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# LEVELING THE PLAYING FIELD: INJURY REPORTS, COLLEGE FOOTBALL, AND MEDICAL PRIVACY OF PLAYERS

## ABSTRACT

*In May 2018, the Supreme Court in *Murphy v. National Collegiate Athletic Association* declared the Professional and Amateur Sports Protection Act unconstitutional. The Act prohibited states from authorizing or sponsoring sports betting operations, which effectively made sports betting illegal without actually declaring it illegal, until the Court struck down the Act in *Murphy*. This put sports betting back in the national spotlight, as states are now free to regulate and operate sports betting as they see fit.*

*This Note examines a side effect of the *Murphy* decision; legal, state-sponsored gambling means certain controls need to be implemented to ensure both gaming and sporting integrity. A longtime control used in professional sports is an injury report, which is a public disclosure saying whether a given player is injured and is available to play in the upcoming game. College sports have long avoided injury reports on a national scale due to their close relation to sports betting, but the emergence of legal sports betting exacerbates the need for transparency and limited insider information. The inherent problem with increased transparency through injury reports is the infringement upon a player's right to medical privacy, something that is further heightened in the case of unpaid college athletes.*

*This Note examines the need for integrity and transparency in sports betting, along with the benefits of injury reports in college athletics, specifically with a focus on college football. These benefits must be balanced with the medical privacy rights of the players, and there are important elements that need to be found in any injury-reporting system to strike that appropriate balance.*

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## I. INTRODUCTION

For nearly as long as sporting contests have been formalized and popular events, people have gambled on their outcomes.<sup>1</sup> People who love to watch sports enjoy having something to root for even when their favorite team is not playing, and putting money down provides a reason to watch and cheer when the particular game might not carry any inherent rooting interest for fans. Research has shown gambling wins activate the reward circuit in the brain in the same way that food, sex, and drugs, such as cocaine, activate that area, thereby encouraging further gambling.<sup>2</sup> However, research also shows that near-wins, which is a regular loss but just where the gambler was seemingly close to winning (an outcome very common in sports with the number of buzzer beaters and come-from-behind victories), are often the biggest reason for what keeps people gambling because of the illusion the gambler is “due” for a win next time—even in people who do not consider themselves gamblers or engage in gambling with any regularity.<sup>3</sup> The sort of risk-taking behavior seen in gambling is a related trait shared by humans and other animals.<sup>4</sup> The rush that comes with a bigger reward for less work, even

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1. See John Milton, *History of Sports Betting*, BIG ON SPORTS (July 19, 2017), <https://www.bigonsports.com/history-of-sports-betting/> [https://perma.cc/6TND-PBZP] (dating sports betting back to the Ancient Greek Olympics and Ancient Roman gladiator contests).

2. Luke Clark, *The Psychology of Gambling*, U. CAMBRIDGE (Apr. 1, 2007), <https://www.cam.ac.uk/research/news/the-psychology-of-gambling> [https://perma.cc/BM88-T9KG].

3. *Id.*

4. Thomas R. Zentall & Jennifer R. Laude, *Do Pigeons Gamble? I Wouldn't Bet Against It*, CURRENT DIRECTIONS PSYCHOL. SCI., Aug. 5, 2013, at 271, 271. The study done here involved pigeons and two alternatives: one that gave three pellets of food every selection, representing steady income, and one that gave ten pellets of food randomly at a 20 percent rate, representing the gamble. Despite the second alternative giving an average of two pellets per selection and the first alternative giving three pellets

though it is less regular than an income, keeps people excited and expecting that same result on the next try.<sup>5</sup> As a result, gambling has a strong hold in the United States, and it permeates into other aspects of everyday popular culture and life.<sup>6</sup>

A combination of the United States' love for sports and the chemical enjoyment of gambling and risk has led to sports gambling becoming a massive industry, with \$4.9 billion being wagered in Nevada in 2017 alone.<sup>7</sup> Prior to May 2018, Nevada had been able to run what amounted to a monopoly on sports betting in the United States.<sup>8</sup> This was a result of the grandfather clause found in the Professional and Amateur Sports Protection Act (PASPA), enacted in 1992, that allowed a state such as Nevada—which already had a sports betting system in place—to continue its sports betting operations but disallowed all other states to sponsor a new sports betting system.<sup>9</sup> PASPA was enacted due to the concerns over widespread gambling corrupting sporting contests and sending the undesirable message that sports were not just about healthy competition.<sup>10</sup> While this moralist argument enjoyed a large audience in the early 1990s, PASPA as a statute was subject to strict criticism, mainly because it did not actually make sports betting illegal; it only outlawed states from sponsoring or authorizing sports betting systems.<sup>11</sup>

The wording of PASPA—the part about how no state may sponsor sports betting instead of simply declaring it illegal—led New Jersey to challenge the constitutionality of PASPA in *Murphy v. National Collegiate Athletic Association*.<sup>12</sup> In 2011, New Jersey citizens approved an amendment to the state constitution making it lawful for the state to authorize sports

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each time, about 86 percent of pigeons chose to select the suboptimal outcome and gamble. *Id.*

5. *See id.* at 275.

6. Lauren Cahn, *13 Bizarre Things You Can (Legally) Bet On*, READER'S DIG., <https://www.rd.com/culture/weird-things-to-bet-on/> [<https://perma.cc/NL4U-X9FP>].

7. *A Look Inside the Numbers of Sports Betting in the U.S. and Overseas*, SPORTS BUS. J. (Apr. 16, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/04/16/World-Congress-of-Sports/Research.aspx> [<https://perma.cc/23PH-MM5X>].

8. *See* Milton, *supra* note 1.

9. 28 U.S.C. §§ 3701–3704 (2018), *declared unconstitutional* by *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

10. ANTHONY CABOT & KEITH MILLER, *SPORTS WAGERING IN AMERICA: POLICIES, ECONOMICS, AND REGULATION* 56–57 (2018).

11. *Id.* at 58; 28 U.S.C. § 3702.

12. *Murphy*, 138 S. Ct. at 1471.

betting, and in 2012, the state did just that.<sup>13</sup> This action led to an attack by the major professional sports leagues and the National Collegiate Athletic Association (NCAA), who brought an action in federal court seeking an injunction under PASPA.<sup>14</sup> This set up the legal battle that did not end until the Supreme Court's decision in May 2018. In a surprising 6–3 decision, the Supreme Court held PASPA's provision banning states from authorizing sports betting schemes violated the anticommandeering doctrine,<sup>15</sup> finding, "That provision unequivocally dictates what a state legislature may and may not do."<sup>16</sup> With concerns about federalism at the forefront of the majority opinion, PASPA as a whole was declared not severable and unconstitutional because "[a] more direct affront to state sovereignty is not easy to imagine."<sup>17</sup>

With PASPA now out of the way, states are free to legislate as they desire when it comes to sports betting within their own state.<sup>18</sup> The decision made in *Murphy* has sparked a national discussion about sports betting, and most states seem to be on track to establish sports betting schemes.<sup>19</sup> While sports betting seems like an inevitability, the effect this will have on the sports themselves is still unknown, especially at the collegiate level.

College athletes are not paid to play<sup>20</sup> their sport, yet people will now legally be allowed to enter a casino (or in some states merely log into an app on their phone)<sup>21</sup> and wager on the outcomes of college sports.<sup>22</sup> Due to this lack of payment for participation in sports, college athletes are especially susceptible to corruption and bribes, as seen by the long history of gambling-

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13. *Id.*

14. *Id.*

15. The anticommandeering doctrine says Congress cannot commandeer the legislative process of the state by directly compelling it to enact and enforce a federal regulatory program. *New York v. United States*, 505 U.S. 144, 161 (1992).

16. *Murphy*, 138 S. Ct. at 1478.

17. *Id.*

18. *See id.* at 1484–85.

19. *See* Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN, [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states) [<https://perma.cc/7R4F-CEKA>].

20. The merits of the amateur system and whether collegiate student-athletes should be paid for either their play or their names, images, and likenesses is outside the scope of this Note. The fact that players are not paid beyond their scholarships will be the extent of the discussion surrounding amateur athletics.

21. *See, e.g.*, IOWA CODE § 99F.9(3A)(b) (2019).

22. *See generally Murphy*, 138 S. Ct. 1461.

related scandals in college athletics.<sup>23</sup> While this overall fear of corruption is something to consider, there is a more specific issue inside of this fear: whether the need for equal information among gamblers requires an injury report in college athletics, football specifically. An injury report is simply a requirement on teams to disclose the injury status and availability for games of all of the teams' players; the report contains information on whether someone is injured, what the injury is, and how likely that player is to play in an upcoming game.<sup>24</sup> Injury reports have long been used in professional sports,<sup>25</sup> but the medical-privacy concerns are far greater for an uncompensated college athlete versus a professional athlete under contract. The normalcy of injury reports in professional sports has made their introduction to college sports seem like an inevitability, especially now with the increased concerns about transparency due to legal sports gambling.<sup>26</sup> In all likelihood, college football will have a mandatory injury reporting system, possibly as soon as the 2020–2021 season.<sup>27</sup> How will all of the interested parties (states, casinos, the NCAA, universities, and collegiate athletic conferences) handle this new issue?

This Note addresses the current state of the sports gambling world post-*Murphy* and gives a brief introduction into how sports gambling works in Part II, examines why integrity and transparency matter and are needed for a state-sponsored sports gambling system in Part III, explains the basic protections afforded to a college football player under both the Health Insurance Portability and Accountability Act (HIPAA) and the Family Education Rights and Privacy Act (FERPA) in Part IV, and identifies important elements needed in a standardized injury-reporting system in Part V.

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23. See generally ALBERT J. FIGONE, CHEATING THE SPREAD: GAMBLERS, POINT SHAVERS, AND GAME FIXERS IN COLLEGE FOOTBALL AND BASKETBALL (2012) (containing a detailed history of the instances of gambling scandals in college athletics).

24. Michael K. McChrystal, *No Hiding the Ball: Medical Privacy and Pro Sports*, 25 MARQ. SPORTS L. REV. 163, 175 (2014).

25. See *id.* at 166.

26. Dennis Dodd, *Standardized Injury Reports Face Hurdles as College Football Adapts to New Sports Gambling Laws*, CBS SPORTS (Feb. 22, 2019), <https://www.cbssports.com/college-football/news/standardized-injury-reports-face-hurdles-as-college-football-adapts-to-new-sports-gambling-laws/>.

27. *Id.*

## II. THE WORLD OF SPORTS BETTING POST-MURPHY

For many years outside of Nevada, sports betting operated in the shadows, primarily through offshore gambling websites or a person in the local neighborhood willing to play the role of bookkeeper.<sup>28</sup> This relative obscurity has led to many in the general public—even among those who consider themselves sports fans—never knowing or being exposed to the machinations and key terms used in sports gambling.<sup>29</sup> After the Court's decision in *Murphy*, sports betting is now playing a prominent role in viewing and promoting sporting events.<sup>30</sup> Understanding how sports betting works and knowing the definitions of some of its key terms will not only help in understanding this Note but will also assist in participating in the general discourse of sports, as gambling's role and visibility is only set to increase as more states legalize sports betting.<sup>31</sup>

### A. How Sports Betting Works and Defining Important Terms

In order to discuss the ancillary impact of sports betting, one must first understand some basic betting vocabulary and how betting actually works. In sports betting in the United States, the most common form is a fixed-odds system.<sup>32</sup> Legally, a fixed-odds betting system operates as a contract; a bettor comes into a sportsbook (the entity or individual processing the bets and paying the winners) and makes a bet with specific odds containing a stated, known amount for the bettor to win or lose, and the amount won or lost by the bettor is honored according to those terms.<sup>33</sup> The contract between the sportsbook and the bettor is a promise based on a future contingent event

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28. See CABOT & MILLER, *supra* note 10, at 53–54.

29. See Rick Maese, *For Al Michaels, NFL Gambling References No Longer Require a Wink*, WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/news/sports/wp/2018/08/29/for-al-michaels-nfl-gambling-references-no-longer-require-a-wink/?utm\\_term=.c84092b7b122](https://www.washingtonpost.com/news/sports/wp/2018/08/29/for-al-michaels-nfl-gambling-references-no-longer-require-a-wink/?utm_term=.c84092b7b122) [https://perma.cc/LG7F-GJXX] (saying sports broadcasters were contractually banned from mentioning gambling).

30. See *U.S. Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP. (Mar. 28, 2019), <https://www.legalsportsreport.com/sports-betting-deals/> [https://perma.cc/9BGU-YCAE].

31. See Rodenberg, *supra* note 19.

32. CABOT & MILLER, *supra* note 10, at 5.

33. *Id.* This is distinguishable from the other common betting system used in the United States—parimutuel wagering—for horse racing. A parimutuel wager is subject to change until the start of the sporting event or race and is based on wagers made by others; a person's odds and amount to win are not “locked in” until the start of the event when bets are no longer accepted. *Id.*

(the outcome of whatever sporting event wagered on), and the sportsbook's obligation to pay the bettor depends on the outcome of that event, while the payment terms were fixed at the time the bettor placed the bet.<sup>34</sup>

With this basic understanding of the process, it is now important to understand what people bet on and what types of bets they place. In the United States, football is the most common sport that Americans bet on, representing about 40 percent of all sports wagering in Nevada sportsbooks.<sup>35</sup> The other 60 percent is made up of all other sports on which the sportsbook decides to take action, but even if a person is not interested in sports, the conversation of betting and its vocabulary will soon expand into areas such as politics and pop culture, as evidenced by some of the available bets in the United Kingdom.<sup>36</sup> The terms discussed next in this Part will be sports-related, but some terms could soon enter the national discourse over almost any topic.

In sports betting, two of the most common bets within the fixed-odds system discussed earlier are money-line bets and point-spread bets.<sup>37</sup> Explaining these bets is easier through examples and hypotheticals. Say a person sees an upcoming game and wants to place a bet on team *X* to win the game outright. This is an example of a situation for a money-line wager.<sup>38</sup> Money-line wagers are most commonly used on particular future events, such as the outcome of a single game or a future bet made at the beginning of the season on which team will win the championship.<sup>39</sup> *Money line* is the term used to describe how the favorite is noted.<sup>40</sup> In the hypothetical, if team *X* is listed at the sportsbook as -200, team *X* is believed to be a 1-to-2 favorite to win the game, so a person that bets \$100 on team *X* to win stands to win

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34. *Id.*

35. *Id.* at 4–5. Of that 40 percent, it is unknown exactly how much is bet on NCAA football, the subject of this Note, but it is estimated to be slightly less than one-half of the total football bets.

36. Amy Browne, *11 Strange Things You Can Bet on Happening in 2017*, LIVERPOOL ECHO (Dec. 31, 2016), <https://www.liverpoolecho.co.uk/news/11-things-you-can-bet-12389237> [<https://perma.cc/F45J-57BL>] (showing the odds for President Donald Trump quitting the Presidency and Paul McCartney announcing another child, among others). Whether U.S. sportsbooks will ever be allowed to take bets on events outside of sports is unclear (and unlikely), but that will not keep people from using betting terms to describe presidential candidates as three-to-one favorites, for example.

37. CABOT & MILLER, *supra* note 10, at 5.

38. *Id.* at 6.

39. *Id.* at 5–6.

40. *Id.* at 6.

\$150 if *X* does win (the \$100 wager plus \$50 in winnings).<sup>41</sup> Contrast that situation with team *X* being listed as +200, meaning team *X* is a 2-to-1 underdog to win the game, so a \$100 bet on team *X* to win pays the bettor a total of \$300 if *X* wins (the \$100 wager plus \$200 in winnings).<sup>42</sup> The minus sign is used to indicate how much money a bettor needs to wager in order to get winnings of \$100, while the plus sign tells the bettor how much money a \$100 bet will return in winnings.<sup>43</sup> The sportsbook uses this system to encourage betting on both sides; otherwise there would not be much incentive to ever bet on the underdog to win outright.<sup>44</sup> The money-line structure is used in all types of betting as the method for a bettor to calculate the potential winnings.<sup>45</sup>

The most popular form of betting for football games is point-spread wagering.<sup>46</sup> It was developed as a way to encourage wagers on both sides in lopsided games because the advantages of a money line do not materialize when bettors view the underdog as having a nearly nonexistent chance of winning the game outright.<sup>47</sup> The point spread is a figure set by the sportsbook that attempts to predict the margin of victory for the game.<sup>48</sup> If the sportsbook believes team *X* will beat team *Y* by six points, team *X* is noted as -6, and team *Y* is noted as +6, using the same plus-and-minus system as money lines to identify favorites.<sup>49</sup> The six-point margin is called the spread.<sup>50</sup> Because the sportsbook is setting a scenario it believes is equally likely to occur, the money-line payouts are typically set as -110 on both sides.<sup>51</sup> So, in the six-point spread example above with teams *X* and *Y*, if team *X* wins by seven points or more, the bettors who placed their wager on team *X* will win. If team *Y* loses the game by five points or less or wins the game outright, then the bettors who bet on team *Y* will win. If the game ends with

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41. *See id.*

42. *See id.* at 5–6.

43. Allen Moody, *How a Moneyline Works in Sports Betting*, LIVEABOUT (Sept. 11, 2018), <https://www.liveabout.com/sports-betting-understanding-money-lines-3116852> [<https://perma.cc/KP28-QB4F>].

44. *See id.*

45. *See* CABOT & MILLER, *supra* note 10, at 5–6.

46. *Id.* at 10.

47. *Id.*

48. *What Is Point Spread Betting?*, THE LINES, <https://www.thelines.com/betting/point-spread/> [<https://perma.cc/LY9Y-BGZD>].

49. *See id.*

50. CABOT & MILLER, *supra* note 10, at 10.

51. *What Is Point Spread Betting?*, *supra* note 48.



team *X* winning by exactly six points, then this is a “push,” and the sportsbook will refund all wagers placed on either side.<sup>52</sup> One can see how this makes betting on the underdog much more attractive because that team no longer has to win outright—just lose by a certain number or less.<sup>53</sup>

One might notice the sportsbook setting both sides of the bet at -110 leads to the sportsbook making more money than just the losing bets, which is called the commission or the vig.<sup>54</sup> While how the sportsbook makes its profits and how commissions work is outside the scope of this Note,<sup>55</sup> it is enough to know this commission system exists as the primary way the sportsbook makes money.<sup>56</sup> One fact that is vitally important to understand is that all of these numbers involved in sports betting—the money line and the point spread—are subject to change at any time before the start of the sports contest, based on a number of factors.<sup>57</sup> However, as discussed earlier, once a bettor places the bet, the bettor is entered into a contract with the sportsbook, and the sportsbook must honor the terms at the time of bet placement.<sup>58</sup> Say on Tuesday, team *Y* is +250 to defeat team *X*, and a bettor places a money-line wager on *Y* to win the game. Now imagine that team *X*’s star quarterback has a nagging injury that is undisclosed to the public but known to the bettor because of a friendship with one of the athletic trainers. On Thursday, the star quarterback and his coach decide the quarterback will not play in this game due to injury, and it is then released to the public. As a result, team *Y* is no longer +250 to win the game, and team *Y* is actually now favored at -105. The bettor who placed a wager on team *Y* on Tuesday because of the inside information about the quarterback now enjoys the benefit of the +250 bet, which is cashed in once team *Y* ends up winning the game on Saturday, because the contract was locked in on Tuesday.

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52. *See id.*

53. CABOT & MILLER, *supra* note 10, at 10.

54. *Id.* at 11–12.

55. For more detail, see *id.* at 5–17.

56. *See id.* at 11–12.

57. *See What Is Point Spread Betting?*, *supra* note 48 (identifying the goal as getting equal money on both sides, so any development making people bet overwhelmingly on one side will lead the sportsbook to change the spread or the money line).

58. CABOT & MILLER, *supra* note 10, at 5.

B. *The Nation's Reaction to the Court's Decision in Murphy*

Following the Court's decision in *Murphy*, states are free to legislate sports betting as they see fit.<sup>59</sup> Response to the decision at the state government level has been positive—12 states (including Iowa) have already joined Nevada in legalizing and operating a full-scale sports betting scheme since the Court's decision in May 2018 at the time of this Note in the summer of 2019.<sup>60</sup> Following close behind are 6 other jurisdictions that have passed a bill to legalize sports betting but have yet to implement the system.<sup>61</sup> A study done around the time of the Court's decision estimated 32 states will likely have legalized sports betting within 5 years of the decision.<sup>62</sup> Iowa recently passed its own legislation legalizing sports betting,<sup>63</sup> and the first legal bets on sports were placed in this state on August 15, 2019.<sup>64</sup> Iowa decided to set its tax rate on revenues from sports betting at 6.75 percent, mirroring the rate Nevada has used.<sup>65</sup> This is not a high tax rate, and sports betting is not expected to be a sudden influx of extra cash for Iowa.<sup>66</sup> Iowa also allows casinos to create an app for people in Iowa to place bets from their mobile device.<sup>67</sup> Currently, a person is required to create the mobile account while physically present at a casino, but that requirement will eventually go away.<sup>68</sup> With this legislation, Iowa is now among the states at the forefront of the U.S. sports betting market, albeit in a much smaller role than some of the states with larger populations.

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59. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

60. Rodenberg, *supra* note 19. Those states are New Jersey, Delaware, Mississippi, New Mexico, West Virginia, Rhode Island, Pennsylvania, Oregon, Iowa, Indiana, Arkansas, and New York. *Id.*

61. *Id.* Those six states are Montana, Illinois, New Hampshire, Tennessee, North Carolina, and Washington D.C. *Id.*

62. Cork Gaines & Shayanne Gal, *Here Are the States Where Sports Betting Is Expected to Be Legal Within 5 Years*, BUS. INSIDER (May 19, 2018), <https://www.businessinsider.com/states-legalize-sports-betting-gambling-2018-5> [<https://perma.cc/3BNT-CSD2>].

63. IOWA CODE § 99F.3 (2019).

64. Danny Lawhon, *Iowa Sports Betting: What to Do Now That It's Legal to Wager*, DES MOINES REG. (July 30, 2019), <https://www.desmoinesregister.com/story/sports/2019/07/30/iowa-sport-betting-start-date-legal-sports-gambling-app-ncaa-college-football-spread-rule-how-to-bet/1857134001/> [<https://perma.cc/2394-LX3E>].

65. IOWA CODE § 99F.11(4)(a).

66. Lawhon, *supra* note 64.

67. See IOWA CODE § 99F.9(3A)(b).

68. *Id.* § 99F.9(3A)(a)(1).

While *Murphy* allows states to legislate sports betting, nothing about the decision precludes the federal government from preempting and regulating sports betting on a national scale or even making it illegal.<sup>69</sup> There is some support for this option of regulation by the federal government, especially among the major professional leagues where their lobbying efforts can be better targeted at one Congress instead of at multiple, individual states.<sup>70</sup> On September 27, 2018, the House Judiciary Committee on Crime held a hearing on sports betting and indicated a desire to legislate in some way in the area of sports betting, but congressional action could range widely from implementing its own regulatory scheme to beefing up attacks on illegal offshore-gambling sites.<sup>71</sup> While action from Congress may or may not occur, states are moving forward, and it is the belief among some members of Congress that Nevada has been regulating sports betting safely and effectively for years, showing states are capable of handling this responsibility.<sup>72</sup>

### III. WHY INTEGRITY IN SPORTS GAMBLING MATTERS

Now that legal sports betting is a choice for states and many states have decided to legalize or are on the verge of legalizing sports gambling, it is important to understand why there is a need for integrity in this area. There is a significant concern for the overall integrity on both the sports side and the gambling side whenever gambling is extended into new areas, but the focus of this Note is on the concerns associated with the abuse of inside information of injuries in college football.<sup>73</sup> The need for integrity in this area can be seen through the history of gambling-related scandals (specifically in college athletics), what the effect on the state is if abuse occurs, and how an injury report could mitigate those concerns.

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69. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

70. Steve Megargee, *NFL Seeks Help from Congress on Sports Gambling Ruling*, ASSOCIATED PRESS (May 14, 2018), <https://www.apnews.com/19b3013ca1c346fc3a59ac9d239e46> [https://perma.cc/LVU8-YJCS].

71. See Eric Ramsey, *Live Blog: Congress Tackles Sports Betting in House Subcommittee Hearing*, LEGAL SPORTS REP. (Sept. 27, 2018, 8:30 PM), <https://www.legalsportsreport.com/24476/congress-sports-betting-live-blog/> [https://perma.cc/Y9RD-3G78].

72. See *id.*

73. For more detail on the various integrity issues in sports gambling, see CABOT & MILLER, *supra* note 10.

*A. Crime, Scandals, and Abuse*

College athletics has a long relationship with crime and corruption entering the fold through sports betting. While this Note addresses the abuse of inside information about injuries, the most common gambling-related scandal in college athletics revolves around manipulating the result to cover the point spread, a practice commonly known as point shaving.<sup>74</sup> Gamblers would often approach players and either bribe them to win or lose by a certain number of points, or the players themselves would be gambling on the game and would influence the score due to their own personal stake.<sup>75</sup> Instances of point shaving date back to 1927, and its peak occurred in the post-World War II time period.<sup>76</sup> This does not mean point shaving has gone anywhere; a report completed in 2006 estimated, based on the incentives for point shaving in games featuring a large spread, college basketball had a *prima facie* case for 6 percent of games with a heavy favorite being corrupted by point shaving.<sup>77</sup> While this Note focuses on the integrity issues surrounding the use of inside information of player injuries, the prevalence of gambling-related scandals in college athletics shows a need for controls in all areas and the proclivity for abuse by college athletes and others involved in college sports.<sup>78</sup>

Looking at more recent history, the threat of gambling-related scandals in college football has fully shifted to the players shaving points as a product of their direct involvement in gambling, not through bribes or other methods.<sup>79</sup> The more recent point-shaving scandals in college football—such as the Northwestern football team being charged with fixing games during the 1994 season,<sup>80</sup> Boston College football during 1996 placing bets against their own team,<sup>81</sup> and Adrian McPherson in 2002, quarterback for Florida State University who risked a potential career in the NFL because of his repeated illegal gambling habits and other crimes to cover his debts<sup>82</sup>—

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74. FIGONE, *supra* note 23, at 5.

75. *Id.*

76. *Id.* at 13.

77. Ryan M. Rodenberg & Anastasios Kaburakis, *Legal and Corruption Issues in Sports Gambling*, 23 J. LEGAL ASPECTS SPORT 8, 28 (2013).

78. *See, e.g.*, FIGONE, *supra* note 23, at 5.

79. *Id.* at 138.

80. *Id.* at 140.

81. *Id.* at 144.

82. *Id.* at 146–47. McPherson was never found to have wagered on Florida State's own games, but a report completed around the same time as his trial by various local

involved this specific problem of football players shaving points in order to win on their own bets or as a way to pay off their own bookies.<sup>83</sup> High-profile college football programs generate millions of dollars each year for their universities.<sup>84</sup> The athletes actually playing the games are not allowed to be paid outside of their scholarships and some incidental expenses, which may play a role in the increase of college athletes gambling on sports.<sup>85</sup> While this hypothesis has not been researched, the examples seen above show an increasing number of players incurring gambling debts and choosing to pay them off by shaving points.<sup>86</sup> These scenarios do not even include the far more likely problems of friends, family, other students, walk-on players, or athletic trainers utilizing information not known to the general public.<sup>87</sup> If the actual players will risk the punishments from shaving points or even losing games on purpose,<sup>88</sup> what is to keep the players or those individuals who are not as involved from selling or abusing inside information about something as small as a strained hamstring?

#### B. How Does Sports Betting Abuse Affect States?

Following the Court's decision to declare PASPA unconstitutional in *Murphy*, states can now regulate sports betting, which means states are also free to tax it.<sup>89</sup> States now have a financial stake in making sure that integrity is kept in sporting events and that casinos are not getting cheated out of

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police departments substantiated the charges against him. *Id.* at 147.

83. *Id.* at 138.

84. Chris Smith, *College Football's Most Valuable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/chris-smith/2018/09/11/college-football's-most-valuable-teams/#3415b44e6c64> [https://perma.cc/T2FK-AR5U].

85. FIGONE, *supra* note 23, at 138.

86. *Id.*

87. Jerry Barca, *Are Bettors About to Get a College Football Injury Report?*, FORBES (July 8, 2018), <https://www.forbes.com/sites/jerrybarca/2018/07/08/are-bettors-about-to-get-a-college-football-injury-report/#6a8f1d5d3f4e> [https://perma.cc/BE2N-NZNX].

88. The risks for a student-athlete found to be shaving points or involved in gambling are varied, encompassing sanctions such as expulsion from the university, a ban from NCAA activities, criminal penalties, and an impacted reputation with (even up to being banned from) the applicable professional sports league. See Mike Singer, *Ranking the 10 Most Shocking Scandals in College Basketball History*, BLEACHER REP. (May 1, 2013), <https://bleacherreport.com/articles/1625497-ranking-the-10-most-shocking-scandals-in-college-basketball-history#slide10> [https://perma.cc/UNP9-4YA8].

89. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1471 (2018).

profits. When a person cheats or abuses inside information in order to win a bet, the sportsbook is not the only entity losing money; the state is also missing out on potential revenue from the taxes it would collect from the sportsbook.<sup>90</sup>

The American Gaming Association has estimated there is a \$150 billion illegal sports betting market in the United States, money from which states currently receive no tax revenue.<sup>91</sup> The 13 states with legal sports betting—Nevada, New Jersey, Delaware, Mississippi, New Mexico, West Virginia, Rhode Island, Pennsylvania, Oregon, Iowa, Indiana, Arkansas, and New York—all have different tax structures on revenue from sports betting, ranging anywhere from 6.75 percent in Nevada up to 51 percent in Rhode Island.<sup>92</sup> Sports betting is not expected to be a cash windfall for states, as revenues from it can be volatile and margins are small.<sup>93</sup> Looking at Nevada in 2017, sports betting revenue roughly totaled \$250 million in the state, but the tax rate was only 6.75 percent, meaning the state only took in around \$17 million from the activity.<sup>94</sup> This represents only .01 percent of the state's overall budget.<sup>95</sup> This may be a small amount, but a state's gaming revenue is often earmarked for important governmental functions, such as public education and infrastructure.<sup>96</sup> These are important public funds, which would be lacking in additional funding if casinos and sportsbooks are not making as much money due to potential corruption and cheating in sports.

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90. Whether the state can collect income tax on the winnings from the individual who won the bet, therefore getting another crack at the winnings, will vary wildly from person to person and state to state. Some states do not collect income tax, sports betting could be a person's profession and could be offset by losses, and a multitude of other tax considerations are outside the scope of this Note. The focus is on the tax revenue generated from the revenues of the sportsbook.

91. Phil Helsel, *Sports Betting Is Now Legal in Several States. Many Others Are Watching from the Sidelines*, NBC NEWS (Aug. 13, 2018), <https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211> [https://perma.cc/7HH9-CK6F].

92. Ryan Prete, *States Cash in on Sports Betting Taxes, More Expected to Play*, BLOOMBERG TAX (Aug. 1, 2018), <https://news.bloombergtax.com/daily-tax-report-state/states-cash-in-on-sports-betting-taxes-more-expected-to-play> [https://perma.cc/WB4F-Y487].

93. *Id.*

94. *Id.*

95. *Id.*

96. See generally *Frequently Asked Questions*, IOWA GAMING ASS'N, <https://www.iowagaming.org/about-us/question.aspx?rid=5> [https://perma.cc/W9ES-GGYD].

### C. How Injury Reports Act as a Control on Corruption

Despite the state's interest in generating revenue from sports betting, crafting laws and implementing an enforcement strategy purely by the state against the use of inside injury information would be difficult.<sup>97</sup> Regulating this sort of behavior requires cooperation between the controlling entity (the NCAA) and the betting providers (the state-owned casinos).<sup>98</sup> As of now, the NCAA, unlike the professional sports leagues, has no mandatory standard injury report.<sup>99</sup> While this means all gamblers are operating in the relative unknown regarding injuries, the lack of any reporting system promotes and incentivizes efforts by gamblers to learn inside information, as people will always be seeking any edge to give them a better chance of winning.<sup>100</sup>

Whether through surveillance, bribery, or coercion, the lack of an injury report leaves players and teams subject to wrongful attempts to gain information.<sup>101</sup> An injury report seeks to level the playing field for all by providing transparency and honesty.<sup>102</sup> College football is unique in that inside information about a player's health is readily available to many different people, many (such as other students on campus) with minimal—if not nonexistent—interest in keeping the information private.<sup>103</sup> With it becoming easier and easier to place legal bets, concerns about transparency should only increase, and an injury report helps mitigate concerns over insiders using information to win at the expense of other gamblers, casinos, and the state.<sup>104</sup> Sports gambling is going to make some money for the state, and the parties involved should be concerned with promoting integrity and fairness as much as they can.<sup>105</sup>

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97. See CABOT & MILLER, *supra* note 10, at 185.

98. *Id.*

99. Barca, *supra* note 87.

100. *See id.*

101. McChrystal, *supra* note 24, at 180.

102. Barca, *supra* note 87.

103. *Id.* (outlining how walk-on players with no scholarship assistance from the school, classmates, neighbors, student managers, student trainers, and athletic trainers could all be potential sources of information).

104. *See id.*

105. See Paul Myerberg, *It's Time for College Football, NCAA to Embrace Injury Reports with Gambling Influence Rising*, USA TODAY (July 3, 2018), <https://www.usatoday.com/story/sports/ncaaf/2018/07/03/college-football-ncaa-embrace-injury-reports-gambling/754784002/> [<https://perma.cc/L2MY-MGDL>].

#### IV. RIGHTS UNDER HIPAA FOR THE COLLEGE FOOTBALL PLAYER

Despite the growing concerns over transparency and fairness, injury reports in not only college football but in all sports are offset by the medical privacy rights of the athlete. It is important for gamblers to have access to the same information, but it is also of great importance that a player's right to medical privacy not be needlessly infringed.<sup>106</sup> In order to properly address these issues and strike the proper balance, the privacy rights afforded to college athletes must be outlined and analyzed with injury reports in mind.

##### A. Privacy Rights Protected by HIPAA and FERPA

Medical privacy encompasses important rights that should be protected. For athletes, these rights do not go away simply because players participate in sports and therefore carry a more national profile than the average person.<sup>107</sup> This right is ensured by HIPAA, enacted in 1996, which gives people the right to control who has access to their private medical information.<sup>108</sup> One of the important protections that HIPAA provides is making sure one's health information is not used for another purpose besides those directly related to one's care without authorization.<sup>109</sup> This was made in order to ease concerns with the overall confidentiality of health records and specifically who has access to those records.<sup>110</sup> HIPAA seeks to cover a person's protected health information, which is defined as any personally identifiable information concerning a person's physical or mental condition.<sup>111</sup> This definition means the information normally reported on an injury report to the public is covered by HIPAA when a player's name is tied to the specific injury.<sup>112</sup>

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106. See McChrystal, *supra* note 24, at 180.

107. Elizabeth Litten, *Athletes Do Not Leave Their HIPAA Rights at the Locker Room Door*, ABOVE LAW (July 31, 2015), <https://abovethelaw.com/2015/07/athletes-do-not-leave-their-hipaa-rights-at-the-locker-room-door/?rf=1> [https://perma.cc/PUH7-3564].

108. OFFICE FOR CIVIL RIGHTS, YOUR HEALTH INFORMATION PRIVACY RIGHTS, U.S. DEP'T HEALTH & HUM. SERVS., [https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer\\_rights.pdf](https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf) [https://perma.cc/E69P-AQNP].

109. *Id.*

110. James Blake Hike, Note, *An Athlete's Right to Privacy Regarding Sport-Related Injuries: HIPAA and the Creation of the Mysterious Injury*, 6 IND. HEALTH L. REV. 47, 51 (2009).

111. *Id.*

112. *Id.*



Colleges have another wrinkle when dealing with HIPAA because they are also covered by FERPA, and HIPAA expressly exempts activities and entities covered by FERPA.<sup>113</sup> FERPA applies to all public colleges and universities, and it is a defense that students can use to protect their private educational records.<sup>114</sup> FERPA operates similarly to HIPAA, but instead of confidential health information being protected, FERPA protects educational records.<sup>115</sup> However, a college falls outside of FERPA—and is therefore subject to HIPAA—when it acts in a nontraditional fashion, which is what would occur if an injury reporting system were put in place.<sup>116</sup>

What this means is that in regard to college athletics and the disclosure of medical information to the public, a college athlete is protected by HIPAA, and medical information must remain confidential unless authorized by the athlete. As with many regulations, there are exceptions. HIPAA allows entities to breach this requirement of confidential medical information in three specific situations: (1) when the disclosure is made to health care providers providing the treatment; (2) when the disclosure is made to the individual after a request; or (3) when the individual authorizes the disclosure.<sup>117</sup> Professional sports leagues generally operate in the third exception, as this authorization is typically found in either the collective bargaining agreement or each individual player's contract, so this would be the exception college football would also likely follow.<sup>118</sup>

In order to get proper authorization, HIPAA requires the covered individual to sign a written authorization form.<sup>119</sup> However, blanket authorizations giving broad permission for any protected health information are generally not allowed.<sup>120</sup> HIPAA requires certain reasonably specific information to be outlined on every form: (1) identification of the person

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113. *Id.* at 53.

114. VENUS D. BOSTON, FERPA AND ATHLETICS, WINSTON-SALEM ST. U., [https://www.wssu.edu/about/offices-and-departments/legal-affairs/\\_Files/documents/ferpa-athletics.pdf](https://www.wssu.edu/about/offices-and-departments/legal-affairs/_Files/documents/ferpa-athletics.pdf) [<https://perma.cc/J3LN-5CYF>].

115. *Id.*

116. Hike, *supra* note 110, at 53–54 (detailing that a university is acting traditionally when the trainer or doctor provides the *coach* with medical information but is acting nontraditionally when that same information is given to the media or other entity outside of the university).

117. *Id.* at 54–55.

118. *Id.* at 55.

119. *Id.*

120. Susan M. Pitz, *HIPAA and the Sports Media: Separating Fiction from Reality*, NEV. LAW., Aug. 2003, at 12, 13.

authorizing disclosure; (2) a description of the information being disclosed; (3) identification of the party authorized to disclose the information; (4) identification of the groups authorized to receive the disclosure; (5) a description of the purpose for the disclosure; (6) a listed time or event causing the authorization to expire; and (7) the date the form was signed by the individual.<sup>121</sup> The specificity HIPAA requires for its authorization forms and its prohibition against blanket authorizations originally led those in all levels of sports to be concerned with disclosures to the media about injuries, but the continued use of injury reports and media reporting has shown athletes have agreed to different requirements.<sup>122</sup>

*B. Privacy Problems Associated with Mixing Injury Reports and College Football Players*

In 2003 when the HIPAA privacy guidelines and regulations were becoming clearer, many universities were concerned the regulations and the law too closely followed the ideal situation, not taking into account the practical realities of the media exposure in sports.<sup>123</sup> In 2003, the National Athletic Trainers' Association (NATA) suggested athletic trainers working for universities should require athletes to sign an authorization form before every game, due to the potential for information to be disclosed to the media.<sup>124</sup> While HIPAA's prohibition against blanket authorizations and requirements of specificity in authorization forms does lead one to believe this, the reality is that the requirements of the authorization form are less strict in practice than they are in theory and allow for more general authorizations.<sup>125</sup>

The authorization form is still required to include all of the requirements previously outlined, but the information needed in each area is generally allowed to be broader and less specific.<sup>126</sup> For example, the identification of the party to receive the disclosure does not have to be a specific person or organization; the form is allowed to identify a class or

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121. Hike, *supra* note 110, at 55–56.

122. *Id.* at 67.

123. Pitz, *supra* note 120, at 13 (painting the humorous picture of a university lawyer running onto the field in the middle of the game, authorization form in hand, for the injured player to sign because of the television cameras that captured the play).

124. *Id.*

125. Hike, *supra* note 110, at 56–57.

126. *Id.*

group of people instead.<sup>127</sup> Or, for a description of the health information authorized for disclosure, the description does not have to be specifically named (such as the January 12 medical report or X-Ray picture one of the left knee); it only has to be named in a way the athlete would understand what information is going to be disclosed.<sup>128</sup> Allowing more general language strikes a good balance between the law and reality; otherwise, the language of the law would require zero discussion about player health (a near impossibility with today's coverage of sports) or an athlete signing authorization forms immediately after every injury.<sup>129</sup>

#### V. HOW TO MIX INTEGRITY AND PRIVACY

The realistic stance taken by HIPAA and the government would allow injury reports to be used in college football, as long as proper authorization is granted by the athlete.<sup>130</sup> Professional sports leagues typically place this authorization in the collective bargaining agreement or in the player's contract (or both), but college football does not have this opportunity because the student-athlete is not under contract.<sup>131</sup> However, with the allowance for lesser specificity already in practice, everything is pointing toward college football introducing injury reports. The combination of the normalcy of injury reports in sports, the growing professionalization and big money found in college football, and the newly added influence of legal sports gambling makes injury reports seem inevitable;<sup>132</sup> in fact, the NCAA recently explored the possibility of implementing injury reports for the 2019–2020 football season.<sup>133</sup> While it was ultimately rejected by the NCAA's Board of Governors, this consideration alone shows openness to the idea of some kind of injury report for college sports.<sup>134</sup> Facing this likelihood, universities should be concerned with their own compliance policies with any existing authorization forms and how to structure a system for authorization

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127. *Id.* at 57.

128. *Id.* at 56.

129. *See* Pitz, *supra* note 120, at 13.

130. *See* Hike, *supra* note 110, at 69–70.

131. *Id.* at 67–68.

132. *See* Barca, *supra* note 87; Myerberg, *supra* note 105.

133. *NCAA Says No Football Injury Reports This Season*, ASSOCIATED PRESS (Aug. 7, 2019), <https://apnews.com/b24bc038af484e9f9110cfbc50f327b8> [<https://perma.cc/3XBU-L9CM>].

134. *Id.*

and injury reporting. This Part identifies and examines some important elements and considerations that those creating an injury reporting system for college football should have in mind.

The truth is that football is a violent game featuring many injuries; a study looking at injuries in college sports from 2009–2014 estimated college football players collectively experienced 47,199 injuries each year.<sup>135</sup> It was also estimated 26.2 percent of those injuries required more than seven days to recover, meaning a player would likely miss a game in that timeframe.<sup>136</sup> Players missing games is the issue an injury report would attempt to resolve by disclosing that information to the betting public. The volume and severity of injuries in college football showcases the need for the type of transparency that an injury report could resolve, but there are still important elements to consider in drafting the best policy for college football that strikes an appropriate balance between greater transparency and an athlete's right to medical privacy.

#### A. *The Need for Uniformity*

The first element that has to be present in an effective injury reporting system is uniformity. While the NCAA has long been against legal betting on its games,<sup>137</sup> it is here and more of it is coming.<sup>138</sup> The NCAA is presented with an opportunity to step in and mandate a uniform system applicable to all Division I football programs that could help protect players from any potential undue influences placed on them by the betting public.<sup>139</sup>

Individual conferences, such as the Big Ten or the Atlantic Coast Conference (ACC), have been free to implement their own injury reporting systems, which is what the ACC had done prior to the Court's decision in

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135. Zachary Y. Kerr et al., *College Sports-Related Injuries – United States, 2009-10 Through 2013-14 Academic Years*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6448a2.htm> [https://perma.cc/JLT9-236R].

136. *Id.*

137. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1470 (2018). This is also evidenced by the NCAA remaining the lead plaintiff throughout the entirety of the lawsuit.

138. See Rodenberg, *supra* note 19.

139. The NCAA could make it required for all Division II and III football programs as well, but the need for transparency is far less at these levels because bets are not placed on those games in any meaningful quantity.

*Murphy*.<sup>140</sup> The ACC required injury reports to be issued two days before in-conference games.<sup>141</sup> The ACC was the only conference in the nation issuing injury reports, which is why it was only required for in-conference games.<sup>142</sup> The conference, with the likelihood of a national standard in mind, voted to remove the injury reporting requirement prior to the 2018–2019 football season.<sup>143</sup>

Looking at the ACC's former policy of injury reporting and the vote to repeal it provides an analysis for why this system should be handled by the NCAA and applied uniformly to all universities. There is an issue if a team in a conference that requires injury reporting plays a nonconference opponent. Teams typically play around three or four nonconference games each year.<sup>144</sup> If injury reporting was done conference by conference as has been done in the past,<sup>145</sup> these games would either see one team making an injury report because its conference requires it to do so or neither team providing one. This results in the same transparency concerns currently seen in betting on college football,<sup>146</sup> and this sort of piecemeal regulation is not what the football programs want.<sup>147</sup>

A standardized injury reporting system would also help remove the gamesmanship seen by college football coaches today. Most college football coaches are hesitant to give their opponents anything resembling advantageous information.<sup>148</sup> Michigan head coach Jim Harbaugh is well known for never providing even a depth chart (showing who starts at what position) for his team, which has routinely been considered available

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140. David Teel, *ACC Football Injury Reports No More; National Standard Likely*, DAILY PRESS (Aug. 28, 2018), <https://www.dailypress.com/sports/dp-spt-acc-football-injury-reports-0829-story.html> [https://perma.cc/4C49-B2ES].

141. *Id.*

142. *Id.*

143. *Id.*

144. *See, e.g., 2019 Football Schedule*, U. IOWA, <https://hawkeyesports.com/schedule.aspx?schedule=445> [https://perma.cc/2XMX-5YHF].

145. *See* Teel, *supra* note 140.

146. *See* Myerberg, *supra* note 105.

147. Derek Helling, *Battles Brewing in College Football as Injury Reports Split Coaches, Administrators*, LEGAL SPORTS REP. (Aug. 7, 2018), <https://www.legalsportsreport.com/22649/college-football-injury-reports/> [https://perma.cc/G5X4-Y298] (showing the ACC commissioner called a standardized injury report “critically important”).

148. Myerberg, *supra* note 105.

information to the public.<sup>149</sup> Coaches, as well as broadcasters during televised games, will often even leave discussions of a player's injuries to the simple statement that a player "has a knee," as if this is a new development.<sup>150</sup> This type of gamesmanship and withholding of information is done to preserve every conceivable competitive advantage and win football games, which is the goal of every coach. However, this "advantage" is mitigated by a combination of both sides providing the same information, the benefits of transparency to sports betting, and even just improving the experience of being a fan.<sup>151</sup>

*B. Any Good System Will Require Enforceability*

With it being understood that the NCAA needs to implement a nationwide system, the next (and probably largest) hurdle becomes how to enforce it. As briefly discussed, most college football coaches are inherently against providing any information on their own teams to their opponents.<sup>152</sup> This presents a major problem because the head football coach is traditionally the one who oversees the injury reporting process.<sup>153</sup> Mike Leach, head football coach at Washington State University, has already expressed his distaste and stated, "They might force me. I doubt it. But they might, and if they do, then I'll try to figure out a way around it."<sup>154</sup> It is likely Leach is not the only head coach with this type of attitude, making enforcement a critical issue.

Even though the NCAA has a less than stellar reputation for enforcing its own rules,<sup>155</sup> it is still the only body with the authority to enforce a nationwide injury reporting system. The way enforcement could be accomplished is through punishments to the university and to the program,

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *See* Teel, *supra* note 140 (describing ACC head coaches as the ones issuing the injury reports).

154. Helling, *supra* note 147.

155. *See generally* Jon Solomon, *NCAA Enforcement: What's Working, What's Not as Ole Miss, UNC Cases Near Conclusions*, CBS SPORTS (Oct. 5, 2016), <https://www.cbssports.com/college-football/news/ncaa-enforcement-whats-working-whats-not-as-ole-miss-unc-cases-near-conclusions/> (providing a discussion of the NCAA's recent enforcement issues).

instead of any direct action against individual coaches.<sup>156</sup> The NCAA's policy for penalties is to take everything on a case-by-case basis, and the goals of its penalties are to deter any future rule breaking along with removing any competitive advantage gained by breaking the rules.<sup>157</sup> A very common punishment for breaking NCAA rules is a loss of future athletic scholarships or other recruiting restrictions.<sup>158</sup> This is an incredibly powerful enforcement tool, especially for injury reporting, because recruiting is where coaches get their most important competitive advantage—more talented players. Coaches would be forced to balance the miniscule competitive advantage gained by failing to disclose injury information with the massive advantage lost by being restricted in recruiting talented players, which should almost always result in disclosure.

While the NCAA does have powerful tools at its disposal, the organization's history with enforcement does not inspire confidence.<sup>159</sup> The NCAA states its timeframe for issuing penalties is six to eight weeks,<sup>160</sup> but it took the NCAA more than three years to make a ruling on the University of North Carolina's recent scandal of academic fraud.<sup>161</sup> Another applicable issue related to the timeframe is that punishing the university and not the coach can create a dissonance between the infraction and the punishment, often resulting in the punishment of innocent parties.<sup>162</sup> Being a college football head coach is a fluid job position, as 68 percent of all coaches in 2018 were at their school for less than five years.<sup>163</sup> Frequent job movement, which is the norm for football coaches, and punishment by taking away future scholarships for the school will create many instances where the successor coach and the school are the ones suffering, not the coach actually committing the infractions.<sup>164</sup>

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156. See, e.g., *Enforcement Process: Penalties*, NCAA, <http://www.ncaa.org/enforcement/enforcement-process-penalties> [<https://perma.cc/T278-EE89>].

157. *Id.*

158. *Id.*

159. See Solomon, *supra* note 155.

160. *Enforcement Process: Penalties*, *supra* note 156.

161. Solomon, *supra* note 155.

162. *Enforcement Process: Penalties*, *supra* note 156.

163. Cork Gaines & Mike Nudelman, *Most College Football Players Will Be Forced to Change Head Coaches at Least Once in Their Career*, BUS. INSIDER (Dec. 6, 2017), <https://www.businessinsider.com/college-football-players-coaches-recruiting-2017-12> [<https://perma.cc/XT8W-FXGK>].

164. See Tom Fornelli, *College Football Coaching Changes Carousel: Grades, Breakdowns for New 2018–19 Hires*, CBS SPORTS (Dec. 16, 2018), <https://>

So, the NCAA has powerful penalties it can use to punish schools and coaches for rules violations, but the inherent job fluidity for head coaches and the timeframe for the NCAA's penalties to be issued could create a dissonance with the punishment.<sup>165</sup> Since the NCAA, as a member institution, punishes the universities and not the individuals involved, the punishment of innocent parties (such as assistant coaches, the players, etc.) is unavoidable when the responsibility to report falls on the head coach.<sup>166</sup> A way to mitigate this concern is by putting the responsibility for injury reporting on the athletic training staff and removing the coaching staff from the equation as much as possible. While this may create some practical difficulties, it will help ensure full disclosure because athletic trainers are not as motivated by winning and retaining competitive advantages as head coaches, and athletic trainers have a code of ethics and integrity through NATA.<sup>167</sup>

While putting the responsibility in trainers' hands instead of coaches' hands might help with getting full disclosure, a potential problem is how to punish any infractions. The NCAA still faces the issue of only being able to punish the institutions themselves, and punishing the football team by placing recruiting restrictions on the program is not a fair solution when the issue came from the training staff.<sup>168</sup> This could be resolved by reaching an agreement to have NATA handle the enforcement as part of its code of ethics, but this would put no motivation on the schools' athletic departments to review and enforce their own injury reports since NATA would only have authority to punish individual athletic trainers. An agreement between NATA and the NCAA could be reached where the two entities cooperate and punish both the institution and the training staff for failure to report, but such a setup would undoubtedly lead to plenty of cases where each side points the blame at the other.

Regardless of how the overall injury reporting system is set up, enforcement is going to be the hardest hurdle to overcome. Every potential

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[www.cbssports.com/college-football/news/college-football-coaching-changes-carousel-grades-breakdowns-for-new-2018-19-hires/](http://www.cbssports.com/college-football/news/college-football-coaching-changes-carousel-grades-breakdowns-for-new-2018-19-hires/) (“[E]very winter is filled with coaches losing jobs, moving on to other jobs and trying on new polos and hats.”).

165. *Enforcement Process: Penalties*, *supra* note 156.

166. *Id.*

167. See Teddy Greenstein, *Athletic Trainers Call for National Injury Report for College Football. Here's How It Would Work*, CHI. TRIB. (Sept. 11, 2018), <https://www.chicagotribune.com/sports/college/ct-spt-college-football-injury-report-greenstein-20180911-story.html> [<https://perma.cc/6KWA-TKCA>].

168. *See Enforcement Process: Penalties*, *supra* note 156.



solution has inherent problems, whether it be the unwillingness of college coaches to follow any policy or having to determine what group has the responsibility of making injury reports. In this Author's opinion, the best solution will undoubtedly involve cooperation and trust among athletic departments, coaching staffs, training staffs, and the NCAA, but a system centered around cooperation and trust always sounds better in theory than it operates in reality. The way this issue is handled will require a delicate balance, and it will likely take some time before the optimal solution is found.

*C. No Need to Disclose More than Necessary*

Even though injury reports seem inevitable, it is important to remember the important medical privacy rights still retained by college football players.<sup>169</sup> Because the importance of these rights is heightened in college football's world of amateurism and unpaid players, the scope of the injury reports infringing upon a player's right to medical privacy should be set carefully.

In determining scope, the easiest comparison is to the injury reporting system currently seen in the National Football League (NFL), due to the sports being the same. However, the NFL's system of injury reporting is more extensive and complex than the other major professional sports leagues.<sup>170</sup> The focus in college football should be on limiting the disclosure and protecting confidential information, rather than the NFL's focus on the fullest possible disclosure.<sup>171</sup> To start, there should be a distinction between sports-related and non-sports-related injuries or conditions.<sup>172</sup> Drawing this line may prove challenging because any condition has an argument to affect athletic performance in some way, but the line could start at mental health issues versus physical issues. A player's mental health would not be required to be disclosed, as these issues are much more personal in nature and not as closely related to athletic performance, lowering the transparency concerns.

A recent proposal by NATA for a standardized injury report highlighted the balance between disclosure and player privacy.<sup>173</sup> This proposal limited disclosure to focus only on availability, making the only

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169. See *supra* Part IV.A.

170. See McChrystal, *supra* note 24, at 175.

171. See *id.*

172. See Hike, *supra* note 110, at 59.

173. See Greenstein, *supra* note 167.

disclosure options be *out—will not play* or *doubtful—unlikely to play*.<sup>174</sup> It also limited disclosure of the actual injury to only an upper-body injury or a lower-body injury, reflecting the policy of the National Hockey League.<sup>175</sup> A vague description such as this addresses two important concerns for the medical privacy of a college football athlete: It keeps opponents from targeting any specific area and potentially making the injury worse, and it retains privacy for those athletes hoping to be drafted to the NFL and are worried of being labeled as an injury risk.<sup>176</sup> Having a documented injury history (especially if those injuries are repeated in the same area) can substantially harm a player's potential draft slot, thereby harming the player financially; professional teams do not want to draft a player with a high pick—paying him more money as a result—if there is a strong likelihood the player will get hurt again.<sup>177</sup>

Examining the proposal for injury reports recently reviewed and rejected by the NCAA also provides a useful tool for analyzing what should be in these injury reports. The proposal would designate players as either *available*, *possible*, or *unavailable*, without mentioning a specific body part or injury.<sup>178</sup> This style of reporting goes the furthest toward protecting players' privacy and, as a necessary consequence, the furthest from providing transparency to gamblers, short of no injury report at all. One concern with this system is how strictly coaches need to adhere to the unavailable designation.<sup>179</sup> If a player is listed as unavailable for the game on Thursday but ultimately decides he wants to play and can play on Saturday, is a coach barred from playing that player? This would just lead to a different style of gamesmanship among coaches, but it at least is a step toward transparency. While this information is more helpful than none, there are still some concerns over its incompleteness. For example, an injury to a quarterback's throwing shoulder is far more impactful than an injury to the opposite arm, so labeling the quarterback as *possible* without mentioning which shoulder is hurt does not provide much help to a bettor wanting to use this

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174. *Id.*

175. *Id.*

176. *Id.*

177. See McChrystal, *supra* note 24, at 171.

178. Dennis Dodd, *NCAA Working Group to Propose First Standardized National Injury Report for College Sports*, CBS SPORTS (May 1, 2019), <https://www.cbssports.com/college-football/news/ncaa-working-group-to-propose-first-standardized-national-injury-report-for-college-sports/>.

179. *Id.*

information in placing the bet. However, a balance must be struck somewhere. The NCAA would prefer to side with less information and more protection for its student-athletes, no matter the cost to the gambling public.<sup>180</sup>

The scope of the injury report can best incorporate and honor the player's right to medical privacy. A proposal should recognize college football players are not professionals, so the disclosure requirements should reflect that reality. The proposal made by NATA and the proposal considered by the NCAA, with their focus on availability instead of the specific injury and their omitting of an explicit injured area, is a good starting point for discussions around implementing a balance between transparency and medical privacy.<sup>181</sup>

## VI. CONCLUSION

The sports landscape has changed dramatically after the Supreme Court's decision in *Murphy*. Sports betting, long operating in the shadows, has now emerged into the forefront of the national discourse about sports, and states are trying to figure out what to do with it. While personal beliefs about gambling may differ, sports betting will likely continue to become more mainstream and be implemented nationwide.<sup>182</sup> Higher interest and increased attention mean controls should be developed to ensure the mistakes of the past that led to PASPA do not come back, especially in college sports.<sup>183</sup> An injury report is a common practice in modern sports, and the NCAA should give a standardized injury report a serious look for its sports as gambling and the potential for corruption that comes with it becomes widespread. While injury reports may seem like a no-brainer to those in the sports world, the medical privacy of college athletes is a substantial right that needs to be considered and reflected in all aspects of any injury report.

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180. *Id.*

181. *See* Greenstein, *supra* note 167.

182. *See* Gaines & Gal, *supra* note 62.

183. *See supra* Part III.A.

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