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MISSISSIPPI SPORTS LAW REVIEW

EDITOR'S NOTE

Jack Noonan

The MISSISSIPPI SPORTS LAW REVIEW, has continued to build on the past successes by maintaining the unique status as the only SEC school with a Sports Law Review. We, as a MSLR family, hold this title with the utmost regard. The REVIEW has continued to accomplish its goals of building a renowned sports law publication through the diligent editing, writing, and selection of novel pieces by its members and supporters. The REVIEW's annual symposium has benefited, the University of Mississippi School of Law, Ole Miss students, and to the citizens of our marvelous state, by providing a forum in which modern and relevant sports topics may be discussed on record with leaders of the sports industry throughout the country. The REVIEW owes much of its continued success to Professor William W. Berry III, our most ardent supporter and faculty advisor, and Professor Ron Rychlak, a highly engaged and influential faculty member who provides much needed guidance. I would like to thank specific members of the REVIEW. First, I would like to thank all the new members of the REVIEW. This process could not have been possible without your help. Also, I would like to thank Ryan Morris who worked with the Staff Editors ensuring all the articles were edited and reviewed on time to meet deadlines. Finally, I wanted to thank Kelley Killorin, Business Editor, who ensured all the funding, accounts, and bills were managed so we could get this edition completed. It's worth bringing up again that none of this could have been done without Professor William Berry. Professor Berry has been a great asset to us all at the REVIEW. He has assisted the REVIEW since its very first days and has always made himself available to advise the staff. Thank you for your advice and guidance, and for being an incredible friend and advisor. I am excited to have the opportunity to serve as Editor-in-Chief for this year to continue to grow the Sports Law Division here at Ole Miss. We are creating a great team with more support than ever before. This excitement will allow us to do more things that will help support and strengthen our brand. I am

excited for what is to come. To the members of the REVIEW, past, present, and future, our faculty and staff, and our readers thank you again for your continued dedication. I am thankful for the opportunity to serve as the REVIEW's seventh Editor-in-Chief.

USING STATE V ROSENTHAL TO TRUMP PASPA AND SAVE ATLANTIC CITY

*By Walter T. Champion**

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I. INTRODUCTON

Professional and Amateur Sports Protection Act (PASPA)¹ is a “derelict in the stream of law.”² It is the only federal act that prevents a state from changing its public policy towards gambling³ which is a states’ rights issue.⁴ States’ rights are the only way one

*Walter Champion is a professor at Texas Southern University School of Law and the author of *Sports Law in a Nutshell* and *Gaming Law in a Nutshell*. He is also an Adjunct Professor at South Texas College of Law Houston. The author gratefully acknowledges the assistance of third-year law student Dr. Reginal Harris in the research and writing of this essay.

¹ 28 U.S.C. §§ 3701-3704.

² *Flood v. Kuhn*, 407 U.S. 258, 286 (1977) (Douglas, J., dissent).

³ Walter Champion and I. Nelson Rose, *Gaming Law in a Nutshell* 321 (West 2012) (hereafter cited as *Champion & Rose*).

⁴ *Id.* at 10.

can solve the conundrum of why there is so much gambling in Nevada, but none in its neighbor Utah.⁵ In short, it is due to the differences of the population, culture history, and professional sports franchises being allowed within their own borders.⁶ States have developed their own unique responses to gaming. Of course, there are federal acts that have some effect on gambling including the Wire Act,⁷ IGBA,⁸ IGRA,⁹ PASPA,¹⁰ and UIGEA.¹¹

But, PASPA,¹² is also certainly anomalous, and created the “Las Vegas loophole”¹³ that allows Nevada a monopoly on legal sports gambling.¹⁴ The posited weak argument is that PASPA eliminates illegal sports gambling.¹⁵ That is just not true. New Jersey wanted a sports book for their struggling Atlantic City casinos.¹⁶ They passed an Act, New Jersey’s Sport Wagering Act,¹⁷ which should have allowed legal sports gambling in New Jersey,¹⁸ but certain entities including Nevada, the NCAA, and the professional sports leagues¹⁹ actively used PASPA to block New Jersey from legal sports gambling. It is a “riddle, wrapped in a mystery, inside an enigma”²⁰ that defies an easy solution, because of special interests.²¹ A potential solution is the case of *State v. Rosenthal*,²² which is a Nevada Supreme Court case holding that denial of a gaming license is not reviewable by a court.²³ *Rosenthal*, when combined with the inherent illogic of PASPA,²⁴ appears

⁵ *Id.* See also Richard McGowan, *The Dilemma that is Sports Gambling*, 18 GAMING L. REV. & ECON. 670 (no. 7, Sept. 2014) (hereafter cited as McGowan)

⁶ *Id.*

⁷ 18 U.S.C. §1084.

⁸ 18 U.S.C. §1955.

⁹ Indian Gaming Regulatory Act (IGRA), 25 U.S.C §2701 et seq.

¹⁰ 18 U.S.C §§ 3701-3704.

¹¹ 18 U.S.C. §§ 1563 and 1566.(re-check this statute)

¹² 28 U.S.C. §§ 3701-3704.

¹³ Champion & Rose, *supra*, note 3 at 319.

¹⁴ *Id.*

¹⁵ *Id.* at 315-19.

¹⁶ See *NCAA v. Governor of New Jersey*, 832 F. 3d 389 (3d Cir. 2016).

¹⁷ N.J. Stat Ann. §§ 5:12 A-1 *et seq.* (2012).

¹⁸ *NCAA*, 832 F.3d at 389, *supra*, note 16.

¹⁹ *Id.*

²⁰ Winston Churchill radio speech, BBC Broadcast (Oct.1, 1939).

²¹ See *NCAA*, 832 F.3d at 389, *supra*, note 16.

²² *State v. Rosenthal* 93 Nev. 36, 559 P.2d. 830 (1977).

²³ *Id.*

²⁴ 28 U.S.C. §§ 3701-3704.

sufficient to maneuver New Jersey into sports gaming under the banner of states' rights.²⁵

II. THE CASINO BOOM

Now is the winter of discontent.²⁶ The President of the United States is Donald Trump, a former casino owner in New Jersey. President Trump appears to support states' rights, which would normally include gaming.²⁷

Casinos in many states are booming.²⁸ For example, Pennsylvania's twelve casinos generates an aggregate of \$3.17 billion in gross gaming revenues and received \$1.38 billion in tax revenues from gambling in 2015 tax revenue.²⁹ Also, New York, while relatively new to casino gambling, earned \$888.4 million in 2015 tax revenue.³⁰ However, Atlantic City has lost five of its twelve casinos, which has reduced the city's tax base by 70 percent.³¹

The gaming industry has been among the strongest industries in America, and casinos have experienced the fastest growth rates in terms of revenue.³² Casinos are controlled by the state gaming regulators, with usually, an assist from local ordinances.³³ Tribal casinos have also greatly proliferated and prospered. State laws still determine whether federally recognized tribes in a state can operate legal gambling³⁴ President Richard Nixon created Indian bingo, which sequenced into tribal casinos by way of a U.S. Supreme

²⁵ See *State v. Rosenthal* 93 Nev. 36, 559 P.2d 830 (1977); *NCAA v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016); Kirk Homeyer, *Lefty is Still Right: The Continued Importance of State v. Rosenthal, to Nevada Gaming Regulation*, 15 Gaming L. REV. & ECON. 105 (no. 3, Apr. 2011) (hereafter cited Homeyer).

²⁶ William Shakespeare, *King Richard the Third*, Act One, Scene 1, William Shakespeare, *The Complete Works* 701 (London: Collins, 1971).

²⁷ I. Nelson Rose, *President Trump and the Future of Legal Gaming*, 20 GAMING L. REV. & ECON. 818 (no. 10, Dec. 2016).

²⁸ *Pennsylvania Becomes United States' Top Gambling producer*, 20 GAMING L. REV. & ECON. 816 (no. 10, Dec. 2016).

²⁹ *Id.*

³⁰ *Id.*

³¹ *New Jersey Rejects Atlantic City's Five Year Financial Recovery Plan*, 20 GAMING L. REV. & ECON. 816 (no. 10, Dec. 2016).

³² Champion & Rose, *supra*, note 3 at 88.

³³ *Id.*

³⁴ *Id.* at 92.

Court decision, *California v. Cabazon Band of Mission Indians*,³⁵ and a federal statute, IGRA.³⁶

So, the time is ripe for a continuation of the casino boom. All reasonable indicators appear to guarantee a robust casino economy.³⁷ However, New Jersey is the one state which has failed in the casino experiment and needs federal assistance.³⁸ The irony is palpable since gaming is clearly a states' rights issue.³⁹ The straw that broke the camel's back in New Jersey, with regard to successful casino development, was a federal statute, PASPA.⁴⁰ Every state is different, and New Jersey, with its long history of Runyoneque horse racing, is clearly unique from all other state gaming scenarios.⁴¹ As the years passed and Atlantic City's fortune diminished with the growing competition from neighboring states legalizing casinos, the interest in sports betting revived. Especially galling to the casino executives and employees were billboards near the entrances to Atlantic City advertising legal gambling in Delaware, which included sports betting.⁴²

III. SPORTS BOOKS GENERALLY

Once upon a time, not so long ago, sports betting was confined almost entirely to illegal bookmakers (a.k.a. bookies).⁴³ The legal sports betting business did not take off until the federal government lowered the wagering tax and football began being televised into every home in the nation.⁴⁴ In 1974 and 1983, Congress lowered the federal excise tax on sports wagers.⁴⁵ In 1975, the Nevada legislature passed enabling legislation so that casinos could have sports books.⁴⁶ By the year 2000, there were about 157 sports books with a total handle greater than \$2.5 billion, generating more than

³⁵ *California v. Cabazon Band of Mission Indians*, 480 US. 202 (1987).

³⁶ Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*

³⁷ Rose, *supra*, note 27 at 818.

³⁸ *Id.*

³⁹ Rose, *supra*, note 3 at 315.

⁴⁰ 28 U.S.C. §§3701-3704.

⁴¹ See I. Nelson Rose, *New Jersey Sports Betting – Court Gets It Wrong Again*, 19 GAMING L. REV. & ECONS. 563 (no. 8, Oct. 2015).

⁴² *Id.* at 565.

⁴³ Champion & Rose, *supra*, note 3 at 315.

⁴⁴ *Id.*

⁴⁵ *Id.* at 317-18.

⁴⁶ *Id.* at 317.

\$117 million in gross gaming revenue.⁴⁷ By 1985, all of the small independent sports books were closed, replaced by multi-million dollar casino sports books with dozens of giant video screens.⁴⁸ Other states saw legalizing sports betting as a way of raising revenue without raising taxes.⁴⁹

There certainly have been incidents of verified sports gambling such as the Black Sox Scandal of 1919 where eight players on the Chicago White Sox were found to have “thrown” the World Series.⁵⁰ Another outrageous example of illegal sports betting is the tragic tale of Jack Molinas who was a famous college basketball player at Columbia and a professional basketball player who shaved points in college with the Fort Wayne Pistons and was suspended indefinitely from the NBA. He later became a player but continued to pay college ball players to shave point and rig games. He was disbarred and went to jail and was later murdered as a result of a ‘mob hit.’ Of course, there were few, if any, legal sports books during Jack’s era (he was expelled from the NBA in 1954 and was murdered in 1975).⁵¹ Proponents of legalizing sports betting argue that eliminating legal betting avenues would divert bets back into the clutches of illegal sports books.⁵²

The NFL, which hates and fears sports betting as a possible corruption of its sport, lobbied Congress to stop the proliferation.⁵³ In 1992, President George H.W. Bush signed the Professional and Amateur Sports Protection Act (PASPA) into law.⁵⁴ This act allows the so-called “Las Vegas loophole” so that Nevada could continue to have sports betting.⁵⁵ New Jersey was given one year to legalize sports books for its casinos, but the state legislature failed to act. PASPA prohibits any states or tribe from authorizing any new sports gambling.⁵⁶ One hundred twenty million Americans participate in sports gambling, whether legal or illegal, it is

⁴⁷ *Id.* at 318.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 328.

⁵¹ *Id.* at 332.

⁵² *Id.*

⁵³ *Id.* at 319.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

estimated that nearly \$100 billion is wagered on various sporting events every year.⁵⁷

The amount of money at stake [in sports betting] makes this a very controversial issue.⁵⁸ “Every major professional and college sports league is opposed to any form of legal sports gambling. Each league’s representatives have claimed that allowing players to legally gamble on their own games will challenge the integrity of the sport.⁵⁹ However, statistical models “clearly indicate that sports gambling could lead to at least a \$2 billion increase in revenue for the states.”⁶⁰

IV. PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT (PASPA)

PASPA⁶¹ was masterminded by former Princeton and NBA great Senator Bill Bradley of New Jersey.⁶² Bradley was concerned with the expansion of sports betting in the state lotteries.⁶³ PASPA was passed by Congress to prevent the proliferation of gambling on sporting events.⁶⁴ PASPA expressly prohibits states from authorizing lotteries and other forms of gambling that are based on the outcomes of sporting events or the performance of athletes. The language is as broad as possible without being unconstitutionally overboard.⁶⁵ PASPA allowed New Jersey an exception of one year to enact a sports gambling scheme which New Jersey did not achieve and thus PASPA exemption expired.⁶⁶

⁵⁷ McGowan, *supra*, note 5 at 670 (footnote omitted).

⁵⁸ *Id.* at 671.

⁵⁹ *Id.*

⁶⁰ *Id.* at 677. *See also* Mark Clayton and Erica Okerberg, *Nevada Moves sports and Races Wagering Forward*, 20 GAMING L. REV. & ECONS. 385 (no. 5, June 2016). “In 2015, The Nevada Legislature passed legislation and the Nevada Gaming Commission promulgated regulations that allow business entities to wager and Nevada sportsbooks to provide risk management.

⁶¹ 28 U.S.C. §§3701-3704.

⁶² I. Nelson Rose, *Gambling on Sports Betting*, 18 GAMING L. REV. & ECONS. 953, 954 (no. 10, Dec.2014).

⁶³ *See, e.g.*, Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act-Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5 (1992).

⁶⁴ Champion & Rose, *supra*, note 3 at 73.

⁶⁵ *Id.*

⁶⁶ NCAA, 832 F.3d at 389, *supra*, note 16.

PASPA provides that it is unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by the law a lottery, sweepstakes, gambling, or wagering scheme based on one or more competitive games in which amateur or professional athletes participate.⁶⁷ PASPA includes a remedial provision that permits sports leagues whose games are subject to sports gambling to enjoin governmental entities from operating sports books.⁶⁸ PASPA is a unique federal law.⁶⁹ The statutes have not gotten much attention over the years.⁷⁰ The states lotteries themselves did not care about the law, because their sports games were failures.⁷¹ PASPA froze the states forever into the forms of sports betting they had more than two decades ago.⁷²

Under PASPA, Nevada can, of course, continue with their sports books,⁷³ as well as Delaware⁷⁴ and Oregon.⁷⁵ Jai alai betting was allowed to continue under the laws of Connecticut, Florida, Nevada, and Rhode Island.⁷⁶ Montana authorized its states lottery to allow games based on sports pools,⁷⁷ including sports tab games,⁷⁸ sports pools,⁷⁹ and Calcutta sports.⁸⁰ New Mexico has Kieran and pari-mutuel wagering on bicycle races.⁸¹ North Dakota has sports pools run by nonprofit organizations⁸² and Calcuttas run by eligible organizations;⁸³ Washington State allows low-limit sports pools;⁸⁴ and Wyoming allows qualified organizations to conduct Calcuttas on amateur sports events.⁸⁵

⁶⁷ 28 U.S.C. §§ 3702.

⁶⁸ 28 U.S.C. §§ 3703.

⁶⁹ Rose, *supra*, note 68 at 956.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Id.* NRS 463.0136, 463.0193, 463.0160.

⁷⁴ 29 Del.C. § 4805(b)(4).

⁷⁵ O.R.S. § 461.213.

⁷⁶ Rose, *supra*, note 68 at 956

⁷⁷ MT ST 23-7-103 (4)(a).

⁷⁸ MT ST 23-5-501, 23-5-512, 23-5-513.

⁷⁹ *Id.* and 23-5-503.

⁸⁰ MT ST 23-5-221, 23-5-222, 23-5-501.

⁸¹ Rose, *supra*, note 67 at 957.

⁸² NDCC 53-06. 1-03(1) (a), 53-06. 1-09.

⁸³ NDCC 53-06. 1-07.3.

⁸⁴ RCW 9.46.0335.

⁸⁵ WY ST § 6-7-101(a)(i), 6-7-101(a) (iii)(F).

PASPA allows about a dozen states to have some form or sports betting.⁸⁶ However, the other thirty-eight states, plus the District of Columbia, Puerto Rico, and other U.S. possession are locked out from ever legalizing sports betting.⁸⁷ PASPA is strange federal law in that the federal government had never before tried to regulate or prohibit gambling within a single state.⁸⁸ PASPA prevents a state legislature from passing a state law which would allow a citizen of that state to make a legal sports bet with another citizen of that same state on a sporting event taking place in that state.⁸⁹ In short, PASPA expressly prevents a state from regulating sports betting, directly or indirectly, unless it was legal in 1992.⁹⁰

V. NEW JERSEY'S SPORTS WAGERING ACT

The State of New Jersey has sought to license gambling on certain professional and amateur sporting events.⁹¹ The New Jersey's Sports Wagering Act"permits state authorities to license gambling in casinos and racetracks, and casinos to operate 'sport pools.'⁹² The sports leagues contend that the New Jersey's Sports Wagering Act "increase[s] the total amount of gambling on sports available, thereby souring the public's perception of the leagues as people suspect that games are affected by individuals with perhaps a competing hidden monetary stake in their outcome."⁹³

The latest Third Circuit version of *NCAA v. Governor of the State of New Jersey*,⁹⁴ which has been granted *certiorari* held that New Jersey's Sports Wagering Act has the effect or authorizing sports gambling in contravention of PASPA.⁹⁵

As in most cases that interpret idiosyncratic federal laws, the opinion is more noteworthy for its dissents.⁹⁶ The Fuentes dissent begins with the proposition that New Jersey voters, by a two to one

⁸⁶ Rose, *supra*, note 67 at 957.

⁸⁷ *Id.*

⁸⁸ *Id.* at 959.

⁸⁹ *Id.*

⁹⁰ *Id.* at 965.

⁹¹ *NCAA v. Governor of New Jersey*, 730 F.3d 208, 214 (3rd Cir. 2013).

⁹² *NCAA, supra*, n. 3 at 216.

⁹³ *Id.* at 218.

⁹⁴ *Supra* note 16 at 389.

⁹⁵ *Supra* note 16 at 402.

⁹⁶ *Id.* at 402 (Fuentes joined by Restrepo, Circuit Judges, dissenting); *see also* 832 F.3d at 406 (Yanaskie, Circuit Judge, dissenting).

margin, passed a referendum to amend the New Jersey Constitution to allow the New Jersey legislature to “authorize by law” sports betting.⁹⁷ The Fuentes dissent posits that because “the state retained certain restrictions on sports betting, the Majority wrongfully *infers* authorization by law. I cannot agree with this interpretation of PASPA.”⁹⁸ Therefore, the majority fails to explain why a partial repeal is equivalent to a grant of permission to engage in sports betting.⁹⁹ PASPA could not conceivably preclude a state from “*restricting*” sports wagering¹⁰⁰ Judge Vanaskie’s dissent reviews the majority’s decision, “As the majority explains, while PASPA’s provisions and its reach are controversial (and some might say, unwise) we are duty-bound to interpret the text of the law as Congress wrote it.”¹⁰¹ Because the majority has excised the distinction between a repeal and an authorization the majority makes it clear that under PASPA as written, “no repeal of any kind will evade the command that no state ‘shall...authorize by law sports gambling.’”¹⁰² The Vanaskie dissent quotes with approval *United States v. Printz* “in the face of such a congressional directive, ‘no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.’”¹⁰³ The New Jersey’s Sports Wagering Act could theoretically be declared invalid for several reasons.¹⁰⁴

The 2014 act might violate the State Constitution, which includes the 2011 New Jersey Constitutional amendment that only empowers the state legislation to authorize sports betting.¹⁰⁵ New Jersey Constitution describes the thorough regulations that follow casino gambling:

“It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by

⁹⁷ *Id.* at 402-03 (dissent)

⁹⁸ *Id.* at 403 (emphasis in original).

⁹⁹ *Id.* at 405.

¹⁰⁰ *Id.* (emphasis in original).

¹⁰¹ *Id.* at 409.

¹⁰² *Id.*

¹⁰³ *Id.* (quoting with approval) (*Printz v. U.S.* 521 U.S. 898, 935 (1997)).

¹⁰⁴ I. Nelson Rose, *New Jersey Sports Betting – Court Gets It Wrong Again*, 19 GAMING L. Rev. & ECONS. 563,568 (no. 8, Oct. 2015).

¹⁰⁵ *Id.*; (referencing N.J. Const. Art. IV & VII).

the State, of gambling houses or casinos within the boundaries ... of Atlantis City...and to license and tax such operations and equipment used in connection therewith. Any law authorizing the State revenues derived therefrom to be applied solely for the purpose of providing funding for reductions in property taxes... of eligible senior citizens... with such formulae as the Legislature shall by law provide. The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.¹⁰⁶

Notably, PASPA expressly prevents a state from regulating, directly or indirectly, any form of sports betting. Despite the declarations from the state's attorney during oral arguments, it is impossible to believe that sports betting in Atlantic City casinos would be unregulated. Under well-established gaming law, states regulate everything that takes place on the grounds of tracks and casinos.¹⁰⁷

The Nevada Supreme Court has ruled that state gaming regulators could require the owner of a dress shop to be examined for suitability.¹⁰⁸ Planet Hollywood had to pay a large fine and agree to police a private nightclub on the casino's grounds.¹⁰⁹ The court said:

“If a casino and its state regulators, were not responsible for activities taking place in the casino, what would sports betting in Atlantic City look like? If the 2014 Act truly eliminated all laws and regulations related to sports betting, then anyone could take a bet from anyone else on a sports event. The might be acceptable. But if a company wanted to set up a sports book, it would have to be treated like any other retail business that wished to operate on the casino floor. If a casino has an agreement with Burger King, it is not going to sit by if McDonalds tries to set up a competing operation in the casino building. Any sports book would have to have the approval of the casino's executives. And those executives would have to report the operation to state regulators. The regulators in turn

¹⁰⁶ N.J. Const.Art.IV7 VII, ¶ 1.

¹⁰⁷ *Supra*, note 47 at 568.

¹⁰⁸ *See State v. Glusman*, 651 P.2d. 639 (Nev. 1982) (footnote omitted).

¹⁰⁹ *Supra*, note 47 at 568 (footnote omitted).

would have to investigate and oversee the sports book, to ensure that the casino company was not doing business with individuals who were unsuitable.¹¹⁰

Does anyone really believe that the New Jersey Division of Gaming Enforcement, a part of the State Attorney General's office, would allow known organized crime figures to take bets on sports events on the floors of Atlantic City casinos?¹¹¹ Prior to PASPA, the new federal anti-gambling laws that were enacted by Congress were always limited to helping the states enforce their public policies toward gambling.¹¹²

VI. NCAA v. CHRISTIE

The State of New Jersey has sued the NCAA and the sports league in an attempt to overrule PASPA and develop their own sports book.¹¹³ The U.S. Third Circuit Court of Appeals in *NCAA v. Governor of N.J.* (Christie I),¹¹⁴ found PASPA to be constitutional.¹¹⁵ The U.S. Supreme Court denied certiorari, and then the New Jersey legislature attempted a new approach by eliminating all of the laws which made sports betting illegal.¹¹⁶

Christie II held “that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so. We do not see how having no law in place governing sports wagering is the same as authorizing it by law.”¹¹⁷ The majority of the panel largely agreed with the reasoning of the district court, finding that PASPA was a constitutional exercise of Congress' commerce power that did not violate the anti-commandeering doctrine or the principle of equal state sovereignty.¹¹⁸ In a 2 to 1 decision the *Christie* majority held that PASPA does not violate the anti-commandeering doctrine because it merely prohibits the

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 564.

¹¹³ See generally, Jordan Hollander, *New Jersey and Sports Gambling: Perfect Together? A Look at Two Challenges to the Professional and Amateur Sports Gambling*, 18 *GAMING L. REV. & ECON.*, 799, 811 (no. 8, Oct. 2014) (hereafter cited as Hollander).

¹¹⁴ *Christie v. NCAA*, 134 S. Ct. 2866 (2014). *cert. den.*, sub nom 730 F.3d at 208.

¹¹⁵ *Id.* See generally Hollander at 811.

¹¹⁶ *Supra* note 113.

¹¹⁷ *Christie I*, 730 F.3d at 214.

¹¹⁸ *Id.* at 240. See also Hollander at 813.

states from acting, rather than coercing them to do something.¹¹⁹ Judge Vanaskie's dissent indicated that PASPA violated the Tenth Amendment.¹²⁰ Judge Vanaskie assessed that "it cannot be disputed that PASPA regulate[s] state governments' regulation of interstate commerce [by] prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism"¹²¹

On February 12, 2014, New Jersey appealed the ruling of the Third Circuit to the Supreme Court. On appeal, New Jersey raised two questions, (1) "Does PASPA's prohibition on state licensing of sports wagering commandeer regulatory authority? (2) Does PASPA's discrimination in favor of Nevada violate the fundamental principle of equal sovereignty?"¹²²The state essentially made the argument that Judge Vanaskie put forward in his dissent in the Third Circuit, namely that there is no difference between the federal government affirmatively requiring the states to do something and affirmatively prohibiting the states from doing something. Since PASPA affirmatively prohibits states from authorizing gambling, it is violative of the Tenth Amendment. The State also put forward the question on equal sovereignty. In its brief, New Jersey concluded that "left undisturbed, the Third Circuit's doctrinal innovation will drive a truck-sized hole through the anti-commandeering doctrine."¹²³ In any of the myriad areas of activity subject to state licensure, Congress could commandeer the legislative authority of the States simply by prohibiting States from issuing a license outside defined circumstances. However, the Supreme Court declined to grant the writ, letting the Third Circuit decision stand.

On February 28, 2013, Judge Shipp of the New Jersey District court in *Christie I* released an opinion that sides with the sports

¹¹⁹ *Christie I*, 730 F.3d at 231. See also Hollander at 813.

¹²⁰ *Id.* at 241 (Vanaskie, Jr. concurring in part and dissenting in part).

¹²¹ *Id.* at 245.

¹²² See Hollander at 814. See also John Brennan, *Breaking: Details on New Jersey Filing a Sports Betting Appeal to U.S. Supreme Court*, NorthJersey.com (Feb. 18, 2014 9:21a.m.), [3 http://blog.northjersey.com/meadowlandsmatter/7836/new-jersey-files-sports-betting-appeal-to-u-s-supreme.com/](http://blog.northjersey.com/meadowlandsmatter/7836/new-jersey-files-sports-betting-appeal-to-u-s-supreme.com/) (last visited)

¹²³ Hollander at 814 (footnotes omitted).

leagues and the DOJ.¹²⁴ “The Court, having considered the Parties’ submissions finds that Plaintiffs are entitled to summary judgment and a permanent injunction.”¹²⁵ Judge Shipp found that 1) PASPA is a rational expression of Congress’ powers under the Commerce Clause; 2) PASPA does not violate the Tenth Amendment because it does not force New Jersey to take any legislative, executive, or regulatory action; and 3) that Congress had a rational basis to enact PASPA in the manner it chose.¹²⁶ Judge Shipp commented that no matter how “unwise a court considers a policy decision of the legislative branch, the proper course of action is to enact new legislation or repeal PASPA through normal legislative means.”¹²⁷

Judge Shipp addressed the Commerce Clause argument, “The Court is satisfied that PASPA meets a rational basis review as it was enacted to prevent the spread of legalized sports gambling and safeguard the integrity of professional and amateur sports.”¹²⁸ Judge Shipp also upheld the grandfathering clause as comporting with the Commerce Clause and held that it was “rational for Congress to remedy a national problem piecemeal.”¹²⁹

Judge Shipp concluded that PASPA “neither *compels* nor *commandeers* New Jersey to take any action” and does not violate the Tenth Amendment.¹³⁰ The court would not allow such an expansive construction of these cases cannot be adopted by the Court, especially in light of the rule that Congressional statutes are presumptively constitutional and should be construed accordingly.¹³¹ Judge Shipp concluded that Congress had merely chosen, through PASPA, to limit the geographic localities in which sports wagering is lawful.¹³²

Judge Shipp also sided with the DOJ in that New Jersey, as a state and not a person, cannot challenge PASPA under the Fifth Amendment, though the court performed the analysis

¹²⁴ See *NCAA v. Christie*, 2013 U.S. Dist. LEXIS 27782, *100 (D.N.J. Feb. 28, 2013).

¹²⁵ *Id.* at 5.

¹²⁶ *Id.* at 7-8.

¹²⁷ *Id.* at 8.

¹²⁸ *Id.* at 20.

¹²⁹ *Id.* at 24.

¹³⁰ *Id.* at 26 (emphasis in original).

¹³¹ *Id.* at 50.

¹³² *Id.* at *55. See also Hollander at 811.

anyway.¹³³ PASPA advances the legitimate purpose of stopping the spread of legalized sports gambling and of protecting the integrity of athletic competition.¹³⁴

In *Shelby City. V. Holder*, the Supreme Court stated that “not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal* sovereignty’ among the states.”¹³⁵ The court enjoined New Jersey since the leagues suffered irreparable harm.¹³⁶ On June 26, 2013, the Third Circuit Court of Appeals held oral arguments.¹³⁷

*NCAA v. Governor of State of New Jersey (Christie II)*¹³⁸ is another 2 to 1 decision of the Third Circuit Court of Appeals that again ruled that New Jersey could not legalize sports betting.¹³⁹ The majority determined that New Jersey’s Sports Wagering Act of 2014 violated PASPA,¹⁴⁰ even though the State repealed all of its anti-sports betting laws.¹⁴¹ The 2014 law also repealed all prohibitions on sports wagering with respect to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey. Likewise, the 2014 law stripped New Jersey of any involvement in sports wagering.¹⁴² “In essence, the 2014 law renders previous prohibitions on sports gambling non-existent.”¹⁴³

NCAA v. Governor of the State of New Jersey,¹⁴⁴ in the 2016 Third Circuit Court of Appeals en banc version affirmed *Christie II*, which affirmed the District Court of New Jersey enjoining

¹³³ See *Christie*, 2013 U.S. Dist. LEXIS 27782, 64 (D.N.J., Feb. 28, 2013). See also Hollander at 811.

¹³⁴ *Id.*

¹³⁵ *Shelby Cnty v. Holder*, 133 S. Ct. 2612, 2622-24 (2013) (emphasis in original) (footnote omitted). See also Hollander at 812.

¹³⁶ *Supra* note 134 at 76-77.

¹³⁷ Hollander at 812.

¹³⁸ *NCAA v. Governor of the State of New Jersey*, 799 F.3d 259 (3d Cir. 2015).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 268 (Fuentes, J., dissent).

¹⁴² *Id.* (emphasis in original).

¹⁴³ *Id.*

¹⁴⁴ *NCAA v. Governor of the State of New Jersey*, 832 F.3d 389 (3d Cir. 2016). Filed Aug. 9, 2016, Amended Aug.

II, 2016), pet. for writ of certiorari filed, Sept. 29, 2016. The Acting Solicitor General is invited to file a brief in

this case expressing the views of the United States (Jan. 17, 2017).

the State of New Jersey (61 F. Supp. 3d 488) from giving effect to the 2014 law which partially repealed the state's prohibition against sports betting. New Jersey's Sports Wagering Act had the effect of authorizing sports gambling in violation of PASPA.¹⁴⁵ The Circuit Court en banc also held that PASPA's prohibition against sport betting does not violate Tenth Amendment commandeering principles.¹⁴⁶ The Fuentes dissent reiterates the illogical reasoning of PASPA that allows a federal statute to dictate a state's gambling decisions.¹⁴⁷ It states,

“Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from *restricting* sports wagering in this scenario. Yet the 2014 repeal comes to the same result.”¹⁴⁸

Judge Vanaskie's dissent goes even further. Since PASPA specifically directs that no state can authorize sports gambling, therefore, such commands are fundamentally incompatible with our constitutional system of dual sovereignty.¹⁴⁹

VII. BOOTSTRAPPING DAILY FANTASY SPORTS TO LEGALIZE SPORTS WAGERING IN NEW JERSEY

Daily Fantasy Sports (DFS) is the latest example of the United States' inherently contradictory response to gambling. Like the failed social experiment of prohibition, it is impossible to legislate mortality. The gaming industry is the most regulated business in America. It is more regulated than nuclear reactors or the neighborhood Ebola clinic.

Regulating gambling is entirely a states' rights issue. Every state has a different history and approach to gambling and other “sins.”¹⁵⁰ But now, states look to gambling, and legalized marijuana, to create a viable source of income in a sluggish economy. Another

¹⁴⁵ *Infra* note 211.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 405 (Fuentes, J. dissent).

¹⁴⁸ *Id.* (emphasis in original).

¹⁴⁹ *Id.* at 409 (Vanaskie, J., dissent).

¹⁵⁰ *See generally* Champion & Rose, *supra*, note 3 at 76-92.

concern is the “meddling” federal statutes which make little or no sense. The federal government is incapable of legislating morality. That was not the compromise when the Constitutional form of government was adopted in 1790.¹⁵¹

Daily Fantasy Sports is that “fuzzy animal” compromise that traces its lineage to the most “fuzzy” of all “fuzzy animals,” the traditional fantasy sports leagues.¹⁵² The traditional leagues were based on the statistical performance of certain drafted athletes for an entire season. DFS is comparable to the traditional leagues but fantasy teams compete on a one game schedule. The professional sports leagues now support DFS because viewers will watch until the end of a contest to see how their players performed statistically, and thus generate additional advertising revenues. The two major DFS sites are Draft Kings and Fan Duel, and as recently as winter 2015, everyone was making money, so they could afford to ignore any isolated questions concerning the games legality. However, during the summer of 2015, DFS exploded through an unprecedented massive advertising campaign during sporting events, and there was a scandal in September of 2015 which brought unwanted legal scrutiny to DFS, including governmental threats that DFS operators would be arrested unless they stopped taking players from New York and Nevada.

The scandal involved a Draft Kings’ employee who accidentally released confidential information about real-world athletes that Draft King was selecting; coincidentally, that employee won \$350,000 while playing with Fan Duel.¹⁵³ The New York Attorney General

¹⁵¹ See generally *Id.* at 54-60.

¹⁵² See generally David Klein, *Fantasy Sports: The Rapidly Developing Legal Framework*, LAW360 (September 20, 2015), <https://www.law360.com/articles/704275/fantasy-sports-the-rapidly-developing-legal-framework>.; I. Nelson Rose, *Are Daily Fantasy Sports Legal?* 19 GAMING L. REV. & ECONS. 346 (2015); I. Nelson Rose, *What Should Daily Fantasy Sports Do Now?*, 19 GAMING L. REV. & ECONS. 683 (2015).

¹⁵³ See also Joe Drape and Jacqueline Williams, “*Fantasy Sports Businesses have to Defend Practices as Integrity Called Into Question*,” *Houston Chronicle* at C9 (2015); Complaint, *New York v. DraftKings, Inc.* (N.Y. Sup. Ct. 2015); Peggy Fikac, *Abbott: No Curbs on Fantasy Sports*, *Houston Chronicle* at A1 (Oct. 23, 2015); Tim Casey, *Daily Fantasy Sports Site, Facing Opposition Maintains its Visibility in City Arenas*, N.Y. Times at B 16 (Nov. 24, 2015); Michael Tripped, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAM. L. J. 201 (2014); Nathaniel Ehrman, *Out of Bounds? A Legal Analysis of Pay-to-Play Daily*, *Fantasy*

claimed that DFS is illegal because they are games of chance, not skill. The question is whether DFS is illegal gambling. The New York A.G. further claimed that DFS supplies “instant gratification” and involves no long-term strategy. DFS counters that their games are legal and based on skill.¹⁵⁴

The federal government has a hand in regulating gambling but mostly to assist states in enforcing their public policies. It is state laws and local ordinances that have the most impact on gambling. Although the regulation is omnipresent, it is not uniform. There are anomalies, for example, there is no state lottery in Nevada, and so the California lottery cannot advertise in Nevada. Gambling must have prizes, chance, and consideration.¹⁵⁵

It is useful to track the considerations that define gambling. The following by definition, is not gambling: (1) amusement games with no prize; (2) tournaments of skill which are not chance; (3) online skill games like fantasy leagues; and (4) online “free” games.¹⁵⁶ However there are also activities that are universally recognized as gambling such as: lotteries, slot machines, banked table games, sports betting, bingo, and horse and dog racing.¹⁵⁷ Generally recognized as gambling includes poker and pyramid schemes, but generally not recognized as gambling includes stock and commodities markets, day trading, multilevel marketing prediction markets, insurance, and auctions.¹⁵⁸

Fantasy sports is played by fans who pay a fee to enter and compete against other players for valuable prizes. The fantasy is that players create and manage their own teams which are comprised of real-world athletes. But these athletes do not usually compete against each other in real-world games, so the competition is based solely on real-world statistics. These teams consist of athletes from

Sports, 22 Sports L. J. 79 (2015); Andy Moore, *What Nevada Action Means for Future of Daily Fantasy Sports*, Law360 (Nov. 3, 2015).

¹⁵⁴ Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349 from Eric T. Schneiderman, N.Y. Attorney General to DraftKings and FanDuel (essentially the same betters) (Nov. 10, 2015); and Complaint, *New York v. DraftKings, Inc.*(N.Y. Sup. Ct., N.Y.

Cty., Nov. 16, 2015).

¹⁵⁵ *See generally* Champion & Rose, *supra*, note 3 at 1-17.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 8-19.

different actual sports teams. The only thing that is real are the statistics generated by particular athletes. Computers are used to determine winners of fantasy contests based on the statistical data of real-world performances. Until recently, fantasy leagues would last the entire season, but DFS revolutionized the fantasy league concept by adding the notion that a league could start and finish in one day, using statistics generated by real-world contests on that particular day.¹⁵⁹

DFS is now legal in ten states.¹⁶⁰ DFS is a glorified sports book; if those states can legislate its legality, why can't they legislate PASPA's illegality?

VIII. STATE V. ROSENTHAL

To reiterate,

“[t]he power to regulate gambling derives from the state’s police power. Every state has the power, and perhaps even the obligation, to protect the health, safety, and welfare and morality of its residents. The most common exercise of this power is with fire, food safety, and disease control. But, gambling has always fallen under the police power, which gives the state extraordinary power to regulate, even when it makes the activity illegal. In fact, the police power normally trumps constitutional rights.”¹⁶¹

For example, a New Jersey Superior Court held that a licensed casino operator relinquished her right to participate in political campaigns.¹⁶² That brings us to Frank “Lefty” Rosenthal, who was made famous in the movie “Casino,”¹⁶³ and in real life was denied a casino license in *State v. Rosenthal*.¹⁶⁴ The Nevada Supreme Court

¹⁵⁹ Rose, *Are Daily Fantasy Sports Legal?* *supra*, note 162 at 346.

¹⁶⁰ Rose, *President Trump and the Future of Legal Gaming*, *supra*, note 30 at 818.

¹⁶¹ Champion & Rose, *supra*, note 3 at 89. “When an Islamist terrorist is about to blow up a building, law enforcement shoots to kill, without first being on trial.” *Id.*

¹⁶² *Soto v. New Jersey*, 496 U.S. 937, 110 S. Ct. 3216 (1990); Petition of Soto, 236 N.J. Super. 303, 565 A.2d 1088 (A.D. 1989), cert. denied, 121 N.J. 608, 583 A.2d 310, cert. denied.

¹⁶³ Champion & Rose, *supra*, note 3 at 89.

¹⁶⁴ *Rosenthal v. Nevada*, 434 U.S. 803, 98 S. Ct. 32 (1977); *State v. Rosenthal* 93 Nev. 36, 559 P.2d 830 (1977), appeal dismissed. *See generally* “Lefty is Still Right: The Continued Importance of *State v. Rosenthal* to Nevada Gaming Regulation,” Homeyer,

in *Rosenthal* held that the regulation of legal gambling is purely a state legislative issue.¹⁶⁵ The state has absolute power to regulate gambling within the state *without* federal or state Constitutional interference.¹⁶⁶ Gaming is a matter of privilege conferred by the state that requires special expertise in its licensing and control.¹⁶⁷ The gaming industry is one which is subject to complete and careful control by the state due to criminal elements commonly involved in the industry.¹⁶⁸

IX. CONCLUSION

New Jersey State Senator Raymond J. Lesniak, the moving force behind the New Jersey Sports Wagering Act,¹⁶⁹ stated that the legal sports betting market was a result of a “perfect storm” made possible by federal law that essentially gives organized crime and overseas interests a virtual monopoly on sports wagering.¹⁷⁰

The federal court decisions barring New Jersey from adding sports books to its race tracks and Atlantic City casinos were unduly complex.¹⁷¹ It looks like the NBA might eventually acquiesce PASPA’s demise.¹⁷² PASPA itself is inherently illogical.¹⁷³ However, *Christie I* and *Christie II*,¹⁷⁴ although possessing

supra note, 28 at 105. Kirk D. Homeyer emphasizes the continued importance of *Rosenthal* “and its subsequent affirmation by the Nevada Supreme Court [*Rosenthal v. State ex rel. Nev. Gam. Comm’n.*, 96 NEV. 959, 960-61 (1980)], the Ninth Circuit [*Jacobson v. Hannifin*, 627 F.2d 177 (9th Cir. 1980)], and the federal district court in Nevada [*Kraft v. Jacka*, 669 F. Supp. 333, 334 (D.Nev. 1987].” *Id.*

¹⁶⁵ *Rosenthal*, 559 P. 2d at 833-37. *See generally* Champion & Rose, *supra* note 3, at 89-90 and 112-13.

¹⁶⁶ *See id.* (emphasis supplied). *See generally* Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 CHAP. L. REV.181 (2002).

¹⁶⁷ *Rosenthal*, 559 P. 2d at 833-37. *See generally* Champion & Rose, *supra* note 3, at 89-90 and 112-13.

¹⁶⁸ *Id.* at 877 (Manoukian, J., concurring) (citing Nevada Tax Comm’n v. Hicks, 73 Nev. 115, 119, 310 P.2d 852, 854 (1957)).

¹⁶⁹ N.J.S.A. 5:12A-1 *et. seq.*

¹⁷⁰ Raymond J. Lasniak, *et. al.*, *Should Sports Gambling Be Legal*, 4(25) U.S. NEWS DIGITAL WEEKLY 15 (2012). *See generally* McGowan, *supra*, note 5at 672.

¹⁷¹ Rose, *Gambling on Sports Betting*, *supra*, note 67 at 953.

¹⁷² *Id.*

¹⁷³ *See, e.g., Id.* at 954-55

¹⁷⁴ *Christie II*, 799 F.3d 259.

strong dissents,¹⁷⁵ still maintained PASPA's legitimacy.¹⁷⁶ Of course, the latest defeat for New Jersey is the Third Circuit acting en banc in *NCAA v. Governor of the State of New Jersey*.¹⁷⁷ However, there were dissents,¹⁷⁸ and it was granted certiorari to the U. S. Supreme Court on June 27, 2017.¹⁷⁹ The Supreme Court tellingly invited the Acting Solicitor General to file a brief expressing the interests of the United States,¹⁸⁰ and the interests of the United States should be to uphold established principles of states' rights.¹⁸¹ PASPA, through its "Las Vegas loophole,"¹⁸² unfairly penalizes New Jersey.¹⁸³

The phenomenon of Daily Fantasy Sports emphasizes the states' power to regulate sports betting.¹⁸⁴ DFS is another example of states' rights decimating silly federal statutes,¹⁸⁵ in this case, UIGEA.¹⁸⁶ If DFS can maneuver around federal statutes, then New Jersey should also be equipped to maneuver around yet another federal statute, in this case, PASPA.¹⁸⁷

The straw that breaks the camel's back and frees New Jersey to reinvent Atlantic City through sports books is the Nevada Supreme Court's case of *Rosenthal v. Nevada*.¹⁸⁸ *Rosenthal* makes some very strong points that can be easily

¹⁷⁵ See *Christie I* 730 F.3d at 208, 241 *et. seq.*; and *Christie II*, 799 F.3d 259, 268 *et. seq.*

¹⁷⁶ *Christie I*, 730 F.3d at 208.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 402

¹⁷⁹ 2017 WL 2742859 (U.S., mem.).

¹⁸⁰ Acting Solicitor General is invited to file a brief expressing the U.S. views, 2017 WL 160451 (mem.) (U.S., Jan. 17, 2017).

¹⁸¹ Rose, *Gambling on Sports betting*, *supra*, note 67 at 955.

¹⁸² Champion & Rose, *supra*, note 3 at 319.

¹⁸³ Rose, *Gambling on Sports Betting*, *supra*, note 67 at 956.

¹⁸⁴ See generally I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, 19 GAMING L. REV. & ECONS. 346 (no. 5, June 2015); I. Nelson Rose, *End Game for Daily Fantasy Sports?*, 19 GAMING L. REV. & ECONS. 634 (no. 9, Nov. 2015); and I. Nelson Rose, *What Should daily Fantasy Sports Do Now?*, 19 GAMING L. REV. & ECONS. 683 (no. 10, Dec. 2015).

¹⁸⁵ *Id.*

¹⁸⁶ UIGEA (Unlawful Internet Gambling Enforcement Act), 18 U.S.C. §§ 5361-5367.

¹⁸⁷ See generally Rose, *Gambling on Sports Betting*, *supra*, note 67 at 953; and Rose, *New Jersey Sports Betting Court Gets It Wrong Again*, *supra*, note 67 at 563.

¹⁸⁸ *Rosenthal*, 559 P.2d 830.

transferred to New Jersey's fight against PASPA,¹⁸⁹ regardless of the fact that Nevada enjoys PASPA's "Las Vegas Loophole."¹⁹⁰ *Rosenthal* reiterates the very obvious fact that "[t]he licensing and control of gaming requires special knowledge."¹⁹¹ This special knowledge is specific to that particular state. In *Nev. Tax Com. v. Hicks*,¹⁹² the court wrote that "[i]t is not the province of the courts to decide what shall constitute suitability to engage in gambling in this state."¹⁹³

Rosenthal indicates "that the statutory standards alone are sufficient since reasonable action by the commission is required in the light of the public interest involved. [G]aming is a privilege conferred by the state and does not carry with it the rights inherent in useful trades and regulations. [G]aming . . . [is] reserved to the states within the meaning of the Tenth Amendment to the United States Constitution. This distinctively state problem is to be governed, controlled, and regulated by the state legislature. It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished, and federal intrusion invited."¹⁹⁴

It is apparent that *Rosenthal* demands that federal interference is not allowed in the state's regulation of gaming.¹⁹⁵ The bedrock principle of federalism is that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the states some undefined options when it comes to sports wagering.¹⁹⁶ *Rosenthal* can be summarized in sound bite format that the Gaming Board's decision to deny a gaming license is not reviewable by a court.¹⁹⁷ Allowing a sports book is a kind of gaming license. Courts do not possess the requisite

¹⁸⁹ *Id.* See generally Homeyer, *supra*, note 28; Rose, Gambling on Sports Betting, *supra*, note 67 at 953; and Rose, *New Jersey Sports Betting – Court Gets It Wrong Again*, *supra*, note 67 at 563.

¹⁹⁰ Champion & Rose, *supra*, note 3 at 319.

¹⁹¹ *Rosenthal*, 559 P.2d 830, 834 (citing *Nevada Tax Comm'n V. Hicks*, 73 Nev. 115, 119, 310 P.2d 852, 854 (1957) (citation omitted).

¹⁹² *Hicks*, 73 Nev. at 119.

¹⁹³ *Hicks*, 310 P.2d at 855 (quoting *Rosenthal*, 559 P.2d at 834).

¹⁹⁴ *Id.* at 836.

¹⁹⁵ *Id.*

¹⁹⁶ *NCAA v. Governor of New Jersey*, 832 F.3d 389, 407 (3d Cir. 2016) (Vanaskie, J., dissenting).

¹⁹⁷ *Rosenthal* at 834. See e.g. Homeyer, *supra*, 28 at 105.

expertise to make decisions that possibly influences state gaming.¹⁹⁸ The hypothetical question is if Nevada was not blessed with the “Las Vegas Loophole” would *Christie* be decided differently? In 2015, two house bills - H.R. 416, “Sports Gaming Opportunity Act of 2015”¹⁹⁹ and H.R. 457, “New Jersey Betting and Equal Treatment Act of 2015,”²⁰⁰ sought to exclude New Jersey from PASPA. There is just too much negative synergy for PASPA to survive.²⁰¹

¹⁹⁸ See generally Homeyer, *supra*, note 28 at 119.

¹⁹⁹ H.R. 416, *Sports Gaming Opportunity Act of 2015*, (14th Cong., 1st Sess., Jan. 21, 2015).

²⁰⁰ H.R. 457, *New Jersey Betting and Equal Treatment Act of 2015*, (14th Cong., 1st Sess., Jan. 21, 2015).

²⁰¹ See generally Wes Bulgarella, *Baseball’s Best Bet! A Call for the Legalization of Baseball Gambling in the United States*, 20 GAMING L. REV. & ECO. 838 (no. 10, Dec. 2016) Now is the time for Major League Baseball to repeal PASPA and “put the past behind it and embrace gambling.”

²¹⁷ See also Hollander, *supra*, note 28; and rose, *N.J. Sports Betting – Court Gets It Wrong Again*, 19 GAMING. L. REV. & ECON. 563. (YEAR)

GETTING IN THE GAME: THE DEMOGRAPHICS OF PROFESSIONAL SPORTS TEAM IN-HOUSE LEGAL COUNSEL

Zachary Flagel & Nathaniel Grow***

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INTRODUCTION

Considering that 60 percent of Americans self-identify as being sports fans,¹ many attorneys undoubtedly count themselves

* University of Georgia, B.A. expected 2018..

** Associate Professor of Business Law and Ethics, Kelley School of Business, Indiana University

¹ Jeffrey M. Jones, *As Industry Grows, Percentage of U.S. Sports Fans Steady*, GALLUP.COM, June 17, 2015, <http://www.gallup.com/poll/183689/industry-grows->

among the ranks of the nation's sporting enthusiasts. For at least a share of these lawyers, getting the chance to put their legal skills to use in the sports industry would undoubtedly be considered a dream opportunity.

Attorneys desiring to work in the sports industry typically hope to follow one of several possible career paths. In some cases, lawyers may want to follow in the footsteps of Tom Cruise's infamous character Jerry Maguire by becoming a sports agent, representing professional athletes in their negotiations with teams and prospective endorsees.² For others, the model career trajectory would instead result in being hired to work directly for a sports league, perhaps following the by now well-trodden path of former league attorneys who went on to serve as the commissioners of Major League Baseball ("MLB"), the National Basketball Association ("NBA"), the National Football League ("NFL"), and the National Hockey League ("NHL").³

For still other aspiring sports lawyers, however, the ideal professional scenario would be to work for a sports team itself, as the franchise's in-house legal counsel. Like any attorney working full-time for a single business entity, in-house counsel for professional sports teams perform a variety of legal functions on behalf of their employer-franchises.⁴ In addition to negotiating and

percentage-sports-fans-steady.aspx (finding that "[a]n average of 60% of Americans" have described themselves as "sports fans since 2000").

² See, e.g., Darren Rovell, *How 'Jerry Maguire' Ruined the Sports Agency Industry*, ESPN.COM, Dec. 13, 2016, http://www.espn.com/espn/story/_/id/18268246/how-jerry-maguire-ruined-sports-agency-industry (quoting veteran sports agent David Canter as stating "The amount of people who wanted to be sports agents after the movie was insane, so many had fallen in love with the celebrity of it."). See also Adam Epstein & Bridget E. Niland, *Sports Agent Litigation and the Regulatory Environment*, 11 ATLANTIC L.J. 36, 37 (2009) (finding that "the business and life of a sports agent is portrayed as glamorous").

³ For instance, at least eight of the current or former commissioners of these leagues previously worked as attorneys, including Kenesaw Mountain Landis, Bowie Kuhn, Fay Vincent, and Rob Manfred in MLB, David Stern and Adam Silver in the NBA, Paul Tagliabue in the NFL, and Gary Bettman in the NHL. See, e.g., Adam G. Yoffie, *There's a New Sheriff in Town: Commissioner-Elect Adam Silver & The Pressing Legal Challenges Facing the NBA Through the Prism of Contraction*, 21 JEFFREY S. MOORAD SPORTS L.J. 59, 61 n.11 (2014) (discussing the history of attorney-commissioners in the four major U.S. professional sports leagues).

⁴ See Morgan Morrison, *A Day in the Life of ... Rafael Stone, General Counsel, Houston Rockets, Houston Comets, and Toyota Center*, 69 TEX. B.J. 628, 628 (2006)

reviewing a plethora of contracts for their clubs—including agreements with broadcast partners, sponsors, and players⁵—team attorneys may also be called upon to handle trademark issues,⁶ immigration matters for foreign-born players,⁷ or in some cases even represent the team in arbitration.⁸

Although an in-house legal position at a professional sports franchise would be a highly desirable position for any number of attorneys, and despite the important roles these in-house counsel serve within their organizations, until recently, relatively little was known about the people who hold these jobs. This article hopes to help fill this void by providing the results of a unique demographic study of the men and women who work as in-house legal counsel for the teams in the four major North American professional sports leagues.⁹ Specifically, by marshalling together a plethora of publicly available data, the article provides new insight into the backgrounds of those lawyers who have been fortunate enough to land a full-time legal counsel position within a professional sports franchise.

The article proceeds in two parts. First, Part I briefly describes the methodology of our study, laying out how the relevant data were collected. Part II then discusses the results of the study, examining the backgrounds and demographics of the more than 180 attorneys currently employed in a legal capacity by a North American professional sports team.

(describing the general counsel of the NBA's Houston Rockets' daily duties as "jump[ing] from one fire to the next").

⁵ See Christopher R. Deubert, Glenn M. Wong, & Kevin Hansen, *General Counsels in Sports: An Analysis of the Responsibilities, Demographics, and Qualifications*, 6 ARIZ. ST. SPORTS & ENT. L.J. 229, 233-36 (2017) (discussing the variety of contracts that a sports team general counsel may negotiate on behalf of her employer).

⁶ See Lauren Nevidomsky, *A Law Student's Perspective: The Inside Scoop from Inside Sports: The Business of Being Team Counsel*, 32-WTR ENT. & SPORTS LAW. 45, 47 (2016) (observing that Tampa Bay Lightning general counsel Danna Haydar has stated that "she often corresponds with the National Hockey League on trademark issues").

⁷ See Morrison, *supra* note 4, at 628 (noting same).

⁸ See Jeanne Theismann, *Play Ball: Sportsman's Club to Host Nats VP Jan. 26*, THE CONNECTION, Jan. 26, 2017, <http://www.connectionnewspapers.com/news/2017/jan/26/play-ball/> (describing the duties of the Washington Nationals' general counsel, Damon Jones, as including work on salary arbitration with players)

⁹ For the purposes of this article, the four major North American sports leagues are MLB, the NBA, the NFL, and the NHL.

I. STUDY METHODOLOGY

As noted above, despite the important role that general counsels and other in-house attorneys play in the modern professional sports franchise, relatively little focus has been paid to the individuals who hold these positions within a sports team. This under-examination arguably mirrors that of the position of in-house counsel generally across the economy as a whole.¹⁰

In order to rectify this shortcoming, a study was designed to ascertain the background and experience of in-house counsel working for professional sports teams. Specifically, the study began by identifying the in-house legal counsel employed by all the teams in the four major North American sports leagues.¹¹ Along these lines, only those attorneys who appeared to be employed in a legal capacity were considered “in-house counsel” for purposes of this survey. Notably, former attorneys employed in different capacities by a sports team were not included in the present study.¹² Demographic information regarding these individuals’ educational background and prior work experience was then collected from publicly available sources, primarily via the attorneys’ profiles on the social-networking site LinkedIn,¹³ but also from various news releases or articles written about the individual.¹⁴

Ultimately, a total of 198 attorneys were identified as working in a legal capacity for one of the 122 teams in the four major North American sports leagues.¹⁵ However, because 11 of these

¹⁰ See Omari Scott Simmons, *The Under-Examination of In-House Counsel*, 11 TRANSACTIONS: TENN. J. BUS. L. 145, 146 (2009) (noting that “there is a relative dearth of scholarship dedicated to” in-house counsel).

¹¹ This identification process occurred in March and April of 2016.

¹² For example, Theo Epstein, the President of MLB’s Chicago Cubs—and former general manager of the Boston Red Sox—attended law school before entering the baseball industry on a full-time basis. See Steven A. Meyerowitz, *Alternative Careers*, 27 PA. LAW. 14, 14 (2005) (observing that “Epstein ... may be the most envied non-practicing law school grad who topped the news during 2004”). However, because Epstein is not currently employed in a legal capacity by the Cubs, he was not included in the present study.

¹³ “LinkedIn is a web-based social networking site that presents itself as an online community offering professionals ways to network.” *Low v. LinkedIn Corp.*, 900 F.Supp.2d 1010, 1016 (N.D. Cal. 2012).

¹⁴ Other studies of a similar nature have adopted the same methodology. See Deubert, et al., *supra* note 5, at 246 (describing methodology).

¹⁵ In several instances, a team listed an attorney employed by its parent corporation as its general counsels; these individuals were included within the study. Similarly, in a

individuals simultaneously worked for two different teams—commonly owned franchises belonging to two different leagues¹⁶—demographics data for these attorneys (when available) was only counted once for Tables 3 through 7 below.

Notably, after the data were collected, but before a draft of this article was completed, another study—by Deubert, et al.—was published that itself analyzed the demographics of sports-team general counsel.¹⁷ The focus of this competing study was arguably more limited than the present survey in at least one important respect, however. Indeed, the other study only collected data regarding the highest-ranking attorney (i.e., the primary or senior most “general counsel”) working for each sports team.¹⁸ In contrast, the present study presents data regarding all attorneys employed in a legal capacity by a franchise in one of the four major U.S. sports leagues. It thus not only includes data regarding the senior most attorney working for these teams, but also those employed in lower-ranking (e.g., “assistant general counsel”) positions as well. Consequently, the present study provides a more complete picture of both the overall demographics of those employed in the sports-team in-house counsel profession, as well as the typical qualifications possessed by those joining the profession in an entry-level position.

II. STUDY RESULTS

Table 1 provides data regarding the number of in-house counsel employed by the franchises belonging to each of the four major North American sports leagues. As the data reported below reveal, teams’ in-house-counsel hiring practices are relatively consistent across the four leagues, ranging from 46 to 53 team attorneys per league, or roughly 1.5 to 1.75 attorneys per team.

few cases, a team identified a lawyer practicing at an outside law firm as its general counsel; these individuals were also included as in-house counsel for purposes of our study.

¹⁶ For example, both the New York Knicks in the NBA and the New York Rangers in the NHL are owned by James Dolan. *See, e.g., James L. Dolan – The Madison Square Garden Company*, THEMADISONSSQUAREGARDENCOMPANY.COM (last accessed Jan. 27, 2017) (discussing Dolan’s ownership of the Rangers and Knicks).

¹⁷ *See* Deubert, et al., *supra* note 5.

¹⁸ *Id.* at 229 (noting the study’s focus on “the highest-ranking attorney at each club”).

Table 1. Number of In-House Counsel by Sport

Sports League	Number of In-House Counsel	Teams with no In-House Counsel	In-House Counsel per Team
Major League Baseball (MLB)	53	0	1.77
National Basketball Association (NBA)	49	0	1.63
National Football League (NFL)	50	3	1.56
National Hockey League (NHL)	46	3	1.63

That having been said, it is interesting to note that six teams—three each in the NFL and NHL—did not appear to employ any in-house counsel at the time the study was conducted.¹⁹ In some of these cases—including the NFL’s Cincinnati Bengals and Pittsburgh Steelers—one or more of the team’s owners were themselves former attorneys. Meanwhile, in at least one other instance—the NFL’s Baltimore Ravens—the individual serving as team president was previously a lawyer. Although not included among the ranks of in-house counsel for purposes of the present study, it is possible—if not probable—that these individuals

¹⁹ Notably, in the study by Deubert, et al., nine teams were found to not employ a general counsel. *Id.* at 244-45. Some of this difference is attributable to differing definitional decisions employed in the two studies. Specifically, the study by Deubert, et al., did not consider an attorney simultaneously employed by an outside law firm to be a general counsel of the club, even if the team listed that individual as such on its website. In contrast, such individuals were included among the ranks of team in-house counsel in the present study.

Because this difference does not explain the entire discrepancy between the findings reached in the present article and the prior study, however, this fact suggests that some of these vacancies were likely temporary in nature.

nevertheless provide some legal guidance to their franchises as well.

Table 2 considers the gender breakdown of the in-house counsel working for teams in the four respective professional sports leagues. As with the number of attorneys employed by teams overall, the number and percentage of male versus female in-house counsel did not substantially differ across the four sports. That having been said, MLB did have both the largest number and highest percentage of female in-house counsel among the four major leagues.

Table 2. In-House Counsel Gender by Sport

Sports League	Male In-House Counsel	Female In-House Counsel	Percent of Female In-House Counsel
Major League Baseball	35	18	33.96%
National Basketball Association	36	13	26.53%
National Football League	36	14	28.00%
National Hockey League	33	13	28.26%

Notably, the percentage of female in-house counsel for each of the four leagues was lower than the percentage of female attorneys in the legal profession at-large, in which women have been estimated to constitute 35 percent of all U.S. attorneys.²⁰ At the same time, however, females are much more heavily represented in sports teams' in-house counsel positions than in the franchises' other executive-level jobs, where females have previously been

²⁰ National Lawyer Population Survey, American Bar Association, 2015 edition, https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf

found to hold less than ten percent of team executive-level positions in each of the four major North American sports leagues.²¹

Also worth noting is the fact that the data presented in Table 2 above reflect a higher rate of female representation in the sports-team in-house counsel profession than was suggested by the prior study by Deubert, et al. In that study, the authors found that only 18.6 percent of team general counsels were female, compared to an overall percentage of 29.3 in the present survey.²² Because the Deubert study only reported data on the senior most attorney employed in a legal capacity by each franchise,²³ this discrepancy suggests that female attorneys have disproportionately been hired to fill lower-ranking, assistant or associate-level in-house counsel positions by professional sports teams.

General data regarding the U.S. law-school alma maters of sports-team in-house counsel—when it could be ascertained—is reported in Table 3. Specifically, the 2017 *U.S. News & World Report* law school rankings were used to categorize the institutions from which the in-house counsel received their Juris Doctor degree. As indicated on the table above, schools were divided into groups representing the so-called “Top 14” national law schools,²⁴ schools ranked 15-25, 26-50, 51-100, and 101-144, respectively, and finally, law schools unranked in the 2017 *U.S. News & World Report* rankings.

²¹ See Brad Muster, *Minority Hiring Practices in Professional Sports*, SPORT J., Feb. 14, 2008, <http://thesportjournal.org/article/minority-hiring-practices-in-professional-sports/> (reporting that females held 5.8% of executive positions in both MLB and the NFL, 6.9% in the NHL, and 9.4% in the NBA).

²² Deubert, et al., *supra* note 5, at 251.

²³ See *supra* notes 17-18 and accompanying text (discussing differences between the prior and present studies).

²⁴ The “Top 14” law schools have traditionally been Yale, Harvard, Stanford, Columbia, Chicago, NYU, Pennsylvania, Duke, University of California, Berkeley, Virginia, Michigan, Northwestern, Cornell, and Georgetown. See, e.g., Erin Cady, Note: *The John M. Olin Fellowships and the Advancement of Conservatism in Legal Academia*, 39 HARV. J.L. & PUB. POL’Y 917, 947 n.174 (2016) (observing same). For a general discussion of the *U.S. News & World Report* law school ranking methodology, see Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791, 794-95 (2008).

Table 3. Law-School Alma Mater (United States)

U.S. Law School Ranking (via U.S. News & World Report's 2017 Law School Rankings)	Number of In-House Counsel	Percentage of In-House Counsel (n=183)	Cumulative Percentage of In-House Counsel
Top 14	51	27.87%	27.87%
15-25	27	14.75%	42.62%
26-50	27	14.75%	57.38%
51-100	35	19.13%	76.50%
101-144	33	18.03%	94.54%
Unranked	10	5.46%	100.00%

Notably, more than 25 percent of team in-house counsel attended one of the 14 highest-ranked law schools, the largest percentage of any of the various tiers of law schools. There are several possible explanations for this result. One possibility is that attorneys attending the highest-ranked law schools have been found to disproportionately go on to practice in a major metropolitan area,²⁵ areas which are themselves more likely to host a professional sports team. So, it is possible that in some cases geographic factors may help explain the proportion of top-14 law school graduates who have joined the ranks of sports-team in-house counsel.

Alternatively, this trend may simply reflect the fact that graduates of elite law schools are more likely to have practiced at highly regarded law firms.²⁶ As further discussed with respect to Tables 5 and 6 below, a sizeable percentage of sports-team

²⁵ See Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 LAW & SOC'Y REV. 1, 32 (2007) (reporting that 77 percent of graduates of law schools ranked in the top ten went on to live in a major metropolitan area, versus just 19 percent of attorneys who attended a so-called "Tier 4" school).

²⁶ See, e.g., Patrick Shin et al., *The Diversity Feedback Loop*, 2014 U. CHI. LEGAL F. 345, 353 n.19 (2014) (stating that "elite law firm hiring from non-elite law schools tends to be limited to the very top of the graduating class"); Charles R.T. O'Kelley, *Foreword: The Many Passions of Teaching Corporations*, 34 GA. L. REV. 423, 424 (2000) (observing that "[t]he average student at an elite law school, regardless of his or her class rank, has the likely post-graduation option of a position at an elite law firm," while "elite law firm positions are almost certainly out of reach" for average students at non-elite schools).

attorneys previously practiced at large, national law firms before moving in-house. Therefore, the percentage of in-house counsel who went to top law schools may simply reflect the fact that teams prefer to hire attorneys who have worked at highly regarded firms, and in particular, firms that have previously represented the teams in various legal matters. Finally, of course, it is also possible that some teams simply value prestigious education credentials.

At the same time, however, it is worth noting that the fact that the top-14 law schools have disproportionately produced such a large share of sports team in-house counsel is also seemingly at odds with a general trend in which graduates of top-20 law schools have been found to be less likely to work in an in-house position compared with those who attended lower-ranked schools. Indeed, one relatively recent study found that only 6.3 percent and 4.7 percent, respectively, of lawyers who attended law schools ranked 1-10 or 11-20 went on to work in an in-house position, compared to roughly 11 percent of attorneys from Tier 3 or Tier 4 schools.²⁷

It is also once again worth noting that the data presented in Table 3 above diverge somewhat from the findings presented in the prior study by Deubert, et al. Specifically, in that study graduates of law schools ranked 101 or over by *U.S. News & World Report* accounted for only 15.2 percent of sports-team in-house legal counsel.²⁸ By contrast, the present study found that graduates of these institutions—comprising both the 101-144 and Unranked categories in Table 3—accounted for 23.5 percent of all in-house counsel in the team sports industry. As with the representation of female attorneys discussed above,²⁹ this discrepancy suggests that graduates of law schools fairing worse in the *U.S. News & World Report* rankings have disproportionately been hired to fill lower-ranking, assistant- or associate-level in-house counsel positions.

Meanwhile, in addition to the U.S. data reported above, data regarding the law-school alma maters for 13 in-house counsel who attended law school—and who now subsequently work for a team residing—in Canada could also be ascertained. Notably, nine of these 13 attorneys attended a law school ranked among Canada's top three in the most recent edition of *Maclean's* Canadian Law

²⁷ Dinovitzer. & Garth, *supra* note 25, at 10.

²⁸ Deubert, et al., *supra* note 5, at 254.

²⁹ See *supra* notes 21-22 and accompanying text.

School Rankings,³⁰ including four individuals who attended top-ranked University of Toronto.

Table 4 contains a list of all U.S. law schools that have produced more than one current sports team in-house counsel.³¹ Not surprisingly given the percentage of team attorneys that graduated from top-14 programs, historically elite law schools such as Harvard, Stanford, and Duke reside at the top of the list. In particular, Harvard Law School leads the way by a significant margin in this respect, having served as the alma mater of 12 current team in-house counsel, twice the number of the next highest-ranking institution. While some of this result may be explained by the fact that Harvard boasts one of the largest law-school alumni bases in the country, its ranking on this list has also potentially been boosted by the school's strong tradition in the field of sports law.³²

Table 4. U.S. Law Schools Producing Multiple In-House Counsel

Law School	Number of In-House Counsel
Harvard	12
Duke	6
Stanford	6
University of Pennsylvania	5
Columbia	5

³⁰ Technically, four schools were ranked among the top three by *Maclean's* in 2013, with McGill University and Queen's University tied for third, behind the University of Toronto (#1) and York University's Osgoode Hall Law School (#2). *The 2013 Maclean's Canadian Law School Rankings*, MACLEAN'S, Sept. 19, 2013, <http://www.macleans.ca/education/uniandcollege/2013-law-school-rankings/>.

³¹ For purposes of Table 4, a law school was only considered to have produced a team attorney if it was the lawyer's degree-granting institution.

³² Specifically, former Harvard professor Paul C. Weiler is widely regarded as one of the first leading sports-law scholars. See John Trumbour, *The Crisis in Workplace Governance: Special Issue in Honor of Paul C. Weiler*, 28 COMP. LAB. L. & POL'Y J. 93, 93 (2007) (observing that "Paul C. Weiler of Harvard University has stood among the foremost scholars" in the field of "sports law," among others). Meanwhile, Harvard continues to offer students a variety of sports-law-related courses, clinics, and journal activities. See Sports Law Clinic, HARVARD LAW SCHOOL, <http://hls.harvard.edu/dept/clinical/clinics/sports-law-clinic/> (last accessed Aug. 2, 2017).

Southern California	5
Marquette	4
Vanderbilt	4
Washington University (St. Louis)	4
Brooklyn	3
Fordham	3
Temple	3
Chicago-Kent	3
Georgetown	3
Michigan	3
Tulane	3
UCLA	3
Cardozo-Yeshiva	2
Virginia	2
University of California (Berkeley)	2
Boston University	2
SUNY-Buffalo	2
California Western	2
Case Western Reserve	2
Duquesne	2
Florida	2
Houston	2
Indiana	2
Maryland	2
Miami	2
Minnesota	2
Northwestern	2
NYU	2
Ohio State	2
Rutgers	2
San Diego	2
Southern Methodist	2
Suffolk	2
University of Chicago	2
Villanova	2

As with Harvard, it is noteworthy that the overwhelming majority of schools having produced multiple sports team in-house

counsel are either located in, or within extremely close proximity to, a city hosting one or more teams in the four major North American sports leagues. This trend once again suggests that geographic proximity is likely to play a role in landing an in-house counsel position with a team.³³

Finally, it is interesting to note that based on the data presented above, the fact that a law school offers a specific sports-law-related concentration or program did not appear to have had a significant effect on the number of in-house counsel it produced. For example, in addition to the aforementioned Harvard, both Marquette University³⁴ and Tulane University³⁵ offer leading sports-law programs and rank in the upper-half of this list. On the other hand, other schools with notable sports-law emphases—such as Arizona State University³⁶ and the University of New Hampshire³⁷—were not among the schools that produced multiple team attorneys. That having been said, considering that the latter two programs were launched relatively recently, it is certainly possible that they will be better represented on this list in the future.

Tables 5 and 6 contain data regarding the prior legal employment of team in-house counsel. Specifically, as noted in Table 5, of the 128 attorneys for whom such information could be ascertained, just under 50 percent—63 out of 128—previously worked for one or more firms ranked among the top 100 in the U.S. by *Vault* before being hired by a professional sports team.³⁸

³³ Indeed, it stands to reason that graduates of law schools residing in major metropolitan areas are more likely to work for a law firm in the same city. Thus, even if the geographic proximity of the law school itself is not driving the higher sports-team placement rates for these schools, it may play a secondary role, helping students get the initial law firm jobs that eventually lead to sports-team employment.

³⁴ See Sports Law, MARQUETTE UNIVERSITY LAW SCHOOL, <https://law.marquette.edu/programs-degrees/sports-law> (last accessed Aug. 2, 2017).

³⁵ See Sports Law Program, TULANE UNIVERSITY LAW SCHOOL, http://www.law.tulane.edu/tlsAcademicPrograms/sportslaw_index.aspx (last accessed Aug. 2, 2017).

³⁶ See Sports Law and Business, SANDRA DAY O'CONNOR COLLEGE OF LAW, <https://law.asu.edu/degree-programs/sports-law-business> (last accessed Aug. 2, 2017).

³⁷ See Sports and Entertainment Law Institute, UNH LAW, <https://law.unh.edu/sports-entertainment-law-institute> (last accessed Aug. 2, 2017).

³⁸ See Vault Law 100, VAULT.COM, <http://www.vault.com/company-rankings/law/vault-law-100/?pg=10> (last accessed Feb. 6, 2017). The Vault law-firm rankings are “based on the assessments of lawyers at peer firms.” Adam Bonica et al.,

Meanwhile, roughly 18 percent of the team attorneys had previous experience working as in-house counsel at another business entity. Only roughly one-third of team lawyers had not previously worked at either a Vault 100 firm or in an in-house position.

Table 5. Prior Legal Employment for In-House Counsel

Pre-Sports-Team Legal Employment	Number of In-House Counsel	Percentage of In-House Counsel (n=128)
Vault 100 Law Firm	63	49.22%
In-House Counsel	23	17.97%
Neither of the Above	47	36.72%

There are several possible reasons why such a high percentage of sports-team attorneys worked for major, leading firms prior to entering the sports industry. For instance, because Vault 100 firms tend to be large, full-service law firms of the sort that teams regularly turn to for legal representation, it is possible that many team in-house counsel previously worked for their franchise as outside counsel before becoming a full-time employee of the team. Alternatively, even if a particular attorney did not previously represent his or her team while in private practice, many of these lawyers may have worked on the type of sophisticated corporate legal matters that a team in-house counsel would routinely be expected to handle. At the same time, however, this finding could once again simply be a sign that teams value prestigious credentials when making attorney hiring decisions.

In addition to the prior legal employment of team in-house counsel recounted above, in many cases these attorneys had also accrued prior work experience in the professional-team-sports industry prior to going to work full-time as a team attorney. Specifically, 41 of the counsel had previously worked for a

The Political Ideologies of American Lawyers, 8 J. LEGAL ANALYSIS 277, 310 (2016). While certainly not a perfect measure of law firm quality or prestige, they have nevertheless been “widely viewed and discussed by both the popular press and legal scholars.” *Id.*

professional sports team or league in some capacity—either legal or otherwise, full-time or internship—prior to joining their current franchises.³⁹ Moreover, several other team attorneys previously worked for other sports-related entities (such as serving as legal counsel at sports cable network ESPN, or working at a sports agency firm) prior to going in-house.

Table 6. Law Firms with Multiple In-House Counsel Alumni

Prior Legal Employment	Number of In-House Counsel
Proskauer Rose	11
Katten Muchin Rosenman	4
Kirkland & Ellis	3
Morgan, Lewis & Bockius	3
Latham & Watkins	3
Arnold & Porter	2
Baker Botts	2
Covington & Burling	2
Day Pitney	2
Holland & Knight	2
Hunton & Williams	2
King & Spalding	2
Reed Smith	2
Simpson Thatcher & Bartlett	2
Skadden, Arps, Slate, Meagher & Flom	2

Table 6 identifies the law firms that previously employed more than one attorney who currently works as a team in-house counsel.⁴⁰ Not surprisingly given the finding in Table 5 above, all

³⁹ This finding is relatively consistent with the prior study by Deubert, et al., which found that 41.6 percent of sports-team general counsels had prior legal-related work experience in the professional sports industry, along with another 15 percent who had prior non-legal-related, sports-related employment. Deubert, et al., *supra* note 5, at 261.

⁴⁰ In some cases, a team attorney may have worked for a firm that while no longer in existence today, was subsequently merged with, or acquired by, one of the firms listed above. In these cases, the attorney was considered an alumnus of the legacy firm listed above. Notably, in this respect, all three of the attorneys identified as having previously

15 firms listed in Table 6 are ranked among the top 100 in the United States by *Vault*.

Also, not surprising is the fact that the Proskauer Rose firm has produced, by far, the most attorneys who now work in-house for a professional sports team. Proskauer Rose has long been recognized as possessing the nation's leading sports-law practice, routinely representing sports teams and leagues in a variety of legal matters.⁴¹ Notably, both former NBA Commissioner David Stern, as well as current NHL Commissioner Gary Bettman, are included among the ranks of the firm's former attorneys.⁴² As a result, it is not surprising that the firm has produced nearly three times as many current team in-house counsel as the next highest-ranking firm.

Table 7. Practice Area Before Joining Sports Team

Area of Specialty	Number of In-House Counsel
Intellectual Property	5
General Litigation	4
Real Estate	2
Mergers and Acquisitions	1
Tax	1

Finally, although extremely limited, in a few cases a team in-house counsel's prior practice area could be ascertained. While the data available is much too limited to draw any significant conclusions, it is interesting to note that intellectual property law was the most common area of expertise among the 13-team in-house counsel for whom such data could be ascertained. While in many respects, it makes perfect sense that a team's in-house attorney would have some expertise in the intellectual-property

worked for Morgan, Lewis & Bockius really were employed by the firm Bingham McCutchen, which was acquired by Morgan Lewis in 2014.

⁴¹ See, e.g., Michael McCann, *Proskauer Rose is the Most Powerful Law Firm in Sports*, SPORTS ILLUSTRATED, March 7, 2013, <http://www.si.com/more-sports/2013/03/07/proskauer-rose> (stating that Proskauer Rose "firm has represented all of the major sports leagues" and that "[m]any Proskauer attorneys eventually work for leagues, teams or key companies in sports.").

⁴² See *id.* (reporting that Proskauer Rose "produced two commissioners (David Stern and Gary Bettman)").

realm—since a sizeable percentage of team revenues are generated from television and merchandising activities that are governed by copyright and trademark law—this finding nevertheless runs contrary to the conventional wisdom that some form of general business or transactional practice best positions an attorney to transition from a law-firm practice to an in-house position.⁴³

CONCLUSION

This article has provided new data regarding the backgrounds and demographics of the more than 180 attorneys currently employed in a legal capacity by the franchises in the four major North American sports leagues. Specifically, after first laying out the methodology of our study, the article then discussed the gender ratios, law-school alma maters, and prior legal experience of the in-house legal counsel employed by the 122 teams in the four major leagues.

Ultimately, this data confirmed the conventional wisdom that there is no single path for becoming the general legal counsel of a professional sports team.⁴⁴ Indeed, team attorneys attended law schools across all levels of the *U.S. News and World Report* hierarchy, and practiced law in a variety of different settings, before entering the sports industry. That having been said, the data presented above did reveal that law schools ranked among the top 25 in the country by *U.S. News and World Report* tend to produce a disproportionate share of the franchises' in-house counsel. Moreover, it also appears that having worked at a Vault 100 law firm—and the Proskauer Rose firm in particular—provides a potential leg up for attorneys who hope to eventually work for a professional sports team.

⁴³ See, e.g., James A. Merklinger, *Compliance Reigns Supreme As In-House Demographics Shift*, LAW360.COM, Aug. 8, 2014, <https://www.law360.com/articles/565307/compliance-reigns-supreme-as-in-house-demographics-shift> (finding that corporate compliance, contract, and generalist are the three most commonly sought after types of legal experience for in-house positions). See also Ben Rigby, *The Transporter*, 7 IN-HOUSE PERSPECTIVE 28, 28 (2011) (stating that “many in-house lawyers” perform a “role[] [that is] largely transactional” in nature).

⁴⁴ See, e.g., Roger I. Abrams, *How to Become a Sports Lawyer*, HUFFINGTON POST, May 24, 2014, http://www.huffingtonpost.com/roger-i-abrams/how-to-become-a-sports-la_b_5024038.html (recounting various paths to become a sports lawyer).

In any event, the data presented above provide a clearer picture of the background and experience of those working as in-house legal counsel for professional sports teams, giving future attorneys hoping to land one of these positions a better sense of what it may take to secure their dream job.

THE NCAA’S IAWP RULE: A “QUICK LOOK” AT AN UNREASONABLE RESTRAINT OF TRADE

*Drew Thornley**

INTRODUCTION

In April 2017, the National Collegiate Athletic Association (NCAA), via its Division I Council, enacted a number of changes to its bylaws, which are adopted by and binding upon the colleges and universities that are members of the NCAA. One of these rule changes is Bylaw 11.4.3, entitled *Individual Associated with a Prospective Student-Athlete—Football* (IAWP).¹ The rule, which is applicable to NCAA Division I Football Bowl Subdivision football programs (the highest NCAA level for football programs), and mirrors a rule that has been applied to Division I basketball programs since 2010, states, in part:

In football, during a two-year period before a prospective student-athlete’s anticipated enrollment and a two-year period after the prospective student-athlete’s actual enrollment, an institution shall not employ (or enter into a contract for future employment with) an individual associated with the prospective student-athlete in any athletics department noncoaching staff position or in a strength and conditioning staff position.²

In the words of the NCAA, the IAWP rule “prevents Football Bowl Subdivision schools from hiring people close to a prospective student-athlete for a two-year period before and after the student’s

* Assistant Professor of Legal Studies, Stephen F. Austin State University, Nacogdoches, Texas, B.A., The University of Alabama, J.D., Harvard Law School

¹See NCAA, 2017-18 Division I Manual – Operating Bylaws, Article 11.4, at 51, available at <https://www.ncaapublications.com/p-4511-2017-2018-ncaa-division-i-manual-august-version-available-august-2017.aspx>.

² *Id.* The same rule was adopted for NCAA Division I Women’s Basketball programs. See Proposal 2016-113, <https://web3.ncaa.org/lstdbi/search/proposalView?id=100336>.

anticipated and actual enrollment at the school.”³ The rule change was effective immediately and applicable retroactively to any contract signed on or after January 18, 2017.

This article examines the rule’s legality, in light of the Sherman Antitrust Act (Act),⁴ and argues the rule is an illegal restraint of trade, unreasonably harming prospective and current coaches, as well as student-athletes. Part I outlines the rule, Part II shares opposition to the rule, and Part III considers the antitrust implications of the rule, in light of the Act.

PART I: THE IAWP RULE

Before examining the antitrust implications of the IAWP rule, a look at the rule in its entirety is necessary. To existing NCAA Bylaw 11.4, *Employment of High School, Preparatory School or Two-Year College Coaches, or Other Individuals Associated With Prospective Student-Athletes*, the following language was adopted by the NCAA:

11.4.3 Individual Associated with a Prospective Student-Athlete—Football. In football, during a two-year period before a prospective student-athlete’s anticipated enrollment and a two-year period after the prospective student-athlete’s actual enrollment, an institution shall not employ (or enter into a contract for future employment with) an individual associated with the prospective student-athlete in any athletics department noncoaching staff position or in a strength and conditioning staff position.

11.4.3.1 Application. A violation of Bylaw 11.4.3 occurs if an individual associated with a prospective student-athlete (see Bylaw 13.02.19) is employed by the institution and, at the time of employment, a student-athlete who enrolled at the institution in the previous two years (and remains enrolled at the institution) was a prospective student-athlete by which the individual meets the definition of an individual associated with a prospective student-athlete. A violation of Bylaw 11.4.3 also occurs if an individual associated with a prospective student-

³ See Michelle Brutlag Hosick, *DI Council adopts new football recruiting model*, NCAA NEWS (April 14, 2017), <http://www.ncaa.org/about/resources/media-center/news/di-council-adopts-new-football-recruiting-model>.

⁴ See 15 U.S.C. §1 (2011).

athlete is employed and, within two years after such employment, a prospective student-athlete by which the individual meets the definition of an individual associated with a prospective student-athlete enrolls as a full-time student in a regular academic term at the institution. In either case, the student-athlete becomes ineligible for intercollegiate competition unless eligibility is restored by the Committee on Student-Athlete Reinstatement.

11.4.3.2 Exception—Reassignment. An institution may reassign an individual associated with a prospective student-athlete from a countable coaching staff position to a noncoaching staff position or strength and conditioning staff position, provided the individual has been a countable coach at the institution for at least the previous two academic years.⁵

The NCAA bylaws were also amended to define who qualifies as an individual associated with a prospect, for purposes of the rule. Bylaw 13.02.19 states,

13.02.19 Individual Associated with a Prospective Student-Athlete—Football. In football, an individual associated with a prospective student-athlete is any person who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student-athlete's athletic skills and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution. This definition includes, but is not limited to, parents, legal guardians, handlers, personal trainers and coaches. An individual who meets this definition retains such status during

⁵ NCAA, *supra* note 1, at 1. In addition to this rule, which applies to employment "in any athletics department noncoaching staff position or in a strength and conditioning staff position," similar rules were adopted regarding Employment in Athletically Related Institutional Activities (Bylaw 13.8.3.2, *Id.* at 128) and Employment as a Speaker in an Institutional Camp or Clinic (Bylaw 13.12.2.2.3, *Id.* at 141-2). This article does not directly analyze these rules, as the author sees no distinction between these two rules and the IAWP rule applicable to coaching. The article's antitrust analysis of the latter rule is applicable to the former (two) rules.

the enrollment of the prospective student-athlete at the institution.⁶

The NCAA provides additional information about IAWP status. In a document published April 11, 2017, the NCAA states:

Question No. 4: Is IAWP status determined based on a class of individuals (e.g., high school coach, nonscholastic coach)?

Answer: No. IAWP status is specific to the relationship that the individual has with the prospect.

Question No. 5: Is it possible to be considered an IAWP for multiple prospective student-athletes at any time?

Answer: Yes. IAWP status is prospective student-athlete specific. Thus, an individual may trigger IAWP status for multiple prospects simultaneously (e.g., junior college assistant coach or high school strength coach).⁷

The IAWP rule and the bylaws' broad definition of *Individual Associated with a Prospective Student-Athlete* essentially mean that anyone considered an IAWP cannot be hired, other than as an on-field coach, by the athletics department of the institution at which the prospect enrolls for a four-year period: two years before and two years after the prospect's enrollment at said institution; and if such a person is hired by an institution's athletics department during this four-year period, the student-athlete (formerly "the prospect") loses his eligibility.⁸ Moreover, if an institution hires a IAWP, the

⁶ *Id.* at 96.

⁷ Jen Condaras, *Summer Compliance Item- 7/19/12- 11.4.2, 13.8.3.2- IAWP- Men's Basketball Non-Coaching Staff Members*, DAILY COMPLIANCE ITEM BLOG (July 19, 2012), <https://dailycomplianceitem.wordpress.com/2012/07/19/summer-compliance-item-71912-11-4-2-13-8-3-2-iawp-mens-basketball-non-coaching-staff-members/>.

⁸ *Football Scoop's* Zach Barnett sums up the rule and its effects as follows:

In plain English: if a college program is to hire a high school coach it must immediately hire him to an on-field position, or it can not have recruited a player from that high school for two years prior to hiring the coach and must also refrain from recruiting players from said high school for another two years after his employment. That's an entire cycle of high school players a college program would have to bar itself from in order to hire a single coach. The intent is clear and admirable — to curb basketball-style package deals wherein commitments from highly-recruited players are contingent upon schools finding jobs for coaches or family members...But the unintended consequence of Bylaw 11.4.3 could essentially choke off one of the major pipelines for college coaching talent in the NCAA. Arizona State's Todd Graham, Auburn's Gus Malzahn, Ole Miss's Hugh Freeze,

prospective student-athlete associated with that IAWP cannot enroll at said institution for a period of two years from the date of the hire.

To be clear, under the rule, an institution is not prevented from hiring an IAWP to an on-field coaching position, but such hires are rare. Most people do not enter collegiate-football coaching as a head coach or as one of an institution's ten permitted on-field assistant coaches,⁹ but rather they enter in an off-field capacity, hoping to

SMU's Chad Morris, Tulsa's Philip Montgomery, UAB's Bill Clark and UNLV's Tony Sanchez famously launched head college coaching careers from high school football. All moved into directly into on-field roles, moves that would have been permissible under the new bylaw. But as staffs have grown, programs have moved to hiring high school coaches into off-field roles, where they then move on the field at that program or elsewhere. For instance, Malzahn hired Chip Lindsey from Spain Park (Ala.) High School to become an offensive analyst at Auburn during the Tigers' eventual SEC championship of 2013; Lindsey is now Auburn's offensive coordinator. Nick Saban plucked Jeremy Pruitt from his defensive coordinator job at Hoover (Ala.) High School to become the director of player development on his original Alabama staff in 2007; Pruitt is now Saban's defensive coordinator. Neither Lindsey or Pruitt would have been hired had Bylaw 11.4.3 gone into effect a decade earlier...In the NCAA's attempt to prevent adults from attaching themselves like leeches to their best players' recruiting processes, it has essentially banned coaches from talent-producing high schools from ever working in college football. If these rules are approved as written, coaches at powerhouse high schools could kiss any college coaching dreams goodbye." Barnett continues, "I have been told over and over again that the best way to start is make good relations with local colleges and to work their camps," a high school coach told FootballScoop. "This is terrible. Local schools will want to recruit and take local kids so now on there is no way I have any chance. More importantly, it's not like I would ever want to ruin any chance of an opportunity for one my kids. So it seems like there really becomes very little chance if any of advancing without potentially screwing over a kid, which I refuse to do. This legislation seems to be a lose-lose that will screw over high school kids and high school coaches." Saban [Nick Saban, head coach at The University of Alabama] agrees. "We had a high school coach here the other day, I'm not going to mention any names, and his son's a prospect and he used to be a college coach," Saban told TideSports. "So now he can never go work at a college, can never work a camp, we can't come speak at clinics. We just had over a thousand coaches here at a clinic and had a great camp, which is the way that I feel we serve the high school coaches and have a chance to give back to them for all that they do in terms of the hard work that they do in developing players, helping us be able to evaluate players, giving us information about their players. Guess we can't do anything. I really, I don't get it, and I don't understand it.

Zach Barnett, *This NCAA proposal could have a disastrous effect on high school coaches looking to move up*, Football Scoop (April 11, 2017), <http://footballscoop.com/news/ncaa-proposal-disastrous-effect-high-school-coaches-looking-move/>.

⁹ Beginning January 9, 2018, the number of allowed on-field coaching positions increased from nine to ten. See NCAA, Division I Proposal 2016-116-1, <https://web3.ncaa.org/lstdbi/search/proposalView?id=100464>.

work their way to an on-field position.¹⁰ Thus, except in the rare case of hiring someone directly to an on-field position, the IAWP rule creates a significant barrier to employment at certain schools for many coaches. As noted above, Part III of this article examines what is, in the author's view, the unreasonableness of such a barrier to employment.

PART II: OPPOSITION TO THE RULE

Thus far, opposition to the IAWP rule has come chiefly from coaches and sports writers, who allege the rule stands in the way of upward mobility in coaching employment. Despite some coaches' concerns/objections, the rule passed as part of a package of new NCAA bylaws.¹¹ One of the bylaws in this package increased by one the number of on-field assistant coaches each NCAA FBS program is permitted, perhaps a necessary concession to coaches in order to pass the IAWP rule.

Just before the rule was adopted, Gus Malzahn, head football coach at Auburn University, said, "This rule will in essence be a death sentence to any high school coach wanting to coach college (football)...It's putting an end to it, and it's not fair."¹² University of Arkansas head coach Chad Morris stated, "I see why they're (considering) it, because staff sizes are blowing up...But I've got coaches on my staff that would not have the opportunity to get into college coaching if this rule was in play. It limits them. They're

¹⁰ "The new rule would keep many high school coaches getting jobs at most of the college programs where they have relationships and connections. High school coaches could only take non-coaching jobs at programs far away that don't recruit their high school. They could still be hired as full-time assistants, but it's much harder to make that jump. Programs more often ease those coaches into the college ranks as recruiting coordinators or in other similar roles." See Matt Jennings, *Proposed NCAA rule change would close recruiting loophole of hiring HS coaches to non-coaching roles*, SEC COUNTRY (April 11, 2017), <https://www.seccountry.com/sec/ncaa-rule-change-close-recruiting-loophole>.

¹¹ See Report of the NCAA Division I Council and Council Standing Committees, April 12-14, 2017, Meeting, http://www.ncaa.org/sites/default/files/April2017DICouncil_Report_20170425.pdf

¹² George Schroeder, *Rule proposal restricting hires of high school coaches creates division*, USA TODAY (April 11, 2017), <https://www.usatoday.com/story/sports/ncaaf/2017/04/11/college-football-proposed-rules-changes-hiring-high-school-coaches/100348806/>.

being punished because of it.”¹³ Both Malzahn and Morris were high-school coaches hired directly to on-field coaching positions, which, as noted above, is not forbidden by the IAWP rule but also not the normal path to collegiate football coaching.¹⁴ “The goal is they learn college football for a year or two and then they get a job (as an on-field assistant),” says Malzahn.¹⁵ According to Eliah Drinkwitz, offensive coordinator at North Carolina State University, “The problem is it’s hard to hire a guy right into an on-field role without any prior (college coaching) experience...You’re grooming them for this (on-field) position. It’s a great way to train up a staff.”¹⁶ Drinkwitz is one of the nine high-school coaches Malzahn has hired during his time as a collegiate head coach. Says Malzahn, “Not one time did I recruit any of their players...I’m trying to put good high school coaches and people into college football. We’re not hiring them to get players here. If that rule passes, it’s gonna hurt. Every one of those (nine coaches), I wouldn’t have been able to hire.”¹⁷ According to Morris, “to limit an opportunity, I just think that’s wrong.”¹⁸

Football Scoop’s Zach Barnett writes,

The intent is clear and admirable — to curb basketball-style package deals wherein commitments from highly-recruited players are contingent upon schools finding jobs for coaches or family members...But the unintended consequence of Bylaw 11.4.3 could essentially choke off one of the major pipelines for college coaching talent in the NCAA. Arizona State’s Todd Graham, Auburn’s Gus Malzahn, Ole Miss’s Hugh Freeze, SMU’s Chad Morris, Tulsa’s Philip Montgomery, UAB’s Bill

¹³ *Id.* At the time of his quotation, Chad Morris was the head football coach at Southern Methodist University.

¹⁴ *Id.* “The IAWP rule proposal does not prohibit hiring high school coaches for an on-field assistant coaching position...or limit recruiting from the coach’s former high school in that instance. But such direct moves aren’t the norm. More often, the path is more like that of Alabama defensive coordinator Jeremy Pruitt, who was an assistant at Hoover (Ala.) High School when he was hired as Alabama’s director of player development, then later moved into on-field roles. Or of Drinkwitz, who was offensive coordinator at Springdale (Ark.) High when he was hired at Auburn, then moved with Malzahn to Arkansas State as an on-field assistant, and from there to Boise State and now North Carolina State.”

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Clark and UNLV's Tony Sanchez famously launched head college coaching careers from high school football. All moved into directly into on-field roles, moves that would have been permissible under the new bylaw. But as staffs have grown, programs have moved to hiring high school coaches into off-field roles, where they then move on the field at that program or elsewhere. For instance, Malzahn hired Chip Lindsey from Spain Park (Ala.) High School to become an offensive analyst at Auburn during the Tigers' eventual SEC championship of 2013; Lindsey is now Auburn's offensive coordinator. Nick Saban plucked Jeremy Pruitt from his defensive coordinator job at Hoover (Ala.) High School to become the director of player development on his original Alabama staff in 2007; Pruitt is now Saban's defensive coordinator. Neither Lindsey or Pruitt would have been hired had Bylaw 11.4.3 gone into effect a decade earlier...In the NCAA's attempt to prevent adults from attaching themselves like leeches to their best players' recruiting processes, it has essentially banned coaches from talent-producing high schools from ever working in college football. If these rules are approved as written, coaches at powerhouse high schools could kiss any college coaching dreams goodbye.¹⁹

As Barnett states, in most cases, the types of employment affected by the IAWP rule are the ones that give high-school coaches

¹⁹ *Supra* note 8. Coaches are also frustrated with the IAWP rule for camps. Barnett continues, "I have been told over and over again that the best way to start is make good relations with local colleges and to work their camps," a high school coach told FootballScoop. "This is terrible. Local schools will want to recruit and take local kids so now on there is no way I have any chance. More importantly, it's not like I would ever want to ruin any chance of an opportunity for one my kids. So it seems like there really becomes very little chance if any of advancing without potentially screwing over a kid, which I refuse to do. This legislation seems to be a lose-lose that will screw over high school kids and high school coaches." Saban [Nick Saban, head coach at The University of Alabama] agrees. "We had a high school coach here the other day, I'm not going to mention any names, and his son's a prospect and he used to be a college coach," Saban told TideSports. "So now he can never go work at a college, can never work a camp, we can't come speak at clinics. We just had over a thousand coaches here at a clinic and had a great camp, which is the way that I feel we serve the high school coaches and have a chance to give back to them for all that they do in terms of the hard work that they do in developing players, helping us be able to evaluate players, giving us information about their players. Guess we can't do anything. I really, I don't get it, and I don't understand it." *Id.*

and others a foot in the door to college coaching. According to Richard Johnson,

...the problem is some of these non-coaching positions aren't shams. There are analyst jobs, quality control posts, and grad assistant roles that are on-ramps to the college coaching profession but will no longer be available to some people. Some high school coaches aren't qualified enough yet to be on the field at the college level, and now the NCAA has cut off a simple way for them to work their way into one of those positions.²⁰

If one views jobs impacted by the IAWP rule as either "illegitimate" or "legitimate," then the IAWP rule's *intent* is to bar the creation of illegitimate jobs, but its *effect* is the barring of illegitimate and legitimate jobs. The rule makes no distinction between the two. So, the rule is particularly damaging to coaches who might be offered the "legitimate" positions foreclosed by the rule, those coaches whose job offers are based on their merit and not on their connections to prospects.

Coaches such as Todd Berry, former head football coach at University of Louisiana-Monroe and current the executive director of the American Football Coaches Association, have acknowledged such potential harm to coaches. Regarding the (at the time, potential) IAWP rules applicable to coaching staffs and camps, *USA Today* reports, "Taken together, Berry said he recognized the proposals would do 'collateral damage' to the career aspirations of high school coaches but suggested the rules were necessary to quell the potential for abuse in hiring people to try to lure recruits."²¹ Not surprisingly, given the rule's adverse impact on the career aspirations of those who wish to break into the ranks of collegiate coaching, some high school coaches have voiced displeasure with the rule, as well.²²

²⁰ Richard Johnson, *How a new NCAA rule hurt high school coaches and players*, SBNATION (April 15, 2017) <http://www.sbnation.com/college-football-recruiting/2017/4/12/15267040/ncaa-rule-high-school-coach-recruit-camp-hire>.

²¹ *Supra* note 12.

²² Chris Clark writes, "South Carolina head coach Will Muschamp has made his thoughts known on the subject recently, saying that he was 'totally against' the rule prohibiting high school coaches from being hired to off-field positions. 'My brother's a high school coach in Atlanta. He'd love to have an opportunity to coach in college,'

III. ANTITRUST ANALYSIS

Enacted in 1890, the Sherman Antitrust Act is the first antitrust law passed by the U.S. Congress, per its authority to regulate interstate commerce.²³ Stated simply, the purpose of the

Muschamp said on Sports Talk with Bo Mattingly out of Arkansas. To wit, several high school coaches contacted by GamecockCentral.com believed it's detrimental to advancing their careers, and could also hurt prospects' chances of being recruited in certain situations. 'It's the worst rule I've ever seen in my life,' Charlotte (North Carolina) Harding head coach Sam Greiner said. 'They (the NCAA) had no interaction with the high school coaches. All it hurts is the high school coaches. It punishes us.' In effect, programs which have an eye toward adding a high school coach to a support staff role would be discouraged from doing so if that program wishes to recruit players from a talent-rich high school. There are numerous examples of current college coaches climbing the ladder from analyst or off-field positions to their current statures, an opportunity that high school coaches now fear is in danger. The new rule mandates that high school coaches with recruited prospects would need to jump straight to a 10th assistant role instead of working their way up the rungs. Current college coordinators Chip Lindsey (Auburn) and Jeremy Pruitt (Alabama) began their college careers as analysts, hired straight from the high school ranks. Clemson hired successful Palmetto State coach Kyle Richardson out of Northwestern in 2016, signing defensive end/linebacker Logan Rudolph in the 2017 class. USC running backs coach Bobby Bentley served as an analyst at Auburn from 2014-15, hired from Byrnes in the Upstate. Had this rule been in place at that time, Auburn would not have been able to recruit Byrnes for a time after—or would not have been able to hire Bentley at all had it recruited Byrnes in the past two years. 'The part of this rule that stinks is that if they (college programs) like him and want him as a coach because they believe he will help their program, then he is not able to get a great opportunity for him and his family and further his career,' said Memphis (Tenn.) White Station's Joe Rocconi. Said South Pointe (S.C.)'s Strait Herron, who has captured multiple state championships and had several Division I signees at his program: 'There are guys out here that are trying to better themselves every day. This policy hurts their chances to excel.' Said Spring Valley (S.C.)'s Robin Bacon: "When you do a blanket statement like that, you're punishing a lot of high school coaches who have earned it. For a lot of us, the goal is to coach college football. The biggest thing I would ask for the NCAA is to look at each case individually.' Greiner, who projects to have a pair of Division I signees at least in the next two recruiting cycles, believes that not every coach has aspirations of moving to the next level. But those who wish to do so should have that chance to begin ascending the ranks, even with prospects at their school. 'Most are satisfied,' he said. 'They get paid enough where they are, like what they're doing, family is growing up in the area. You're talking about slim pickings with people that want to make a jump to college. You're saying your career stops there, segregating high school coaches.' Chris Clark, High school coaches rail against new NCAA rule, GamecockCentral.com, (May 8, 2017), <https://southcarolina.rivals.com/news/high-school-coaches-rail-against-new-ncaa-rule>

²³ See 15 U.S.C. §§1-7, *supra* note 2. Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." See U.S. Constitution, Article I, Section 8, Clause 3.

Act is to protect economic competition.²⁴ To that end, Section 1 of the Act states,

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.²⁵

As many courts and scholars have noted, since every contract conceivably restrains/limits trade or commerce in some way and since the text of Section 1 states that “every” contractual restraint of trade or commerce is illegal, strict application of the Act invalidates every commercial contract.²⁶ Surely this was not Congress’s intent, so courts began to apply to the Act the common law doctrine of restraint of trade, separating, as a matter of public policy, reasonable restraints of trade (legal) from unreasonable restraints of trade (illegal).²⁷ In other words, what is illegal is not *restraint of trade* but, rather, *unreasonable restraint of trade*.

²⁴ See *Banks v. National Collegiate Athletic Association*, 977 F.2d 1081 (7th Cir., 1992), (“The purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition,” *Id.* at 1087); see also *Agnew v. National Collegiate Athletic Association*, 683 F.3d 328, (7th Cir., 2012), (“...the Sherman Act is meant to protect the benefits of competition,” *Id.* at 335; “The entire point of the Sherman Act is to protect competition in the commercial arena” citing *Banks* at 1087).

²⁵ *Supra* note 4.

²⁶ See *Law v. National Collegiate Athletic Association*, 134 F.3d 1010, 1016 (1998), (“...nearly every contract that binds the parties to an agreed course of conduct ‘is a restraint of trade’ of some sort,” quoting *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984)); see also Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 Case W. Res. L. Rev. 61 (2013) (“Read literally, section 1 of the Sherman Act would seem to prohibit all commercial contracts.”).

²⁷ See *U.S. v. Brown University*, 5 F.3d 658, 668 (3rd Cir. 1993) (“Because even beneficial business contracts or combinations restrain trade to some degree, section one has been interpreted to prohibit only those contracts or combinations that are ‘unreasonably restrictive of competitive conditions.’” quoting *Standard Oil Co. v. U.S.*, 221 U.S. 1, 58, 31 S. Ct. 502, 515, 55 L. Ed. 619 (1911).)

Before examining the elements of a Section 1 claim, it should be noted that NCAA rules are not exempt from the requirements of the Act. In *Agnew v. NCAA*, a case involving a challenge to two other NCAA rules, the Seventh Circuit said that “*Board of Regents*, the seminal case on the interaction between the NCAA and the Sherman Act, implies that all regulations passed by the NCAA are subject to the Sherman Act.”²⁸ In *Board of Regents*, the Supreme Court stated,

It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.²⁹

The *Agnew* court stated, “This presumes the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply.”³⁰ The *Agnew* court then stated directly that “the Sherman Act applies to the NCAA bylaws generally.”³¹

²⁸ *Agnew* at 339 (7th. Cir. 2012).

²⁹ *Bd. of Regents* at 117.

³⁰ *Agnew* at 339.

³¹ *Id.* at 340. The court continued: “As indicated above, the Sherman Act applies to commercial transactions, and the modern definition of commerce [*28] includes ‘almost every activity from which [an] actor anticipates economic gain.’ Areeda & Hovenkamp, *Antitrust Law*, ¶1260b, at 250 (2000). No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.⁵ Indeed, this is likely one reason that some schools [*341] are willing to pay their football coaches up to \$5 million a year rather than invest that money into educational resources. See Kristin DeRamus et al., *College Football Coach Salary Database*, 2006-2011, (Nov. 17, 2011 11:02 AM), USA Today, <http://usatoday.com/sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1> (putting top salary for a college head football coach at

To determine whether a given restraint of trade is unreasonable and, thus, a violation of Section 1 of the Act, a plaintiff must prove (1) the defendant participated in an agreement (2) that unreasonably restrained trade in a relevant market, (3) thereby injuring interstate commerce.³² In addition, a plaintiff must have standing, by showing an injury resulting from the unreasonable restraint on trade.

Element #1

Regarding the IAWP rule, the first element (*defendant participated in an agreement*) is easily met. Clearly, an express agreement exists, in the form of NCAA bylaws, adopted by all members. In *Agnew v. NCAA*, the Seventh Circuit stated, “There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first showing of an agreement or contract is

roughly \$5.2 million). That is not to suggest that all universities with a football program are solely [**29] driven by economic benefit; the profits derived from athletics can aid a university in many positive ways that fall in line with the mission of the university as a whole. But that does not prevent many universities, through their football teams, from entering the recruiting market, setting their recruiting budget, and making recruiting decisions with economic interests in mind. Similarly, student-athletes contemplating scholarship offers likely include economic factors in their decision-making process, such as the value of a given degree or the increased potential for entry into professional football. It follows that the NCAA’s bylaws can have an anticompetitive or a procompetitive effect on collegiate athletics generally and the national college football recruiting market specifically, and those effects can have an economic component. Thus, HN12the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act. See *White v. NCAA*, CV 06-999-RGK (C.D. Cal. Sept. 20, 2006) (holding that under the Sherman Act, “Major College Football” is a relevant market in which “colleges and [**30] universities compete to attract prospective student-athletes”).” *Id.* at 340-41.

³² See *Agnew* at 335 (“Accordingly, a plaintiff must prove three elements to succeed under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury.” (quoting *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir.1993)).); see also *Lee v. The Life Insurance Company of North America*, 829 F. Supp. 529, 535 (D.R.I. 1993), (Thus, to state a valid claim under § 1 of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under the *per se* or rule of reason analysis; and (3) that the restraint affected interstate commerce. See *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1410 (9th Cir.), *cert. denied*, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991). See also ABA Antitrust Section, *Antitrust Law Developments* 2 (3d ed. 1992)).

therefore not at issue in this case.”³³ The same is true regarding the IAWP rule: NCAA members adopted the new rule, so an agreement exists.

Element #2

Federal courts have developed several methods to analyze the second element of a Section 1 claim (*the agreement unreasonably restrained trade in the relevant market*), the main two of which are the “Per Se Rule” and the “Rule of Reason”. A third method, referred to as “Quick-Look, is an abbreviated (i.e. truncated) form of the Rule of Reason. In *Agnew*, the court noted that these methods “often blend together,” stating, “All of these methods of analysis are meant to answer the same question: ‘whether or not the challenged restraint enhances competition.’”³⁴

A court applies the Per Se Rule only in the exceptional case that a restraint is blatantly anti-competitive, without sufficient pro-competitive value. Such naked restraints are deemed unlawful, “without any inquiry into the market context in which the restraint operates.”³⁵ The Supreme Court has held that “Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to [468 U.S. 85, 104] render unjustified further examination of the challenged conduct.”³⁶ In *Law v. NCAA*, the Tenth Circuit stated, “The per se rule condemns practices that ‘are entirely void of redeeming competitive rationales’...Once a practice is identified as illegal *per se*, a court need not examine the practice’s impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of antitrust law.”³⁷

However, even behaviors typically considered anticompetitive *per se* are not necessarily so, in the case of NCAA bylaws. In *NCAA v. Board of Regents*, the Supreme Court essentially took the *per se* rule off the table, with regard to NCAA bylaws, holding,

³³ *Agnew* at 335.

³⁴ *Id.*

³⁵ *Agnew* at 336 (citing Bd. of Regents. at 100).

³⁶ *Bd. of Regents* at 103-04.

³⁷ *Law* at 1016 (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)).

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an “illegal per se” approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 -20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, 21 on the fact that the NCAA is organized as a nonprofit entity, 22 or on [468 U.S. 85, 101] our respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics. 23 Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.³⁸

The Court continued,

Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. 61 It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.³⁹

Unlike the Per Se Rule, the Rule of Reason test balances the pro- and anti-competitive effects of a challenged agreement. The *Agnew* court explains the Rule of Reason test as follows:

The standard framework for analyzing an action’s anticompetitive effects on a market is the Rule of Reason. *Cf. Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992). Under a Rule of Reason analysis,

³⁸ *Bd. of Regents* at 100-01.

³⁹ *Id.* at 117.

the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area. *See Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006). As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987). If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective. *Areeda, Antitrust Law*, ¶1507b, at 397 (1986).⁴⁰

Finally, and as noted above, the “quick-look” test is an abbreviated version of the Rule of Reason. Along the continuum of the three tests, the “quick-look” test sits between the other two, requiring more analysis than the Per Se Rule but less than the Rule of Reason. In *Agnew*, the Seventh Circuit describes the “quick-look” test as follows:

The third framework is the “quick-look” analysis, which is used where the per se framework is inappropriate, but where “no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement,” and proof of market power is not required. *Bd. of Regents*, 468 U.S. at 109, 104 S.Ct. 2948 (quoting *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)). Put another way, the quick-look approach can be used when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,” *Cal. Dental*, 526 U.S. at 770, 119 S.Ct. 1604, but there are nonetheless reasons to examine potential procompetitive justifications. See Herbert Hovenkamp, *Antitrust Law*, ¶ 1911c, at 273 (1998). Among other situations, the quick-look approach is used when a restraint would normally be considered illegal per se, but “a certain degree of cooperation is necessary if the [product at issue] is to be

⁴⁰ *Agnew* at 335-36.

preserved.” Bd. of Regents, 468 U.S. at 117, 104 S.Ct. 2948; see also Hovenkamp, *Antitrust Law*, ¶ 1911c, at 274 (1998). Under this approach, if no legitimate justifications for facially anticompetitive behavior (such as price-fixing) are found, no market power analysis is necessary and the court “condemns the practice without ado.” Chicago Prof'l Sports, 961 F.2d at 674. But if justifications are found, a full Rule of Reason analysis may need to take place. Cf. Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir.1996).⁴¹

Although I believe the IAWP rule to be anticompetitive *per se*, the Per Se Rule is not a promising method for analyzing the IAWP rule, in light of the Supreme Court's holding in *Board of Regents*; and though the standard Rule of Reason test is the test a court likely would employ in a case challenging the IAWP rule, my view is the “quick-look” test is the test that should be applied to a challenge to the IAWP rule, as it is more appropriate than the Rule of Reason test and more promising than the Per Se Rule .

In *Law*, the Tenth Circuit held that “where a practice has obvious anticompetitive effects...the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a ‘quick look’ rule of reason.”⁴² As the *Agnew* court noted, the Supreme Court held in *California Dental Association v. FTC*⁴³ that the “quick-look” test is appropriate when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”⁴⁴ The Court went on to state that “quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.”⁴⁵ It is my contention that this is precisely the situation created by the IAWP rule and that applying the *quick-look test* to the rule yields a finding that the rule unreasonably restrains trade in the interstate commercial market for collegiate coaches.

⁴¹ *Agnew* at 336.

⁴² *Law* at 1020.

⁴³ 526 U.S. 756 (1999).

⁴⁴ *Id.* at 770.

⁴⁵ *Id.*

The IAWP rule “has obvious anticompetitive effects.”⁴⁶ It makes certain jobs off-limits to certain people and not for any reason(s) related to one’s qualifications or work eligibility. A person is ineligible for a particular job solely due to his/her connection to a prospective student-athlete. Likewise, the rule impedes the ability of a student-athlete to accept a scholarship at a certain university, due to his relationship to another person. Thus, the rule operates to block the gainful employment of certain individuals, thereby burdening the free, competitive market for coaching positions; and it blocks the acceptance of a scholarship to a certain university, potentially harming a prospect’s academic and/or athletic development, in preparation for future employment. Market participants are harmed. Markets are harmed.

Even one with a “rudimentary understanding of economics” can see that a rule that bars certain individuals’ job candidacies, for a reason unrelated to their suitability for certain positions, is completely at odds with a free, competitive market. Such candidates are not allowed to compete for certain jobs; what should be their freedom to accept a particular job is foreclosed. Additionally, if some institutions are effectively not options for particular job candidates, then those institutions are not able to compete freely for those candidates. For both institutions and potential employees, the field of options for the other is limited by the rule. Similarly, what should be a prospect’s complete freedom to accept a scholarship offer from any given school that offers one to him is blocked. Likewise, and as is the case regarding potential employees, institutions are limited in their abilities to compete freely for prospective student-athletes. Clearly, such effects of the IAWP rule are anticompetitive, as one with even a basic understanding of markets can see. The only question that remains under the “quick-look test, therefore, is “whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects.”⁴⁷ They do not.

Before addressing possible pro-competitive justifications the NCAA might advance in support of the IAWP rule, I turn to a pro-competitive justification the NCAA might put forth regarding NCAA bylaws, generally: NCAA bylaws are presumptively pro-

⁴⁶ *Supra* note 38.

⁴⁷ *Law* at 1020.

competitive, since they are necessary for intercollegiate athletics to exist in its present form. Quoting from and citing to *Board of Regents*,⁴⁸ the *Agnew* court stated,

A certain amount of collusion in college football is permitted because it is necessary for the product to exist. Accordingly, when an NCAA bylaw is clearly meant to help maintain the “revered tradition of amateurism in college sports” or the “preservation of the student-athlete in higher education,” the bylaw will be presumed procompetitive, since we must give the NCAA “ample latitude to play that role.” *Id.* at 120, 104 S.Ct. 2948. But if a regulation is not, on its face, helping to “preserve a tradition that might otherwise die,” either a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness. See *id.*⁴⁹

The IAWP rule does not help to maintain the “revered tradition of amateurism in college sports” or the “preservation of the student-athlete in higher education,” and in no way does the rule help to “preserve a tradition that might otherwise die,” so I do not believe the rule should be presumed pro-competitive.⁵⁰ Without the IAWP rule, intercollegiate football would continue to exist and would deteriorate to no degree.

Presumably, transparency in recruiting is a rule-specific argument the NCAA would advance, should the IAWP rule be challenged in court, as the NCAA has written that the IAWP rule “promotes transparency in recruiting by establishing a line between hiring legitimate candidates for employment and providing a recruiting inducement through the hiring of individuals whose primary value to an institution is in their ties to specific prospective student-athletes.”⁵¹ Thus, the NCAA’s impetus for the rule was to separate what is, in its view, an institution’s justifiable hiring of an individual from a hiring that is primarily motivated to induce a prospective student-athlete to enroll at said institution. Obviously, though not stated, the NCAA believes a hiring of the latter variety is illegitimate. However, this potential justification for the rule – its

⁴⁸ *Bd. of Regents* at 113.

⁴⁹ *Agnew* at 342-43.

⁵⁰ *See id.*

⁵¹ *Supra* note 1.

dividing of legitimate hires from illegitimate hires, to promote transparency – is inadequate.

The NCAA's statement takes as a given that a candidate is either "legitimate" or is one whose main value to the potential employer is his/her ties to one or more prospective student-athletes. Chiefly, I see two problems with this line of thinking.

Firstly, a potential candidate can be associated with a prospect yet still offer the potential employer value independent of said association. Being qualified for a job and being connected to a prospect are not always mutually exclusive. What if the most qualified candidate for a potential position at a university is connected to a prospect who wishes to enroll at that university? In such case, other than hiring the candidate to one of the school's limited number of on-field assistant coaching positions, the institution would be forced to choose between hiring the candidate or enrolling the prospect. In that case, opting for the latter would mean that the university could not hire the most qualified candidate.

Secondly, even if a potential hire's chief value is his/her connection to a prospect, such a candidate shouldn't automatically be categorized as illegitimate. Why can't the hiring of such an individual be legitimate? Legitimacy is subjective. Even if the NCAA considers a particular hiring illegitimate, can't the hiring institution consider it legitimate? For argument's sake, imagine a certain IAWP is the person closest to, and the person with the most positive impact on, said prospect. Imagine the university feels hiring the IAWP is the best way to ensure that the IAWP stays close to said prospect, thus giving the prospect the best odds to succeed at the university. Could not such a hire be considered legitimate? What if the prospect is the university's most sought-after recruit, the player with the most potential? Couldn't that make the hire even more important to the school? Surely, there is value in that.

But even if a particular IAWP offers no value to a university – even if the only reason the IAWP is hired is to induce a prospect to enroll – there is nothing inherently illegitimate about this. A university should have the unfettered freedom to weigh the pros and cons of potential candidates and hire whomever it chooses (within the bounds of applicable federal and state labor and employment laws), regardless of how the NCAA views the hire.

Moreover, even if the rule promotes transparency by making clearer which people are closely associated with prospective student-athletes, such transparency does not promote competition. Shining a light on which people are shut out of a market does not make that market more competitive. Again, if anything, by limiting the number of market participants, the rule makes the market less competitive. If markets are harmed by not knowing the primary value of athletics department hires, then markets are harmed not knowing the content of every conversation between an institution and a prospect and by not knowing every factor that played into a prospect's enrollment decision. Whatever is said in such conversations and whatever factors matter to prospects, where and when a prospect enrolls at an institution are public knowledge. The outcome is transparent, and competition is not threatened by not knowing everything that led to that outcome.

The NCAA might also offer as a procompetitive justification the argument that the IAWP rule fosters competition by keeping big-budget institutions from spending money to hire IAWPs and, thus, gaining advantages over institutions that lack the financial ability to make the same hires. "The intent here is simple: to prevent bigger schools from creating sham jobs that high school coaches can fill and then the college gain an advantage in recruiting," writes *SB Nation's* Richard Johnson.⁵² Like the NCAA's case for promoting transparency, its claim that the IAWP rule fosters competition is unconvincing.

Within the bounds of NCAA rules, there are myriad ways schools gain advantages over schools with smaller budgets. One need look no further than the incredible disparities in, for example, size and quality of athletic facilities and size of athletic-support staff (e.g. non-coaching analysts, academic-support staff, and athletic trainers), to see that there exists nothing close to a level playing field, when it comes to the resources available to university athletics departments.⁵³ The very goal of recruiting is to make your school more attractive to recruits than all others. If one school has

⁵² *Supra* note 16.

⁵³ See Will Hobson and Steven Rich, *The latest extravagances in the college sports arms race? Laser tag and mini golf.*, THE WASHINGTON POST, (December 21, 2015), https://www.washingtonpost.com/sports/colleges/for-college-athletic-departments-building-the-best-is-never-ending-task/2015/12/21/e8384dd4-a558-11e5-9c4e-be37f66848bb_story.html?utm_term=.cc87021df1fe.

the money to add an indoor water park to its athletics facilities, while another does not, building the water park does not hurt competition. On the contrary, it means the school does something to compete better. Should the NCAA ban water parks or juice bars or fancy player lounges? Spending money to hire an IAWP is no less a legitimate use of a school's money than is the building of a water park. If anything, the former hurts other schools less than the latter, for a water park is likely to induce a far greater number of prospects to enroll than is the hiring of an IAWP.⁵⁴

Typically, the schools that can afford high-end amenities and other perks are the ones that have been successful on the playing field. Winning typically results in increases in football-related

⁵⁴ See Alicia Jessop, *The Surprising Factors Driving College Football Recruits' College Decision*, Forbes, (December 14, 2012), <https://www.forbes.com/sites/aliciajessop/2012/12/14/the-surprising-factors-driving-college-football-recruits-decision/#23cf3407411a> ("College football recruiting has become a big business, with the likes of ESPN nationally televising the campus selections of young men. Top-tier football programs invest hundreds of thousands of dollars annually to lure the highest-rated recruits to their programs. What factors attract football recruits to the colleges and programs they ultimately choose? A recent survey conducted by Galain of 179 college football players sought to identify the factors most important to college football recruits in making their college decision. Of the fifteen choices participants had to select from, the participants ranked a school's academic reputation as the most important factor to their decision. The least important factor was their friends' opinions about a school or program. Most interesting about the study's findings, however, is the important role that a campus' facilities play to a recruit's decision. A recruit's opinion of a team's playing facilities ranked as the fourth most important factor, while campus living facilities and team facilities ranked sixth and eighth, respectively. Major football programs and their associated athletic departments nationwide are arguably picking up on this trend. At least 24 BCS football programs are currently engaged in or recently completed construction projects aimed at benefiting their football programs. The low-end of these projects include locker room upgrades, like those taking place at Syracuse to the tune of \$5 million. The high-end of the spectrum sees projects like Arizona's \$378 million expansion to its north end zone stadium area...As athletic departments nationwide continue to commit themselves to building costly athletic facilities...Recruits will continue to be attracted to programs with the greatest facilities..."). See also Hobson and Rich, *supra* note 49 ("In a recent phone interview, Clemson deputy athletic director Graham Neff defended the miniature golf, laser tag and bowling lanes as relatively inexpensive additions that offer a recruiting edge. 'Our football program is the engine to our athletic train. The ability of that program to be successful, be able to recruit, is important for the whole department, and I'd argue, for the whole university,' Neff said. 'For that incremental cost of pouring concrete [for mini golf holes], we feel there's going to be a big ROI [return on investment] for it being new and unique to Clemson.'").

revenue and more money from donors. Spending money in such a fashion is one way the school can try to recruit players that will help them succeed in the future. Having the financial means to make your institution more attractive to recruits only spurs schools to be more successful on the field to be stronger competitors. More wins lead to more money. More money can lead to more wins. The rich get richer, so to speak. The only way a level playing field would, at least on the surface, exist, is if each university had the same budget and could spend nothing in excess of it. This is not the present reality in NCAA Division 1 FBS football, so the claim that the IAWP rule fosters competition by foreclosing a way for richer institutions to gain a competitive advantage rings hollow.

Moreover, the reality is that every school, regardless of budget, has the ability to hire an IAWP, in order to induce a given prospect. Even if a school does not have the financial means to create a position for an IAWP, the school could employ an IAWP in one of the limited number of on-field coaching positions each school has. So, each school may hire an IAWP, and each school may use an IAWP to compete for a certain prospect. In this sense, the playing field is even. And if, as noted above, the ability of richer schools to fund certain positions within its athletics department gives them an advantage on other schools, all schools are able to hire IAWPs to university positions outside of their athletics department. There is no NCAA rule against this. If schools are able to hire IAWPs to positions outside of their athletics department, there is no legitimate justification for barring their ability to hire IAWPs within their athletics department.

Finally, it is not as if hiring an IAWP means the university gains an extra scholarship athlete. On the contrary, all universities are allotted the same number of scholarships, so awarding one to a prospect connected to an IAWP employed or to-be employed by the institution simply means the university uses one of its finite number of scholarships, and that the scholarship awarded to this prospect did not go to any other prospect. The university does not gain an additional scholarship, and no other university loses a scholarship. There is nothing pro-competitive about the rule, then, in this regard. It does not enhance competition.

Element #3

Finally, the third element (*injury to interstate commerce*) is easily met, as the IAWP rule limits certain individuals' abilities to accept employment with certain schools. Individuals whose employment options are limited by the rule would, thus, have standing to sue.

Obvious injuries can accrue to coaches and prospective coaches in the form of obstacles to upward and/or lateral professional mobility. Such injuries can be economic (e.g. lost profits) and/or non-economic (e.g. emotional distress). It is difficult to imagine many clearer examples of cognizable injury to a competitive market than a rule that limits participants' abilities to freely participate in it. Not only can the rule keep someone from entering collegiate coaching via a non-coaching staff position – a common entree to collegiate coaching – it can also prevent a current non-coaching collegiate staffer from accepting a similar position at any institution with an enrolled player that would trigger the rule for the coach, due to the coach's prior association with said player. For example, if a high-school coach accepts a non-coaching staff position at a university that is not foreclosed to him by the IAWP rule, he would presumably be unable to accept a similar position at any other university that enrolled within the past two years any of the players he coached in high school. For some coaches associated with a large number of student-athletes, this could significantly limit employment mobility and/or opportunities for financial gain. Potentially, these coaches would effectively be regarded in the market as off-limits, so to speak, due to other schools' concerns that hiring these individuals could violate the IAWP rule. Many schools would not want to take such a risk and would, thus, simply avoid hiring otherwise qualified candidates. Additionally, other legitimate non-economic injuries like emotional anguish and loss of enjoyment in one's profession could result from a coach's inability to work for a certain NCAA member institution. Far from promoting competition, the IAWP rule limits it. Without a doubt, IAWPs have fewer potential opportunities than they otherwise would, in the absence of the rule.

It is also worth noting that, though they are amateurs, student-athletes are injured by this, as well. The IAWP rule can limit a player's freedom to choose among potential institutions for

enrollment; and the inability to accept a football scholarship from a given school could lead to economic injuries resulting from loss of earning power; either regarding a career in professional athletics or in a non-athletic career, or both. For example, the IAWP might foreclose a player's ability to enroll at a school that would allow him to compete at the highest possible level or at least at a level higher than his other options. Which football program a player is a part of can impact the player's visibility (to future employers, sponsors, etc.) and development (physically, mentally, emotionally, and otherwise), thereby affecting potential future earnings. In addition, just as a collegiate coach's options for employment at other institutions can be limited by the IAWP rule, the rule can limit a collegiate student-athlete's options, with regard to transferring schools. Moreover, due to that player's being or not being enrolled at a given school, other non-economic injuries like negative impacts on a player's personal life and loss of enjoyment can result because of the rule.

In short, the IAWP rule burdens the markets for college football's coaches and players. Both the markets, generally, and its participants, specifically, are less free than they would be in the absence of the rule, which puts coaches and players at risk of economic and/or non-economic injuries.

CONCLUSION

The NCAA's IAWP rule is an unreasonable restraint of trade, in violation of Section 1 of the Sherman Antitrust Act. More specifically, the rule is an agreement among NCAA member institutions that unreasonably restrains trade in the commercial market for NCAA Division 1 Football Bowl Subdivisions coaches; thus, injuring potential entrants to the market and injuring current market participants' abilities to move freely among the market, for reasons related to the qualifications of prospective employees. The rule also injures student-athletes both presently in terms of their abilities to have the fullest possible range of enrollment options, and in the future in terms of potential reduction in professional earnings. The rule does not, "preserve a tradition that might otherwise die," so presuming the rule to be pro-competitive is

unjustified.⁵⁵ Thus, the burden to show a legitimate justification for the facially anti-competitive nature of the rule falls on the NCAA, whose stated reason for the rule is transparency in the recruitment of student-athletes and who might argue that the rule also serves to promote competition. These reasons are inadequate counters to the anti-competitive effects of the rule, which, on balance, harms competition in the market for FBS coaches. As such, an individual injured by the rule who challenges it in court has a strong case that the rule unreasonably restrains trade, in violation of the Sherman Act.

⁵⁵ *Supra* note 45.

CALL THESE COACHES BY THEIR NAMES: “WHITE-COLLAR” BANDITS

By: Kimberly Russell

A quick Google search of the phrase “worst NCAA scandals in history” will turn up many articles ranging from opinion articles to factual timelines. Most will rank several widely-publicized controversies like the “death penalty” at Southern Methodist University and a Baylor basketball coach covering up murder.¹ It does not take long in reviewing story after story to become a critic of the National Collegiate Athletic Association (NCAA). The NCAA quickly seems like it decides and punishes arbitrarily in every case. Regardless of the validity in its investigation, the organization is going about punishment in the entirely wrong way.

The NCAA’s current punishment structure is unfair because the violations do not punish the actual wrongdoers. Instead, it punishes the up-and-coming recruits, and it punishes the academic recruiting and enrollment for universities. In some cases, it even punishes the small college towns that are blossoming in tourism from booming athletics. The NCAA is punishing innocent people. However, there is a solution to this, and it lies in white-collar crime. Before diving into that, there is some foundation to lay, and a good place to start is in Oxford, Mississippi.

The whine of unfairness from an Ole Miss fan probably comes across as self-indulging in a law review article. Earlier in 2018, the NCAA slapped the University of Mississippi with historic sanctions after years of embarrassing headlines for the athletic department.² It started with a gas mask marijuana bong and continued even still

¹ Ravi Lulla, *10 Worst Scandals in NCAA History*, BLEACHER REPORT (Sept. 28, 2011) <http://bleacherreport.com/articles/869007-10-worst-scandals-in-ncaa-history>.

² Corey Knapp, *NCAA officially releases long list of Ole Miss Sanctions*, SEC COUNTRY (Dec. 1, 2017) <https://www.seccountry.com/mississippi/breaking-ncaa-officially-releases-long-list-ole-miss-sanctions>.

to Southeastern Conference football programs denying jobs to former Rebel head coach Hugh Freeze.³

During the 2016 NFL Draft, Former Ole Miss Rebel Laremy Tunsil plummeted in the draft lineup.⁴ An embarrassing video of the player doing a bong hit of marijuana out of a gas mask lit up Twitter. Later, his own Instagram account was allegedly hacked and used to post messages of coaches offering to pay his rent and his mom's utilities. Team after team passed on the once-rumored first pick. The damning evidence cost Tunsil millions. His final landing place was thirteen picks into the draft with the Miami Dolphins.⁵ Worst of all, the evidence forced the NCAA to reopen its investigation into the University of Mississippi.⁶

The University demonstrated their cooperation in the investigation by forfeiting some scholarship and its bowl eligibility for the following season.⁷ After a year long dig, the NCAA released its first Notice of Allegations (NOA) which included 28 charges across all three sports, 13 alone against the football team.⁸ Football would receive a reduction of 11 scholarships over four years.⁹ It was over, again. Then, the NCAA interviewed rival football players and asked them about Ole Miss's recruiting. From there, a new NOA came about and coach Freeze vowed to fight every new allegation.¹⁰

That is, until he parted ways with the university. The following summer, it came to light that Freeze had relations with a

³ Matt Forgette and Jeff Gray, *A complete timeline of Ole Miss' NCAA investigation*, RED CUP REBELLION (Feb. 22, 2017, 8:18 PM), <https://www.redcuprebellion.com/2017/2/22/14703816/ole-miss-ncaa-investigation-timeline-bowl-ban-hugh-freeze>.

⁴ Lindsay H. Jones, *Laremy Tunsil slides after bong video surfaces, he took money from Ole Miss coach*, USA TODAY (April 28, 2016, 9:20 PM), <https://www.usatoday.com/story/sports/nfl/draft/2016/04/28/laremy-tunsil-video-marijuana-twitter-nfl-draft/83678590/>.

⁵ *Id.*

⁶ In 2012, the NCAA began an investigation into the University of Mississippi's Athletic Department. It started because of infractions with the women's basketball team but expanded to also include track and field and football. The investigation was over until the Tunsil draft incident. *Supra* note 3.

⁷ *Supra* note 2.

⁸ *Supra* note 3.

⁹ *Id.*

¹⁰ *Supra* note 3.

professional escort.¹¹ Freeze parted ways with the school and saw no major punishment.¹² After its final round of sanctions, the NCAA decided that it would ban Freeze from two conference games if given a head coaching job before the 2018 season.¹³ Meanwhile, the University of Mississippi got three years probation, two years of postseason bans, vacation of all wins in which ineligible students competed, and scholarship reductions.¹⁴ The NCAA said that “Ole Miss lacked institutional control and fostered an unconstrained culture of booster involvement in football recruiting.”¹⁵ However, if you followed the story I just told, you’ll realize: the players who “broke the rules” were gone. The coaches and influencers who caused the problem left. So, who is left to deal with the NCAA punishments? That now falls on kids who were never recruited by Freeze. It falls on the quiet town of Oxford that was growing due to national football recognition. It falls on the academic recruiting success of and institutional monopolizing on wins. The thing they all have in common is that they had little-to-nothing to do with “unconstrained culture” of the athletics department, or, more specifically Hugh Freeze’s football staff.

I. WHAT IS “WHITE-COLLAR CRIME” AND HOW DO WE PUNISH THESE CRIMINALS?

American writer Upton Sinclair coined the term “white-collar” in the 1920s. Office workers wore a white collar while manual laborers wore blue overalls.¹⁶ The term made the shift to crime from Edwin Sutherland.¹⁷ He wanted to stress that crime transcended social classes. Since then, the term serves as a sort of catchall for

¹¹ Antonio Morales, *What went into the NCAA’s ruling on Hugh Freeze?*, CLARION LEDGER (Dec. 3 2017, 5:15 AM), <http://www.clarionledger.com/story/sports/college/ole-miss/2017/12/03/hugh-freeze-ole-miss-ncaa-ruling-suspension/916018001/>.

¹² Talal Elmarsy, *How did Hugh Freeze avoid major punishment? Chief hearing officer on Ole Miss case explains*, SEC COUNTRY (January 2018), <https://www.seccountry.com/mississippi/hugh-freeze-major-punishment-chief-hearing-officer-ole-miss-case-explains>.

¹³ *Supra* note 11.

¹⁴ *Supra* note 2.

¹⁵ National Collegiate Athletic Association (@NCAA), TWITTER (Dec. 1, 2017, 10:36 AM) <https://twitter.com/NCAA/status/936635172728049664>.

¹⁶ *A History of the World: White Collar*, BBC, http://www.bbc.co.uk/ahistoryoftheworld/objects/1AhY3K_mSwqaEBvZaN5eYw.

¹⁷ BRIAN K. PAYNE, WHITE-COLLAR CRIME, (2012).

workers in business and government who commit a range of fraud.¹⁸ Crimes go all the way from identity theft to corporate fraud. That last one is the one which lends itself to college athletics the most.

The premise behind corporate fraud is that one powerful person lies and deceives in order to benefit themselves either directly or through their company's profits. Here is a direct quote from the FBI about corporate fraud:

“These are not victimless crimes. A single scam can destroy a company, devastate families by wiping out their life savings, or cost investors billions of dollars (or even all three). Today's fraud schemes are more sophisticated than ever, and the FBI is dedicated to using its skills to track down the culprits and stop scams before they start.”¹⁹

This is a look at a specific example: Charles Ponzi. It is the story behind the term “Ponzi scheme.” Ponzi created a structure where he used investors' money to pay back original investors and set it up so that he made hundreds of thousands in profits every day.²⁰ His scam practically served as a mentorship for Bernie Madoff and the likes. Out of his frauds and the others who followed his example, the U.S. found these individuals guilty and punished them with jail time and fines.²¹ After the Sentencing Reform Act of 1984, the country began to take very seriously the crime of using goodwill to pad a pocket.²² Convicted white-collar criminals receive a sentence of jail time, fines, restitutions, or any combination.

¹⁸ *White-Collar Crime*, FBI, <https://www.fbi.gov/investigate/white-collar-crime>.

¹⁹ *Id.*

²⁰ Megan Brame-Finkelstein, *3 Famous White Collar Criminals (And How They Changed Everything)*, HUFFINGTON POST (Aug. 3, 2016, 11:54 AM) <https://www.huffingtonpost.com/?icid=hjx004>.

²¹ *Id.*

²² Casey C. Kannenberg, *From Booker to Gall: The Evolution of the Reasonableness Doctrine as Applied to White-Collar Criminals and Sentencing Variances*, 34 *Iowa J. Corp. L.* 349.

II. HOW THIS FRAMEWORK CURES WHITE-COLLAR CRIMES:

Charles Ponzi's sentence was only five years after he defrauded so many investors.²³ In the more modern era of white-collar crime, punishments have mounted. The most famous is Bernard Madoff.

Bernie Madoff had an elaborate Ponzi scheme of his own. He started his investment business with \$5,000 he earned from manual labor jobs in the 1960s.²⁴ His business grew and served clients as famous as Steven Spielberg.²⁵ In 2009, Madoff pleaded guilty to eleven felony counts was sentenced to 150 years in prison at the age of 71.²⁶

While Madoff was a historic sentencing example, the stern judgment of white-collar crime remains.²⁷ The purpose behind this framework is to protect economic victims. White-collar crime is mostly non-violent. Violent crimes, historically, are often dealt the heaviest and harshest of punishments. The modern, Madoff punishment approach for non-violent white-collar crimes reminds the public and the court that victims of these crimes are victims. It reminds them that this fraud destroys lives.²⁸

III. APPLYING WHITE-COLLAR PUNISHMENTS TO THE COACHES IN POLOS

Spend any time with NCAA regulations, and it is apparent that much of the rules fall on the students. It is a system that expects the students to operate at a higher standard in nearly every walk of life: the classroom, the practice field... even in their own morals.²⁹ Page after page lists how they must act because the student athlete is the driving force behind these money-making

²³ Lucian E. Deruan * and Ellen S. Podgor, "WHITE-COLLAR CRIME": STILL HAZY AFTER ALL THESE YEARS, 50 Ga. L. Rev. 709.

²⁴ *Bernard Madoff Biography*, BIOGRAPHY, <https://www.biography.com/people/bernard-madoff-466366>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Investopedia, *Sentences For White-Collar Criminals: Too Harsh or Too Lenient?*, FORBES (June 8, 2012, 10:09AM) <https://www.forbes.com/sites/investopedia/2012/06/08/sentences-for-white-collar-criminals-too-harsh-or-too-lenient/#203440d3275b>.

²⁸ *Id.*

²⁹ 2017-2018 NCAA Division I Manual.

teams. But, similar to the history behind white collar crime, there is a discrepancy. Coaches, like the white-collar criminal, are doing everything to protect their status.³⁰ Unlike white collar crime, students are the ones bearing the brunt of the punishment when the athletic department is found in the wrong and the coaches are scrubbed from the staff.

White collar crime and corporate fraud are very similar to the problems plaguing the NCAA and Ole Miss. College sports are turning a historic profit. Coaches, specifically in football, are raking in monumental salaries.³¹ Nick Saban at Alabama blew the ceiling off with a contractual clause that says he must be the highest paid coach in the country.³²

It seems like college athletics are implementing this white-collar framework on their own. The Southeastern Conference rejected Hugh Freeze's ploys for assistant coaching gigs. Freeze fielded coaching interest from at least four conference schools, most notably the powerhouse that is Saban's Alabama staff.³³ The reason Freeze was not allowed to coach was not because of NCAA punishments. What happened to Freeze turned on the leadership of the SEC. Commissioner Greg Sankey stepped in to throw down bylaws on Freeze and ban him from coaching in the conference.³⁴ It was reported that Sankey said the conference does not allow teams to hire coaches associated with an NCAA investigation spurred by unethical conduct without consulting the league.³⁵ Sankey reportedly was not going to approve a Freeze hire until after Ole Miss sanctions passed.³⁶ The Commission on College Basketball took it a step further and recommended that the NCAA itself should

³⁰ *Supra* note 1.

³¹ Cork Gaines and Mike Nudelman, *The average college football team makes more money than the next 35 college sports combined*, BUSINESS INSIDER (Oct. 5, 2017, 3:36 PM), <http://www.businessinsider.com/college-sports-football-revenue-2017-10>.

³² Michael Casagrande, *Nick Saban's contract extension, big raise approved by Alabama trustees*, AL.COM (June 3, 2014, 1:38 PM), http://www.al.com/alabamafootball/index.ssf/2014/06/nick_sabans_contract_extension_1.html.

³³ Flint Christian, *SEC blocks Hugh Freeze hire, cites bylaw and investigation*, The Daily Mississippian (Apr. 23, 2018, 5:37 AM), <http://thedmonline.com/sec-blocks-hugh-freeze-hire-cites-bylaw-and-investigation/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

ban cheating coaches from basketball.³⁷ That should apply to all sports in the NCAA.³⁸ This is the closest an athletic association can get to jail time. If these coaches were to see serious bans for misconduct, there would likely be more responsibility for monitoring.

Coaches should also face fines and possible restitutions for blowing up programs. The NCAA found that Freeze had a failure to monitor compliance. Reportedly, his punishment would have been greater if it had been proven that Freeze fostered an atmosphere of non-compliance.³⁹ There ought to be a standard that coaches have to pay, perhaps tiered, if the NCAA finds they are guilty of misconduct. These coaches are making serious money, and those funds could go into a pool for suffering programs or scholarships to less lucrative sports. Other involvement, such as inappropriate support from boosters, ought to be fined from the boosters themselves. Boosters ought to receive bans if they violate rules, as well. The NCAA should start turning the hammer on the ones who actually broke the rules instead of killing opportunities for 18 and 19-year-olds.

The white-collar framework ultimately will not solve all of the financial rule breaking happening in college athletics. There are more issues to discuss, such as amateurism, that would also help alleviate the pain these investigations cause programs. Although holding the right people accountable is a step in the right direction and making coaches and boosters pay for their indiscretions is a strict way to ensure compliance.

³⁷ Ralph D. Russo, *NCAA begins work of implementing complex basketball reforms*, AP (April 25, 2018), <https://collegebasketball.ap.org/article/college-basketball-panels-ban-cheats-let-players-go-pro>.

³⁸ *Id.*

³⁹ *Supra* note 3.

THE CURRENT FATE OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

SYMPOSIUM TRANSCRIPT

I. INTRODUCTION

Will Pomeroy: Alright folks we are going to go ahead and get started. First of all thank you all for coming. My name is Will Pomeroy. I am the outgoing Editor-In-Chief. I'd like to give thanks for everyone who helped out, especially Jack Noonan, he is the new, incoming Editor-In-Chief, Spencer Durden, Brantley Adams, and Evan Brewster. You all helped out tremendously. Our faculty sponsor Professor Berry was not able to make it today. He had a family emergency and had to leave this weekend. Without him, we would not be able to do any of this, and we appreciate his help. Now with that I am going to turn things over to our esteemed professor, Professor Rychlak. We have great topic and a great panel. He will introduce the panel as well.

Professor Rychlak: Preparing for the panel caused me to go back and look. Every year I have students in my Gaming Law class write papers for me, and we traditionally get 6-7, maybe 8 papers published. We get high quality papers that I am very proud of and it fits nicely because this field calls for more academic study. It is one of the reason I encourage students to take the course. Because of this, I was looking last night at old papers that had been written to help prepare myself for today. I ran across Will Pomeroy's paper which was a great paper who was not actually published. I recommended to him to publish his paper. With that being said, I recommend everyone to be published at least once.

We have a great panel today. I am very excited to have this discussion. Starting with the far end, we have Mike Bruffey.

II. PANELIST INTRODUCTIONS

A. *Mike Bruffey*

Professor Rychlak: He told me earlier he was a graduate here in 1994, and I remember him from one of my criminal law classes. Since then he has gone on to do great things. He spent 15 years in-house for a casino, and he is now the deputy director of Mississippi Gaming and Hospitality Association. So there is a great deal of business and promotion Mike has going for him with that.

Mike Bruffey: Thank you. Glad to be here. I'll just say that Professor Rychlak was my professor here and that was in 1993. Gaming was just getting started in 1992, and so, at that time, there really wasn't anything to talk about. Now, we are hitting our 25th year of gaming, we have an association that talks about this as an industry. An industry that was probably viewed in a moralistic view in a negative way, but now is considered the fourth largest industry in our state, that's the travel and tourism industry. It employs over 86,600 Mississippians. It generates about a billion dollars of tax revenue a year. Just gaming alone, provides 21,250 jobs in our state. And each year wages and benefits get close to 900 million dollars. Going from where we were in criminal law with Professor to where we are today in gaming, we have come a long way. Thank you.

B. *David Purdum*

Professor Rychlak: David Purdum is next. He is a traditional journalist who writes for ESPN. He has covered gambling and sports betting for several years now. It has been kind of a special topic for him. He has covered all sorts of interesting cases, such as line making, sports business, etc. David why don't you go ahead and tell us a little more about yourself.

David Purdum: Thank you Professor. Yea, I am a traditional newspaper journalist. I worked for the Atlanta-Journal Constitution for a long time. I was a sports editor down the road in Sidell, Louisiana for a few years. I covered everything from professional, college and high school sports. Newspaper industry if you guys haven't noticed is not doing so hot. So, I started freelancing. I started writing game previews from a gambling

perspective with point spreads. The writer in me really loved the characters and loved the stories that came out of it. I continued to proceed to cover the industry, and now I have ended up at ESPN. The fact that ESPN has a sports gambling writer says a lot about how far we have come. Looking back 15-20 years ago, boy, I don't think we ever saw anything like that on ESPN or mainstream. It was a big deal whenever someone mentioned the point spread or a story mentioning gambling. Now, the spread is a part of the story line, it is almost the only story line that we cover. Who does America like, where is the money falling. I just think that just goes to show how far we have come in the sports betting and gaming industry.

C. Cathy Beeding

Professor Rychlak: Cathy Beeding, who is the president and general counsel of Island View Casino. There was a profile of successful women in the gaming industry and it started with her giving a quote, "It is sometimes difficult to be superwoman. Being superwoman is exhausting." When you read through, you soon realize she is a super woman. She got out of law school and worked her way into the industry. She worked her way to the top of her profession now in an industry that has been known to not always have many woman executives. She worked her way up personally and we are glad to have her here.

Cathy Beeding: Thank you so much, and it is a pleasure to be here. I really never think of myself as a woman in a man's world. I just think of myself as a person lucky enough to work in the gaming industry. And hopefully 10 years from now those gender distinctions will further blur and everyone will have an equal opportunity. But off the soapbox, thank you for those kind words. I have had the pleasure of working in the industry for almost 18 years. My situation is probably a little bit different than most. In that, I have worked for the same two guys for the last 18 years. They are from Gulfport, Mississippi. These are two guys that if you look up American entrepreneur in the dictionary, there should be a picture of Rick Kerr and Terry Green. That is the spirit they embody. It is the life they have lived and what they believe. They believed in me when I was a very youthful young lawyer. They asked me, Hey, do you think you could do this, and I was stupid enough to say yea sure, why not. So, they would constantly give me

challenges. The ignorance of youth made me not when to say no or to ask for help. So, with lots of homework and late nights, early mornings I figured things out. I certainly had many notable failures along the way, and learned to ask for help along the way. I learned that I may not be super woman all the time, but just a fallible human being like everyone else. But, it has been a great run, and look forward to spending the rest of my career, if not with Rick and Terry, but definitely within the gaming industry. How I got involved with sportsbook was it has also been a passion of mine. I am a huge sports fan. In law school, I had the pleasure of taking sports law learned a lot about anti-trust law and union law. I had the pleasure of being appointed to the DFS Task Force in Mississippi last year. Coming up with the legislation that is moving through the State House right now. Made a lot of contacts along the way. It is a huge opportunity for Mississippi and hopefully some day we will be able to exploit it.

D. Erik Balsbaugh

Professor Rychlak: Thank you Cathy. Erik Balsbaugh is the Vice President of Public Affairs for the American Gaming Association, the AGA. He advises the AGA on the day to day public affairs efforts, campaign to change the federal sports betting law is one of them, shaping the industry's image as a strong community partner. Prior to coming to the AGA, he was involved with politics. He was involved with the Dewey Square Group in Boston and many campaigns along the way.

Erik Balsbaugh: Yea, it is interesting being here. If you would have asked me 15 years if I would ever be involved with the gaming industry I would have laughed at you. You know I was involved with politics and campaigns, and getting involved with things where my heart was. As I got older, had a family, I started doing more private sector consulting, and I got involved with an effort in Massachusetts to pass the casino gaming bill which allowed for two resort style casinos and a slot parlor. As I was doing that work I really realized a lot of different things. It was in the heart of the downturn and this industry was offering a lot of good paying jobs in areas that were going through hard economic times. One area I was looking to set up a casino in Springfield, Massachusetts was an area that an unemployment rate that was

double the state average. It was down on its luck, companies were moving left, right, and center, and there was really no hope for the community. The casino company came in and signed an agreement with the city. Things were noticeably different immediately. People were hopeful for jobs. Other companies saw that things were happening there and a couple of the companies moved back to the city. The story of Springfield, Massachusetts has gone from one that was sad to now has a lot of hope for the future. It was really cool to see how the gaming industry brought them there.

Being a political guy, it is also a very fun industry with entertainment and a lot of great things happening. So, when the AGA asked me to come down and help them shape their public affairs efforts around the sports betting campaign and the regulatory efforts, I was very happy to do so and now I am leading the effort on legalizing sports betting.

E. Brian Barrio

Professor Rychlak: And, finally, we have Brian Barrio. Brian is the senior associate athletic director at the University of Nevada located in Reno. I work as the faculty athletic instructor here, so I work closely with the athletic compliance office. If you have any advice, we would love for you to come talk to us afterwards, some stuff going on. Before going to Nevada, he worked at Pepperdine. At Pepperdine, he oversaw compliance and academic support and business operations. He also served there as the Title IX coordinator for the school. Working in all levels of collegiate sports, I know you must have an interesting prospective on this issue.

Brian Barrio: Yea obviously my professional perspective is going to be a bit different coming from my side of the sports industry than from the side of the gaming industry. But I think there is two things from my background that makes this a close personal issue for me. One is that I was in undergrad and worked in athletics at Boston College. If you have studied gaming at all, you know that Boston College was the epicenter of two of the biggest scandals that have happened in sports gaming. So, I have had a little first-hand experience with that with the 1997 gambling scandal. And now, being a collegiate athletics administrator in the state of Nevada, it is a different deal. Someone brought up the moralistic concerns

earlier, and Nevada is definitely a state which has gotten past all moralistic concerns. So, our perspective is a little bit different, and, you know, I can give a little bit of perspective of the NCAA from the member institutions. Even though, I don't personally endorse many of the NCAA positions. Since it was brought up, I was going to say a bit on the current situation here. I find myself as a bit of a Forrest Gump of college scandals having been through the gambling one at BC, I was at Ohio State for the Maurice Clarett situation, I was at USC for the O.J. Mayo, Reggie Bush scandal, and I came to Pepperdine after they had a major infraction and got them through a probation, and so far so good at UNR. But I guess the upshot of that is all those institutions are all still existing and playing sports.

Professor Rychlak: As you can see we have got a great panel. A lot of diverse background here.

II. PANELIST QUESTIONS

Professor Rychlak: I guess we can jump in and bring up what is on everyone's mind is a sportsbook in Mississippi. There is the federal law that we can explain that we must get around, but Cathy you have worked in the industry for some time.

A. *What are your thoughts about a full sports book starting in Mississippi?*

Cathy Beeding: Well to start, I can explain the federal law you mentioned that would have to be overruled before Mississippi can get in the mix. It is called PASPA, Professional and Amateur Sports Protection Act of 1992. It bans any type of sports betting except in three states which they have sports lotteries. These were grandfathered in. These states are Oregon, Delaware, and Montana. The only sportsbook, single wagering on single games, is in Nevada, but PASPA does provide authorization to three states to conduct forms of sports betting

So, what does that mean for Mississippi? That means that sports wagering here is illegal. It is interesting because I teach at the University of Southern Mississippi, and I teach undergraduate students gaming law. When we get to this chapter on sports gaming, I always ask my class who thinks betting on the internet or betting on a sport is illegal, and it is amazing to me that none of

them raise their hands. They don't raise their hands because they are all doing it, and that maybe has some areas of concern that we can explore here as a panel. The fact of the matter, and the reason for that illustration is that this is an activity that is happening in an unregulated and untaxed environment. And it is preying on people that may be vulnerable, certainly youth can be vulnerability. So, that is a concern. To the extent that you can bring that shadow industry out into the light, regulate and tax it, then you can address issues like player vulnerability.

So, I had this one student ask me, well I asked him, "So how is it that you wager online?" And he said, "Well, I can't use my credit card, so what I do is go to this one website and I will buy a bike. Then I take the value of the bike to use on the interactive site." And then I said, "Does that not raise any concerns? Maybe do you think that is weird? May not be a straight forward transaction." So that is a concern as well, kind of this, way of doing business that is not recognized way of business that is becoming normalized because of this illegal behavior. That is a concern for me and a concern for anyone that works in the gaming industry that struggles and strives every day to maintain the credibility that we have, and we do that by doing business in a way that is typical, that is regulated, and that everyone can rely on and is fair.

Professor Rychlak: And Eric, does the AGA have an opinion on the spreading of a sportsbook?

Erik Balsbaugh: Why yes, indeed we do. Thank you for asking. Our view is that PASPA has failed and failed miserably. The only thing it has done is create, a conservatively estimated, 150-billion-dollar black market. In which there are no consumer protections. People are wagering with sportsbooks in third world countries where there is not guarantee that they are going to pay out. And it's dangerous. We are making common behavior criminal. It is time we take a new approach to this. We realize that there are some states that probably aren't going to want to offer sports betting. So, we believe that states should be able to take their own approach to this. It is a state's rights issue. If states want to offer sportsbooks at their casinos, they should be able to do that. They already have the regulatory structures in place. Allow them to pass a law and offer legal, safe sports betting in their states.

Professor Rychlak: Mike, I gotta think that there is quite a demand of sportsbook in Mississippi. People with casinos probably want the chance to bring sportsbook in Mississippi and bring more tourism into the state. Are there any active measures, or do we just need to get past the law first?

Mike Bruffey: So, in 2013-2014 timeframe, I was asked to sit on the state's task force on internet gaming and sports betting. And the primary objective we were tasked for addressing for the legislature is what the laws were now and what changes the laws needed if any to allow for internet gaming and to allow for sports betting. When you get into the whole analysis of this and you start with the premise with 99-33-1 which is the general prohibition. It is a criminal statute, and it simply says, you have to pay a fine of \$500 if you wagering on the outcome of an event. So, then gaming becomes legalized through exception. In Mississippi, we have four exceptions and it is on a cruise vessel, and that is how gaming was legalized here in our state. As you start getting into the history of gaming and really get in to it before 1989-1990, was gaming happening in Mississippi? Absolutely. Ask Senator Tommy Gollott, and he'll tell you that there was a lot of gaming happening, it just was not legal. So, we had that very same issue happening here in Mississippi that Erik was talking about right now in the context of sports betting. And look where it has led to.

Senator Gallott said when we were rolling out these packets I referred to earlier, he said the amount of money that is being made is about \$500,000 to \$1 million dollars. And that is just by a small group of people, he called it the mafia or the undesirables, but in any case, think about that. And then you legalize it and given the statistics like I just went over. I think that not only is there a demand for it, there is a mechanism in Mississippi where we can conform with *Christie I* and can look at *Christie II* and analyze that a little bit, and yea to answer the question, there is a demand for it and I feel like there is a way to go about doing it.

Cathy Beeding: I am going to just buttress on that real quick because I do not think I answered the question on PASPA and that is what is the status of PASPA right now. So, Mike just referenced *Christie I* and *Christie II*, that is New Jersey's attempt to have a lawful sportsbook within their own state borders. They tried it a few different ways to be honest with you. And so, *Christie I* didn't

work, went back and then they tried this repeal of prohibition concept that they thought the 3rd Circuit told them to do in *Christie I*, but then the 3rd Circuit said that doesn't work either. They actually reheard the case *en banc*, still did not work. And right now, it is pending before the Supreme Court. So, whether or not, the Supreme Court grants cert is going to be our answer for the time being on PASPA. They have asked the Solicitor General to weigh in. Once the Solicitor General is appointed, I think that we will have a lot of visibility into what the Supreme Court will do with *Christie II*. Would I like to see it reviewed? Sure. I think we all would. It would provide some closure to this issue of whether or not PASPA is constitutional or unconstitutional. But, still the question mark remains if the Supreme Court will review the decision or not. If they do, the decision from the 3rd Circuit stands, which is PASPA is the law of the land. We are still going to see challenges though. That is only the 3rd Circuit, and it has split twice now. But that does not mean other circuits might not come to a different conclusion. So, you see different statehouses across the country- New York, 2nd Circuit, Michigan, South Carolina. All of them have sports wagering laws at the state level working through their state houses. So, those opportunities show it is not over if the Supreme Court does not grant cert to *Christie II*. And states will keep taking a crack at it until it will create a conflict in circuits that then will call the Supreme Court to take a hard look at it.

Mike Bruffey: Can I talk a little bit about this bright line if you will. As I understand the legal issue in *Christie I* the court basically said was that it's not commandeering and its unconstitutional, that is PASPA, because a state can't deregulate. In other words, it does not deny the state the option for the state to deregulate and allow for that activity to occur. It's not requiring them to make it illegal. So, of course, New Jersey did what they did from the 2014 laws that were referenced in *Christie II*. 3rd Circuit said well all you basically did was authorize something that was illegal before. So, I've got in front of me, I just wanted to read a little paragraph to you guys, the brief that was filed by five states to the Supreme Court asking that they take the case up- West Virginia, Louisiana, Arizona, Mississippi, and Wisconsin. Now, those are the five states who signed off on this brief. It says, "Over two dissents, including one by the author of the 2013 panel decision, the *en banc*

court held that the state selective repeal of certain prohibitions amounts to authorization under PASPA. Despite now interpreting PASPA to prohibit state repeal to existing wagering laws, the court concluded its view of PASPA's constitutionality remains unshaken. Why is that? Because the states were still afforded sufficient room under PASPA to crack their own policies."

Well, ok. You can't go as far as Jersey in 2014, so that begs the question where is that line. This is what it said, "Specifically the court suggested that federal prohibitions on state regulation were lawful. So long as they did not subject states to a coercive binary choice, that is requires states to maintain either a complete prohibition to sports wagering or wholly repealing it." So, there is this line, right. There is this sweet spot. Where is that sweet spot? We know that the 2014 laws in New Jersey went too far, but could we perhaps take a different approach, more conservative approach. That's what I was alluding to a minute ago in Mississippi. Where, you know, our laws could we say look at 97-33-1 and just say alright, we are going to deregulate sports betting on cruise vessel. Just one line, as defined here in the Act. Is that going too far? I don't know. I think that is really the question that a different court, even the 3rd Circuit, would have to grapple with that.

And so, we read in the paper the other day, there was an article and I brought it with me. It is called *New Jersey's Nuclear Option*. And that is just to repeal the entire law in New Jersey if they are not successful to open it up entirely. That would conform to *Christie I* if you read that decision. So, *Christie I* didn't say that you can't have sports betting under PASPA, what it said was, it me it actually opened it up to allow more.

Cathy Beeding: But it does exactly what PASPA is trying to avoid, right? You would have a completely unregulated, untaxed environment. Game integrity becomes a concern.

David Purdum: And that's how it is now, so you know.

Professor Rychlak: There is the judicial avenue to PASPA, but, you know, it's a piece of legislation that can be overturned.

B. David, you study sports betting I know at times it has a lot of interest, but is there enough political will for there to be a political change?

David Purdum: I think we are going to find out. Obviously, it is very tough to tell what is going on with this presidency and this administration, but we have had multiple federal bills that have been going through review. Erik has been working on a bill with the American Gaming Association as well. So, they are going to start pushing on it. If you look back at Trump's history, he was in New Jersey as a casino owner in Atlantic City. When PASPA got enacted in 1992, New Jersey was given a year to pass a law that you can offer sports betting. There was a lot of politics in it, and Trump was pushing for it big time. We need to do this, all we are going to do is take the money from the bookies and bring it to the regulated market. So, he was a very outspoken proponent of it, but still there was a lot of politics involved. New Jersey did not pass a law and now 25 years later they are still trying to do it.

As far as the political interest, Erik can speak on this a little better than I can, so I am probably going to let you talk about that.

Erik Balsbaugh: Congress is a complicated beast. Right now, the docket is pretty full of what the Republican Congress and Presidency want to get done. What we do know is that there is interest in the states. 80% of Super Bowl fans, research done by Mark Mellman, one of the most respected pollsters in the country, want the law to change. People are ready to go sign up in an effort to put pressure on Congress to change this. We know that Congress doesn't generally act quickly, so we need to be able to smartly build a coalition of supporters in the states that are going to be able to push the members of Congress to take this up and make a change to law. We are getting there, we are starting to see the tide turn. Adam Silver came out a year ago that he wants to see PASPA repealed. Rob Manfred in his comments at the owner's meeting, said they are taking another look at this. The NHL is moving a team to Las Veags, and are now saying this isn't as big of a problem as we once thought it was. The NFL is a little bit slower, but they are also looking to move a team to Las Vegas as well. Some of the financing has gotten a little sticky, but it is looking pretty good that it is going to happen. So, the landscape at the league level is starting to change, and then also we have done a lot of research

with Nielsen Broadcasting, who does all the ratings. We saw that people who are betting on sports, just on NFL, watch an average of 19 more games every single year. They watch the entirety of the game, they watch through the commercials, they are posting the things that they see on social media, they are engaging with the product that much more. And why? Betting on sports is fun. People like to do it. So, they are starting to realize there is a lot of opportunity here. The appetites are getting there. The PGA commissioner is even starting to say that maybe we should look at this. If you look across the pond to the U.K. in Europe and Australia, they have legal, regulated sports betting markets, and the U.S. is in line with China right now on its policies with sports betting. It is time we caught up with the rest of the Western world.

Cathy Beeding: And speaking about the rest of the world, and how fun it is to bet on sports, 70% of bets made on sports are in-game. So, it is not the typical sports bets that you maybe have made in Vegas where it's legal on the outcome of the game or the over under bet. You are actually making a bet in the game. Will they get a first down? Who will score first? And that level of fan engagement just increases and increases. There's one hundred and twenty thousand different sports game that take place every year, and so the bet volumes are incredible when you look at it at a numbers perspective. We have thrown out some huge numbers here, like 150 billion dollars in the shadow sports industry illegal offshore stuff, and those are really big numbers but keep in mind those are bet volumes. It is the amount of money wagered. That doesn't mean that from an operator's perspective that we are going to bring 150 billion dollars to the bottom line. Because obviously a lot of that is paid out, so what we see from the operators perspective is the opportunity for sportsbook, is not only to overturn the law, but also to drive visitation. People are going to want to bet on sports in an environment similar to the ones in Las Vegas. It is a really nice room like this where people have TVs and making wagers in the room. Very fun and social. It is the resort type atmosphere where people will come and do that. When they are there they will spend money on the non-gaming side and maybe will drive some revenue from other channels on the gaming side, like slot machines and table games. So, sportsbook in and of itself relatively low margin of business, two to six percent, where is if you look at a slot

machine you look at much much higher, in the upper thirties. So, this isn't all about a revenue story, even though a revenue story is a big piece of the bigger, but what we see as the operator's perspective is to drive visitation and get people to come to Mississippi to do that.

C. Brian, the NCAA takes a very strong line against gambling.

I would love to hear your thoughts on that. Also, you live in Nevada and until about 10 years ago, casinos did not take bets on Nevada sports team. They are doing that now, but those are two interesting things I'd like to hear you what you think.

Brian Barrio: Yea, you know, the NCAA remains an opponent of legalized sports betting, and I think the NFL does too. The fact of the matter for those two organizations is that the status quo is pretty good, and they do not want to rock that boat in any way, shape, or form. I think for both of them they have had issue in the past, and I think the NFL is way in the past. But this is going way back in time to the 60s and Alex Caras and Paul Horning were two big NFL stars at the time. They were suspended for a long time for betting on sports and fraternizing with gamblers. Pete Rozell was the commissioner at the time and handled that very strictly and was praised for it. That incident has kind of become a legacy in the NFL, and the current commissioner Rodger Goodell see it that way. He always talks about protecting their shield, which makes me sick because I am a Patriots fan. I think for the NFL they are thinking they are making money hand over fist right now. There is no need for this. There is no need for an increase in popularity of football because they are almost at max football right now. I think that 10 years from now, if cable subscribers keep going down, and the concussion thing keeps coming back to bite them and they keep seeing a bite in their revenues, then they might more receptive to this. I think that there is a head in the sand, ostrich thing going on with both the NCAA and the NFL about how much interest in the games are driven by gamblers, and it always has been. On the NCAA side, I think it is a bit more complicated. Folks have a tendency to look at the NCAA as this monolith in Indianapolis that hand down all these rules and punishments. But in reality, having been on the bad end of that a bunch of times having said, I think the reality of it is the decision making of the NCAA and the policy

making of the NCAA is very diffuse. It comes from folks like you (Prof. Rychlak) and I or folks like university presidents who are scattered across the country who's institutions look very different than one another and thus they are not a progressive organization. It takes them a long time to make changes, so something like this is considered a pretty radical idea. I think for years ago, going back to the point shaving at BC, it is such a third rail of the NCAA and gambling that I think the presidents and the athletic directors are not very familiar with this. You know, this conversation would be so outside of their comfort zone. I do not think that they think about this kind of stuff. I think when you talk to college presidents, when you talk to athletic directors who are in their 50s, when they think about illicit gambling, they are not thinking about you in your apartment online gambling. They are thinking about Sully at the bar taking book illegally and you are involved with organized crime. This whole paradigm looks a lot different than what illicit gambling is now. And, so they will not even consider it. And I don't know anyone in the NCAA who has looked at this in any kind of favorable way. They are not even willing to bring it up for discussion. The one tiny piece of movement we have had in the past couple of years, I guess, and it benefited the University of Nevada, was for a long time the NCAA had a ban on any championship events taking place in states that have legalized gambling. So, even though there are no lines on college baseball games, we (Nevada) could not host a first round of the tournament event in baseball at the University of Nevada. When we hosted the singing competition 10 or 12 years ago, we had to host it in California. They are so strict about this that they are hurting their own member institutions when it does not protect anybody. So, I think they are a long long way from being on board with this. And my impression is that the NFL is the same way.

D. David, is football at such a saturation point where gambling would not make a difference?

David Purdum: No, it would make a difference. They did a study that said it would increase viewership by ten percent. There has been another study by a Texas A&M professor that was a very interesting one in which he compared all the Pac-12 football games where the point spread or the over/under total was in play going

into the fourth quarter compared to just the games that were blowouts. It was a dramatic increase in popularity for the ones which the point spread is in play that people stay tuned in. As far as saturation, I don't think so. I think that gambling would increase interest in sports. I think it would increase in anything. The Oscars on Sunday. You are more likely to stay tuned if you have money at stake with these things. It's the bottom line, it's just a fact. Some people do not like it. The NFL wants to try and believe that gambling is not a big reason for their popularity, but it is, and it would increase if we legalized sports betting. I wonder though if our theory is that we are all betting already and there is all this money at stake so the league is already getting the fan engagement from that. So, I don't know if we will have a monumental increase, but I definitely think there would be some help with ratings. You know blow out games, who is watching the Thursday night Browns vs. Jaguars game unless you bet on it.

Cathy Beeding: So, I also think with the head in the sand mentality with the NFL there is also a certain level of hypocrisy going on there. They have embraced DFS but still want to uphold PASPA. If you read PASPA, it is about betting on individual players. And if that is not DFS, I am really not sure what is. So, they want embrace DFS. They have some pretty lucrative partnerships with Fanduel and DraftKings, yet they want to hold PASPA as the guard for game integrity. Just a little plug on game integrity, since we were talking about outside of the United States. The United States is seen by the outside world as the last untapped market for a lot of forms of gambling. But it is untapped and probably going to stay that way because of these giant barriers to entry that based on these puritanical, moralistic laws. What they have been able to do to protect game integrity through technology that PASPA has not done is use monitoring companies like SportsGenius and SportsRadar. And what they have been able to do is they plug these sports monitoring companies in with the statistics and the bookies. So, for example, SportsGenius who runs 150 different sportsbooks throughout the world and they look at all of the data coming in on the bet volumes. They marry that with the statistical information that they get real time. They have algorithms that hash that data and look for irregularities. And it is through those irregularities that they are able to see that something is a

miss. They can alert the bookies immediately to suspend betting. Then they can also alert the leagues. This kind of data is hard because 90% of the irregularities that are flagged are not, but it just requires a little bit more deep dive into the data. For that 10% that is out there, those are issues of game integrity. And the way they are working in concert with the bookies and the leagues, that is how you can protect game integrity. You plug that portion into the regulatory environment, you don't need PASPA anymore.

E. Something that David said a minute ago promoted a thought I had. Is there anything that would preclude a casino from offering a bet on the Emmy, Grammys, Oscars? Couldn't there bets be placed on things outside of PASPA?

David Purdum: That is a good question, you know, speaking from the sports side of things New Jersey was going to try and offer betting on MMA and golf and these other sports leagues that were not suing them at the time. The judge thought if they are not suing them then go ahead, but then there was a change of heart somewhere when someone said there was a call like an hour later and the judge waxed it out. He said you could not do that on any sporting event in New Jersey. As for the Oscars and those kinds of events, in Nevada you cannot do that. They have a strict regulation that are state laws, not federal law. I do not know anything if you are transmitting the information across state lines. It may be a Wire Act violation.

Cathy Beeding: So, I think what you may run afoul of more so than PASPA is intellectual property issues. They protect their mark like no others. So, if you were trying to advertise you were taking bets, for the Oscars you would have to have some pretty good marketers that did not use the word Oscar or the statue. So, here in Mississippi, since we have a complete prohibition, like Mike was talking about we would not be eligible to do it here, but there may be other states that do not take that pact and would be eligible to do these things.

Mike Bruffey: What we can do that would be kind of interesting like that is through the daily fantasy sports that we have legalized here in Mississippi. We have this pari-mutuels. So, let's say you have got the Cowboys playing the Giants. So, in Mississippi, it's Dak Prescott vs. Eli Manning. You can go to one of

these casinos that could set up one of these pool like pari-mutuels things where you are essentially betting on the performance of these two players that are pitted against each other. That is legal in Mississippi right now. You just do not see operators taking advantage of that. There are companies out there that put these pari-mutuels type things together. I think it is legal, I just do not see it being done.

Professor Rychlak: Why not? Because it seems to me that there is a big attraction. Too much investment?

Mike Bruffey: I don't think people know. It is technical.

Cathy Beeding: Plus, the DFS law is not even 12 months old. So, it is a pretty nascent industry that not many people believe in. It has kind of become a bad word in some circles.

Professor Rychlak: Yea, you know I just recently went to Tennessee and someone asked me to talk about DFS, and I had thought it had not been legalized. Turns out that they passed a recent bill legalizing daily fantasy sports. And I talked to some legislators and they said they have never been wined and dined because of the money involved with this. Because we see how large DraftKings and Fanduel have become.

Cathy Beeding: We talk about how there is so much money, but there was so much money in venture capital, or at least there was. Behind Fanduel, behind DraftKings. It is mostly migrated away from that. You are now looking at E-Sports and stuff like that. So that was the money that was in DFS. And again, you see a lot of bet volume, but the bet volume controlled by a small population of people. Unless you are really good at it, you should just instead give me your money. You have the same odds of getting it back. So, this small group of people use algorithms and data to pick the teams and know the stats. You can't beat them. And this is why the DFS business model is not sustainable.

Mike Bruffey: And there was some efforts in the legislative review to put restrictions on the categories of players. So, you are an amateur DFS player, versus playing an expert player like Cathy was talking about. It is just these think tanks and professionals who crafted algorithms. Before all this, people did fairly well. People were having fun and watching the games. Then one day people stopped winning. It was the think tanks that took all the winnings and now you hardly have a shot at all.

Professor Rychlak: Then the argument is doesn't that explain the skill portion of this. I know it is a complex topic because of the computerization of the algorithm.

Cathy Beeding: This is a topic that we could have a day long panel about.

Mike Bruffey: I do want to say one thing about that. If you play fantasy sports over a season, that is so much different than daily fantasy sports. You know, to me that is real skill. The season based because now you go in and make your picks. Going in and making selections each week.

Professor Rychlak: I heard on the radio today our (Mississippi) governor now has come out in favor in the lottery. This could have an impact to sports betting as well.

F. What impact does the lottery have with states and sports betting?

Cathy Beeding: I will go in about the history of the lottery in Mississippi. So, there was the lottery prohibition in the constitution of Mississippi. Then it went on to the electorate, and the electorate voted to repeal the prohibition. So, the thing is just by saying that the lottery is prohibitive by the constitution, does not authorize the lottery. There actually has to be enabling the legislation and many steps involved with details that takes legislative action. Whereas the electorate voted to repeal that part of the constitution, the guys we send to Jackson think about it a bit differently. They represent specific jurisdictions within the state, and what they hear from their constituents is the only thing they hear. They may have some more vocal people within that group that are anti-lottery. They take that idea to Jackson. The lottery is couched as gaming. They are all anti-gaming. So, you have to get passed that to get the legislation moving and going. The fact that the governor came out for it, that is great. In Mississippi, the most powerful man in state government is not the governor. So, you have to get the Speaker of the House and Lieutenant Governor signed on as well before we have lottery in Mississippi. At this point, they are both staunchly anti-lottery.

Mike Bruffey: I find it very ironic that our governor has now come out in favor of the lottery. Our association used to be called the Mississippi Casino Operators Association. And after Governor Barber term was up, and Governor Bryant came in, we knew he

was anti-gaming. He wouldn't take a donation from anyone connecting with gaming, would not meet with us. We realized that in order to work with our governor on our issues we would have to partner with others like tourism and travel. So, we changed our name to the Mississippi Gaming and Hospitality Association. We did a white paper for the governor. It was educational. He has come a long way. In fact, on January 25th when we released this rollout, we had a legislator's reception. Governor and Lieutenant Governor were both there getting pictures with people. So, I think we have gone a long way in this.

David Purdum: So, wait, you just changed your name to hospitality, and he was cool with that?

Mike Bruffey: Well, he didn't realize it. (Laughter) It was very subtle. But, yea that was our plan.

G. Brian, how much harder is it to manage an athletic department, especially in a state like Nevada where there is legal betting in college sports compared to other places you have been?

Brian Barrio: So, that is a great question, and something I have asked myself a lot when thinking about coming to Nevada. I think it has been less of an issue than I anticipated. You know, the whole theme here today is about where illicit gambling is today. Student athletes have the opportunity to gamble on sports whether it is legal or not. Our student athletes are less likely to walk into the Silver Legacy and place a bet on an NFL than they are to go back to the dorm room and bet on the computer. We know from studies that about 30% of student athletes wager on sports, and I would wager it is even higher than that. My concern as an administrator is always the student's wellbeing, and I do not know if legalized sports betting has an impact on their wellbeing. I do know that when I go to the basketball games and sit away from the administrators, I hear the talk around the crowd. Even as there is a casino a mile away, maybe 25% of those people have bet on this game which is really, really different than it is at other places. The risk factor may be a little bit higher for point shaving in that aspect, but I also think there are ways to monitor that legally. It is probably harder to monitor point shaving scandals with offshore accounts than it is when it is legalized or happening in Las Vegas. I am not

convinced that is a higher risk environment than it is anywhere else.

Erik Balsbaugh: Yea, Sully at the bar around the corner, is not reporting to BetGenius what is happening with the action. PASPA was created before there was internet. Bill Clinton's 1992 campaign did not even have a website. So, we actually have the technology to monitor what is happening real time. If you talk to BetGenius who just gave a presentation to the MLB, there have been examples of soccer matches where something fishy was happening and they actually got the match called. They cancelled the match because the lines were not moving as they should. So, the best way to protect the integrity is not through Sully at the bar, it is through a rigorous, analytical system which is demonstrable and provable.

David Purdum: I want to add as you talk about the wellbeing of student-athletes, the legalization would only help with the wellbeing of the student. You may not see a point spread movement offshore, but you also will not find the guy who has a compulsive behavior. If this guy is betting much more than his means, the offshore book is not going to cut him off, they are going to welcome and encourage this behavior. Problem gambling is a concern and always will be, but legalization is only going to help protect these people and regulate them better than before. In fact, the National Council of Problem Gamblers does not oppose legalized sports betting. Before most of the people that come to them, come to them with a problem about consumer protection. Also, most sports book used these days is based on credit. You know, you get to play until you are up or down \$1,000 or whatever it is. Well for a college kid, he blows through that and does not have it. He panics immediately when he does not have that money. So, with a lot of those things and eliminating them will come from legalizing and regulation will only help protect and benefit the student athlete.

Brian Barrio: I think the point about betting on credit is very important in regards to student athletes. Traditionally, and having gone through the situation at BC 20 years ago, you didn't have to show any means to place those bets. When you didn't have that money on the back half is when you had some accidents happen. Same thing with the online betting, there are all kinds of things you can do with your credit card when you gamble online. I think it is

little bit harder to gamble at the casino. You obviously are not able to walk into the sportsbook saying you are putting \$500 on this game. That is just not the way it works.

Cathy Beeding: Also, when you are in the casino environment, you need to look at the age of the authorized player. Right now, there is a bill in Nevada to reduce that age to 18. There is a real, critical look at that. Our industry struggles with millennial engagement and figuring out to get you guys engaged to get to the casinos. But, I really do not think that lowering the age to 18 is really the wisest choice. All you are doing is exposing these younger folks to dangerous circumstances that are out of control especially with credit. At 21, these oversight and regulation is better for possible sports bettors, and we can find better ways to engage this crowd.

Brian Barrio: Yea, that would be terrifying for the student administrators stand point. I meant to say this earlier, but the thing that worries me most in Reno is the student-athlete that are 21 taking his stipend check and going down to play blackjack or poker with it. Because as much as we educate them, there is no NCAA rule against that. And we don't prohibit them from going to the casino because of all of the personal freedom problems that may cause. Plus, we like to stay friendly with the state of Nevada. But, yea, that worries me as much as anything.

Professor Rychlak: I know that electronic gambling is more addictive, but that may not translate because of the instant gratification effect.

David Purdum: You're spot on. Less than one percent of the calls that come into the Nevada Problem Hotline identify sports betting as their primary problem. It does not have the instant gratification. Video poker, lottery, slots, scratch-off tickets are by far more problematic. And maybe we should be encouraging methods like sports betting that may be better than these other forms of gambling. When you get these people to stand up, and say we have this conflict and give more people the chance to gamble getting addicting. Sports gambling might be less.

Erik Balsbaugh: There's always that very small part of the population that has a problem with gaming. The gaming industry spends millions of dollars to address the issue. It is not good for industry to have people run through all their money having issues.

We do not want that to happen. So that is a very small, small percentage of people coming in. We want to make sure people come back and enjoy the other offerings that are there. The entertainment offerings, the hotels, everything. In Vegas, gaming has become less and less of what accounts for revenue for these companies. MGM says the gaming is only like 28% of their total revenue. A lot of it is the hotels, the entertainment, the thousands of Cirque Du Soleil shows you see down there. I mean you can have a lot of fun with your family and never play blackjack. So, the industry wants people coming back, they want people having fun. I mean that is what gaming is, it is supposed to be fun. When it is not fun for someone, and they take it too far across the line, you want to make sure they have every resource possible to get help.

Cathy Beeding: Yea I agree, from the operators perspective, our target demographic is not the compulsive gambler. They have a very short shelf life, and our business model is built on loyalty and return visits. So, set a reasonable budget and stick with it. That is our mantra, that is what we want from our guests. We want to provide them with a good entertainment option. And we want them to leave if they have exceeded that budget. Also, they then should not come back unless they are able to live within the restraints of that budget.

Erik Balbaugh: Yea, I forget the exact number, but I think it is like above ninety percent of people who go into a casino, set a budget of \$200 and stick to it.

David Purdum: The gambling addiction piqued at 2.7% in the United States in the late nineties. It has declined ever since even as gambling has been expanding across the nation. It is now right around 2%.

Erik Balsbaugh: Yea, exactly. If you include horse racing and lotteries, gaming is in 48 states now. I mean that is an explosive growth. We are a national industry. I mean we support 1.7 million jobs across this country. The majority of these jobs are great jobs. They pay well. The maid or the cleaner is making more than other industries. These are great jobs where you can support a family on. We are really proud of that, and even with the expansion, the problem gaming has not. The corollary has not been there.

Mike Bruffey: So, one of our responsibilities with the association is responsibilities is responsible gaming. Larry Gregory,

our executive director, was the head of the Mississippi Gaming Commission for 16 years. And being with in-house counsel, we were on the compliance side, and he was on the enforcement side. He and I do a responsible gaming training program together. And it is kind of cool that we play off one another. You know, what we do is bring in the Gaming Commission. Dorothy, from the Commission meets with these problem gamblers. When we first did our presentation, we used to say these are the behaviors of people with problem gambling. And then we would list them, and next asked Dorothy to tell a few stories. Well she talked on for 20 minutes. There is nothing quite like hearing someone talk about who a problem gambler is. It is not anything to take lightly either. Even as it is a small percentage, the impact it has on those people's lives is pretty dramatic. And, it can start in college. There is something by the National Center for Responsible Gaming called collegegambling.org. And you guys, and universities should really check it out because it talks about steering away from these things. And while it sometime seems to be quite innocent, it can lead to bigger issues. As Erik mentioned, if you look at our model and the model of Las Vegas, non-gaming revenue has far surpassed gaming revenue. The idea is yes, we have gaming, but this industry is not just about gaming. It is about providing you guys, millennials, with what you want. And what you want are night clubs, you want to interact, you want skill-based gaming. MGM just came out with Frogger and that is geared to what the younger generation wants. That it is entertainment based. So that is what I would say about responsible gaming, and we take it very seriously.

Cathy Beeding: I know when I was preparing for this I read a stat that said every college and university have a policy on alcohol use and only 22 percent of college and universities have a policy on gambling. So, I would urge you guys to take a look at that here at Ole Miss. Maybe you already have something within that 22 percent, but maybe you don't. And that is something that should be looked at because it is seen that problem and compulsive behavior starts at an early age. And you guys are in that category of folks.

III. CLOSING REMARKS FROM THE PANELISTS

Professor Rychlak: We have a few minutes left. I hate when I am on a panel and do not get to say something I prepped before,

so I want to give each panelist a chance to bring up something they wanted but have not gotten to. Or if you want to ask one another a question, I want to give you some time to do that.

Mike Bruffey: Well, I'll start. I would say for my parting comment is that Mississippi is a unique position. I hope we get creative and look at sports betting. We have 28 casinos operating in our state, and I do know if y'all realize or not, but we lost about 40 percent of our visitors from Arkansas and Tennessee when the rivers flooded in May 2011. And there was no federal relief like there was after (Hurricane) Katrina. There were no volunteers coming in like there was on the Gulf Coast. I mean those folks are suffering. So, I see sports betting as that one hook, that unique thing, to bring people back to Mississippi. I am passionate about this topic because I do see it for that reason. If there is a way we can legalize this in Mississippi I want to find it.

David Purdum: So, most everyone always wants to know how long before it happens. The most common estimate is 3-5 years. I feel like I have been saying that for about two years now, so we are getting closer. President Trump will most likely have a bill on his desk at some point. We will see how long it will take to get there, or what happens before that. The leagues right now are where they are. Major League Baseball is getting closer to where the NBA is on the situation. Rob Manfred was on ESPN the other day talking about it. The NFL and NCAA way on the other side that are not very close. They say that they are starting to evolve a little bit, but we will see how far that goes. Three to five years depending on what happens with that New Jersey case that is in the Supreme Court right now.

Cathy Beeding: I was speaking at this ICE in London a few weeks ago about sports betting. At the beginning of the panel, the moderator did this interactive thing with your phone called Slinga. She asked the audience how long they thought sports betting would be legalized in the United States and PASPA overturned. At the beginning of the panel, the audience said it was going to be one year. Then at the end of the panel, she asked the same question and the results changed to five years. It is almost like the more you know, the more pessimistic you become. Don't take that as your lesson because I am with Mike, let's find a way. We do not have to necessarily have to follow New Jersey's path, maybe there is

another way for Mississippi, maybe there is another way for other states in the nation. We just need to keep chipping away at it. And for those of you who interested in finding your way into sports law or sports wagering law, I encourage you to find a unique path in.

Erik Balsbaugh: I agree with the timeline of three to five years and is just because Congress moves so slow in where the docket is. I am really confident that we will be able to get this done. I feel more confident each and every day because of the people we talk to and the gathering of public opinion research. So, what I would say is that if you are interested in this, join us. We have a website with a lot of our big ticket information, and it is going to turn into a full blown campaign effort and website. So, we are going to need engagement from people to offer their opinions and sharing things. So, it is sportsbettinginamerica.com. Go in, give us your email, I promise we won't email you more than once every other week. It's good stuff, it's all great stuff and I am a great writer, so I'll make you laugh. But, in order to win this, I need you help and I need your engagement. It will make a difference if every law student and smart person says something about this and helps us talk to every member of Congress. We can win this with your help, you will not regret giving us your email.

Brian Barrio: This has been very interesting for me because I am not usually exposed to this point of view very often in the field that I am in. I think the President of the University of Nevada would be furious at me if I said I support legalized sports gambling nationally, and I do not think I am quite there yet. However, I do share some of the concerns raised from the black market. You know, any black market. We have a created a black market in the NCAA where student-athletes cannot get paid, so there is a market in which kids do get paid under the table. So, whenever you create that black market for any good or service, there are a number of problems that come with it. We see it with gaming, we see it with college athletics. There is certainly a case to be made that the current status quo is not solving those problems, so it has been a very interesting afternoon for me.

Professor Rychlak: That will conclude our panel. Thank you all so much for being here today.

