protected information”, which includes intelligence, investigative, and treatment information.¹²⁸ Only a “criminal justice agency” may gain access to protected information.¹²⁹ This is problematic because typically the type of information a state regulator or authorized bookmaker is going to need to determine an individual's suitability to gamble is privileged information. An administrative licensing agency generally will not be considered to be a criminal justice agency and hence will not be able to obtain direct access to the protected information,¹³⁰ and private bodies such as sports leagues or sports bookmakers certainly are currently unable to obtain this

¹²⁴ Adrian Anderson, *Match-fixing, not drugs, is sport's biggest threat*, (Melbourne) Herald Sun, Sept. 16, 2013, available at <http://www.heraldsun.com.au/news/opinion/matchfixing-not-drugs-is-sport8217s-biggest-threat/story-fni0ffsx-1226719582273>.

¹²⁵ See generally National Crime Information Center (NCIC), Federal Bureau of Investigation (May 16, 2006), <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm>.

¹²⁶ 18 PA. CONS. STAT. §§ 9101-9106 (1979). See generally WILLIAM H. RYAN JR., CRIMINAL HISTORY RECORD INFORMATION ACT HANDBOOK (5th ed. 2011).

¹²⁷ See generally Michael Adams, *White Paper #7: Benchmarking the Background Check Industry Criminal and Civil Records*, Commercial Business Intelligence, Inc. (Aug. 2005) (paper on file with author).

¹²⁸ See Ryan, *supra* not ___, at 2.

¹²⁹ *Id.* at 4-5; see also 18 Pa. C.S.A. §§ 9102, 9106 (1979).

¹³⁰ *Id.*

information. In order for states to effectively regulate a sports gambling market, federal and state law needs to give state gaming regulators greater oversight and investigatory capabilities.

There are several examples of useful information exchange systems that newly authorized sports gambling regulators can emulate. These include the anti-money laundering system used by the Financial Industry Regulatory Authority,¹³¹ the Las Vegas' joint information sharing system with the Federal Bureau of Investigation (FBI),¹³² and the Australian system.

Currently, casinos are required to develop and implement a compliance program reasonably designed to manage the risk of illicit activity and ensure compliance with applicable regulations. The agreement requires casinos to file reports, properly identify customers conducting transactions, and maintain appropriate records of transaction. These reports are then used to track everything from money laundering and illegal gambling to counter terrorism.¹³³

Established FBI practices used to combat an illegal gambling ring based in Las Vegas could also be emulated. The FBI worked together with many different agencies, including the New York Police Department, the Nevada Gaming Control Board, the New Jersey State Commission of Investigation, the Monmouth County Prosecutor's Office, the Pennsylvania State Police, and the Los Angeles Police Department, in a concerted effort to bring down a multi-million dollar, nationalized illegal gambling ring. The FBI orchestrated the exchange of information amongst all of these agencies and this effort led to several indictments.¹³⁴ Even though this example involves one of the previously discussed "criminal justice agencies," it

¹³¹ See, e.g., Jamal El-Hindi, *AML Compliance Program Requirements*, FinCEN (Dec. 24, 2014), http://www.fincen.gov/statutes_regs/guidance/pdf/01162015.pdf.

¹³² For a description of this system in operation, see FBI New York Press Office, *Twenty-Five Individuals Indicted in Multi-Million-Dollar Illegal Nationwide Sports Gambling Ring*, FBI (Oct. 25, 2012) <http://www.fbi.gov/newyork/press-releases/2012/twenty-five-individuals-indicted-in-multi-million-dollar-illegal-nationwide-sports-betting-ring>.

¹³³ El-Hindi, *supra* note __, at 2-3.

¹³⁴ FBI Press Office, *supra* note __, at 1.

illustrates how sharing can work, especially if legislation expanded the net of those with access to critical information.

In Australia, Victorian laws promote information sharing among the betting agencies, the sports leagues, and the government.¹³⁵ The mechanics of the Australian system are fairly straightforward. To accept sports wagers, bookmakers must enter into agreements with sports leagues whose competitions are the subject of the wager, and the agreements must provide for information sharing between the betting providers and the leagues.¹³⁶

Closely linked with the feasibility of a robust information sharing system, are federal privacy laws. In particular, the Privacy Act of 1974¹³⁷ could limit the information sharing capacity of private bookmakers, sports leagues, and the government. The Privacy Act “establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.”¹³⁸ The Act mandates that a federal agency cannot disclose a record about an individual from a system of records¹³⁹ absent the written consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. The twelve exceptions are as follows: (1) the “need to know” within agency; (2) required disclosures under the Freedom of Information Act; (3) routine uses; (4) Bureau of Census; (5) statistical research; (6) national archives; (7) law enforcement request; (8) health or safety of an individual; (9) congressional; (10) general accounting office; (11) court order; and (12) debt collection act.¹⁴⁰

¹³⁵ Sports Betting Act 2007, (Vict.) div 3 s 4.5.24(Austl.).

¹³⁶ Sports Betting Act 2007, (Vict.) div 3 s 4.5.24.

¹³⁷ 5 U.S.C. § 552a (1974).

¹³⁸ Office of Privacy and Civil Liberties, Privacy Act of 1974, THE UNITED STATES DEPARTMENT OF JUSTICE (Feb. 6, 2015), <http://www.justice.gov/opcl/privacy-act-1974>

¹³⁹ “A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual.” *Id.*

¹⁴⁰ 5 U.S.C. § 552a(b)(1)-(b)(12) (1974).

Conflicts between the Privacy Act and a legalized sports gambling framework could arise due to the possibility that the information exchange required for effective sports gambling regulation would not fall under any of the twelve exceptions, thus making the framework illegal under the Act. When evaluating these exceptions, the law enforcement request exception could very well apply for records exchange among some parties involved in the regulation of sports gambling. Government guidelines state that “in addition to providing for disclosures to federal law enforcement agencies, [the Act] also allows an agency, ‘upon receipt of a written request, [to] disclose a record to another agency or unit of State or local government for a civil or criminal law enforcement activity.’”¹⁴¹ The administrative agencies that would handle a large amount of the regulatory responsibility in a legalized sports gambling framework, such as state gaming control board, could very well qualify under the “another agency or . . . civil . . . law enforcement activity.” However, critical information sharing with private bookmakers and sports leagues would require appropriate modifications of the federal act, and parallel legislation and the state level.

E. Building on Commissioner Silver’s proposal

NBA Commissioner Adam Silver recently stated that “the laws on sports betting should be changed. Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”¹⁴² Silver acknowledged the hypocrisy associated with the professional sports leagues’ opposition to sports gambling by pointing to league collaborations with fantasy sports, and pointed to the NBA’s own very lucrative deal with the fantasy sports operator Fan Duel that gave the NBA an equity stake in the company. Silver noted: “while I wouldn’t categorize [fantasy sports] as sports

¹⁴¹ OMB Guidelines, 40 Fed. Reg. 28,948, 28,955 (July 9, 1975)

¹⁴² Silver, *supra* note __, at 1.

betting, on the continuum of no betting at all and legalized betting, it is certainly on the spectrum.”¹⁴³

Although the NBA’s Silver may be the most vocal about the need to change the thinking on legalized sports gambling, other leagues are taking notice as well. Most notably, MLB Commissioner Rob Manfred has stated it is time to give fresh consideration to the issue of sports gambling, thus distancing himself from the MLB’s historical stance that sports gambling should continue to be banned.¹⁴⁴ Additionally, in 2012, the NFL convened a forum in collaboration with other pro leagues, the IOC, and the NCAA to discuss the feasibility of sports gambling. This forum combined with other private meetings that have taken place among the professional sports leagues’ leaders, indicate that the leagues are aware that change is on the horizon regarding legalized sports gambling.¹⁴⁵

Commissioner Silver has proposed a persuasive framework to establish a robust system of checks and monitoring would promote the integrity of the sporting events and rid the events of corruption that was previously left undetected. The framework consists of six specific regulatory features would best inhibit sports corruption, much of which may go undetected today: “mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures; geo-blocking technology to ensure betting is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming.”¹⁴⁶

¹⁴³ Purdum, *supra* note __, at 58.

¹⁴⁴ Adam Kilgore, MLB’s Deal With DraftKings Should Signal Baseball’s Changing Stance on Gambling, Wash. Post (Apr. 7, 2015), <http://www.washingtonpost.com/news/sports/wp/2015/04/07/mlbs-deal-with-draftkings-should-signal-baseballs-changing-stance-on-gambling/>.

¹⁴⁵ Purdum, *supra* note __, at 58.

¹⁴⁶ Silver, *supra* note __, at A27.

We quibble with Commissioner Silver’s proposal only in a few respects. First, as previously noted, we fear that geo-blocking technology that would preclude lawful and regulated sports gambling in states where sports bookmaking is not legal and regulated would create an undue risk of facilitating an underground illegal sports gambling market in those states. Second (perhaps Silver was simply being politic in leaving this out), league cooperation and consent ought to be essential, and, as in Victoria, mandated by statute as a prerequisite for legalized betting on a sport. This not only avoids some potentially cumbersome issues of trademark and related intellectual property law,¹⁴⁷ but facilitates strong league support and cooperation. League cooperation is essential, as noted previously, politically, as part of effective information

¹⁴⁷ In order to facilitate legalized sports gambling, sports books and casinos would need to use league names, team names, logos, and player likenesses to promote their new sports gambling businesses. This use would raise trademark implications because without appropriate licensing the leagues and their players will assert that the unlicensed use of this information would constitute trademark infringement. Unlike copyrighted material, or inventions that are patented, leagues and clubs do not “own” trademarked logos “outright.” For example, federal law allows for non-commercial trademark use by third parties. 15 U.S.C. § 1115(b)(4) (1946). Leagues and club trademark holders can, however, enjoin others from using a trademark when the use is likely to cause “consumer confusion.” ROBERT W. GOMULKIEWICZ, LICENSING INTELLECTUAL PROPERTY 119 (Edwin Chemerinsky et. al. eds., 3rd ed. 2014). In *Boston Prof’l Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1009-10 (5th Cir. 1975), the court held that trademark infringement occurs when

a person uses (1) any reproduction . . . of a mark; (2) without the registrant's consent; (3) in commerce;(4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive

However, in that very case, the court found that, even without consumer confusion, trademark law prevents third parties from capitalizing on the goodwill of a sports entity’s trademark. *Id.* at 1012-13. The use of team and league logos by sports bookmakers would, under the reason of *Boston Hockey*, constitute trademark infringement. Moreover, the fair use doctrine would not be applicable to commercial operations like sports books. See 15 U.S.C.S. § 1115(b)(4) (1946)(outlining the fair use exception); 4 CALMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 22.59 (4th ed. 2011); *ACLU v. Miller* 977 F. Supp. 1228, 1233, n. 6 (N.D.Ga. 1997)(“Congress acknowledged the first amendment problems with banning non-commercial use of trademarks by limiting the scope of the new Federal Trademark Dilution Act to apply to commercial use only.”).

Some sports books would like to offer wagers on individual sporting performance. In this regard, the case law is somewhat less favorable to intellectual property rights of the sports industry. In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that combinations of player names and statistics for commercial purposes were deemed protected for public use under the First Amendment. The court reasoned that “the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.” *Id.* at 823.

exchanges, and also to bar particular kinds of wagers (“spot betting”) that pose undue risks to sporting integrity.

League support is likely critical to break congressional gridlock on major legislation. Although some leading legislators, including Senator John McCain, feel that the sports gambling issue needs to be reevaluated,¹⁴⁸ others, such as the congressman who represents Penn State, Rep. Glenn Thompson, do not agree that “expanding gambling is a good thing.”¹⁴⁹ Even if a consensus could be developed among sports leagues and regulators, Nevada’s legislators may oppose federal reform because of its current advantage as one of the few states that has legalized sports gambling.¹⁵⁰

In addition to the benefits of league cooperation to legal reform and implementation of an integrity-enhancing regulatory regime, economically beneficial licensing would be facilitated by league approval of sports gambling. With league approval, there could be a previously planned licensing scheme that would give each respective league their fair share of licensing fees. Data sharing between leagues and sports books could also be facilitated through licensing.¹⁵¹ In a previously planned licensing scheme, prior to the induction of a legalized sports gambling framework, the sports leagues, government, and gambling proprietors would institute a licensing system that promulgates all the licensing provisions so that difficulties do not arise once the

¹⁴⁸ Matt Bonesteel, *Sen. John McCain Says Congress Needs to Re-Examine U.S. Ban on Sports Gambling*, WASH. POST (Feb. 2, 2015), <http://www.washingtonpost.com/blogs/early-lead/wp/2015/02/02/sen-john-mccain-says-congress-needs-to-re-examine-u-s-ban-on-sports-gambling/> (quoting Sen. McCain, “We need a debate in Congress . . . We need to have a talk with the American people, and we need to probably have hearings in Congress on the whole issue so we can build consensus.”).

¹⁴⁹ Tim Davaney, *NBA Push to Legalize Sports Betting No Slam-Dunk in Congress*, THE HILL (Nov. 15, 2014), <http://thehill.com/regulation/224278-nba-push-to-legalize-sports-betting-no-slam-dunk-in-congress>

¹⁵⁰ Seth McLaughlin, *Chris Christie Bets Legalized Sports Gambling Will Boost Atlantic City, 2016 Hopes*, WASH. POST (Jan. 29, 2015), <http://www.washingtontimes.com/news/2015/jan/29/chris-christie-backs-legalized-sports-betting-in-b/?page=all> ((stating how Nevada Senator Harry Reid, the Democrats’ floor leader, is in a powerful position that he would use to protect Nevada’s near-monopoly on sports gambling).

¹⁵¹ See Purdum, *supra* note __, at 58 (outlining Dallas Mavericks owner Mark Cuban’s suggestion that the leagues could charge sportsbooks and casinos licensing fees to use the league’s data).

legalized gambling is officially enacted. The leagues could also charge sports books and casinos licensing fees to use the leagues' data.

CONCLUSION

Problems including the heavy involvement with organized crime, lack of transparency, and foregone financial opportunities, all suggest that the current federal prohibitions on sports gambling outside of Nevada are flawed. Judicial interpretation of the Professional and Amateur Sports Protection Act makes it clear that federal law precludes all state efforts to implement regulated sports gambling.

The best solution is to legalize sports gambling through federal legislative reform, coupled with league agreement and approval. This solution would allow states to tax and regulate the sports gambling, thus removing the presence of organized crime and allowing transparency between the bettors, bookmakers, regulators, and sports leagues. Bringing sports gambling “into the light” would also give increased visibility to the problems of compulsive gamblers, and facilitate the identification, treatment, and appropriate other remedies for problem gamblers.

The Victorian model of sports betting has proven successful in maintaining integrity in sports, while also boosting the Victorian economy. By removing sports betting from the dark shadows and smoky back rooms of bars, and into the hands of legitimate businessmen, the United States can ensure sporting integrity, while simultaneously boosting the economy and substantially increasing federal and state tax revenues in a similar fashion. While, there are many legal hurdles to overcome on the path to sports betting legalization in the United States, it is possible with carefully crafted statutes. Additionally, with league approval there would be no

need to engage in costly and difficult intellectual property licensing disputes between the leagues and the gambling proprietors.

Ultimately, legalization of sports betting is a positive move for the United States. It can ensure sporting integrity while boosting the economy. Such reform is in the public interest.