
BLACK YOUTHS LOST, WHITE FORTUNES FOUND: SPORTS BETTING AND THE COMMODIFICATION AND CRIMINALIZATION OF BLACK COLLEGIATE ATHLETES

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Since 2018, legalized sports betting has become commonplace in several states and may soon become commonplace in others. Yet, the conversation does not end once the gambler wins or loses a bet on their favorite team's bowl game. Instead, the unintended—but far from unforeseen—result of such legislation is the immense harm to collegiate athletes. Some athletes will make a rational choice to participate in under-the-table fixing of games. But, in response to such a choice, the student may become liable for criminal and civil violations of state law, be in breach of contracts with the NCAA and their university and lose opportunities for future play and employment. Instead of searching for the root of this problem, governments, associations, and society will look to vilify the athlete. Can one, however, truly blame an athlete for making a rational economic choice in light of their exploitation and monetization? Society will argue yes and turn back to how such betting harms the integrity of the game. With such integrity harmed, society will say the most important social cost of sports betting is the delegitimization of nationally syndicated sports. But is that truly the most important cost?

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Rather than focusing on how legalized sports betting may turn away fans who become apathetic to rigged matches, academia, news, and colloquial conversations alike should instead consider the cognizable harm to collegiate athletes. The time to look past the commodification and criminalization of college athletes is gone—we must all acknowledge their vital role in the game and protect them accordingly. For, in reality, the true integrity of the game comes from the athletes and the value they bring to us all. This Article argues that the only way to prevent this immense social cost to collegiate athletes is to continue prohibiting legalized sports betting. We do not argue that this will solve the problem of commodifying and criminalizing athletes, but we hope that we will become one step closer to acknowledging the value of every athlete’s life beyond the court or field.

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I. INTRODUCTION

*I have nothing to lose tonight.
 All my men surround me, panting,
 as I spin the ball above our heads
 on my middle finger.
 It’s a shimmering club light
 and I’m dancing, slick in my sweat.
 Squinting, I aim at the hole
 fifty feet away. I let the tension go.
 Shoot for the net. Choke it.
 I never hear the ball
 slap the backboard. I slam it
 through the net. The crowd goes wild
 for our win. I scored
 thirty-two points this game
 and they love me for it.
 Everyone hollering
 is a friend tonight.
 But there are towns,*

*certain neighborhoods
where I'd be hard pressed
to hear them cheer
if I move on the block.*¹

In the 2018 *Murphy v. National Collegiate Athletic Association* decision, the Supreme Court of the United States overturned the Professional and Amateur Sports Protection Act (PASPA), which prohibited sports betting across the nation (with certain exceptions for states with previously standing systems that the legislature deemed acceptable).² Following that ruling, states and interest groups rushed to prepare legislation to create sports betting mechanisms.³ Naturally, opposition was just as loud and far-reaching. Namely, the National Collegiate Athletic Association (NCAA), one of the litigants that sued to preserve PASPA,⁴ continues to challenge state-by-state sports betting legalization schemes on the basis of sport “integrity.”⁵ As the NCAA sees it, sports betting will ruin college games.⁶

But for whom does *Murphy* ruin the game? It is certainly not the players—rather, the NCAA’s persistent concerns regarding sports betting legalization focuses on the effect on fans, who may turn away from collegiate sports if they believe that games may be fixed or rigged.⁷ After all, where is the sport in that? But what the NCAA does not tell you is that the harm does not stop there, nor is the harm to fans the true injury at hand. Rather, who is most harmed by legalized sports betting is the athlete playing the game upon which the fans bet. The athlete who has been commodified, monetized, and criminalized up until now will continue to face the same exploitation as they always have, but now with the added attention from those looking to make a buck from a fixed game. Like in the rest of collegiate sports, the player who is commodified, monetized, and criminalized the most by this is the Black college athlete.⁸

1. Essex Hemphill, “American Hero.” The author gives credit to David J. Leonard and Richard C. King, who included an excerpt from this poem in the introduction to their powerful anthology, for the inspiration to weave “American Hero” throughout this article. See David J. Leonard & Richard C. King, *Celebrities, Commodities, and Criminals: African American Athletes and the Racial Politics of Culture*, in *COMMODIFIED AND CRIMINALIZED: NEW RACISM AND AFRICAN AMERICANS IN CONTEMPORARY SPORTS* (David J. Leonard & Richard C. King eds., 2011).

2. 138 S. Ct. 1461, 1484–85 (2018).

3. See Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021), https://www.espn.com/chalk/story/_id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [https://perma.cc/YCM7-3V3G].

4. *Murphy*, 138 S. Ct. at 1461.

5. See *id.* at 1470.

6. See, e.g., Dustin Gouker, *NCAA Head: Sports Betting is ‘Going to Threaten the Integrity of College Sports in Many Ways’*, LEGAL SPORTS REP. (Jan. 29, 2019), <https://www.legalsportsreport.com/28038/ncaa-says-sports-betting-will-threaten-integrity/> [https://perma.cc/2FRV-TH58]; *Doubling Down*, NCAA, <https://www.ncaa.org/static/champion/doubling-down/> (last visited Aug. 15, 2021) [https://perma.cc/M3CJ-V2D8].

7. See Jeffrey L. Derevensky & Tom Paskus, *Mind, Body and Sport: Gambling Among Student-Athletes*, NAT’L COLL. ATHLETIC ASS’N, <http://www.ncaa.org/sport-science-institute/mind-body-and-sport-gambling-among-student-athletes> (last visited Aug. 15, 2021) [https://perma.cc/KH7B-FQA2].

8. See *infra* Parts III–IV.

This Article places no blame upon any athlete who chooses to accept a bribe to change the outcome of a game. Rather, we see this as a natural response to the economic conditions they face: overworked, overplayed, and under (or never) paid, the college athlete who accepts a bribe is only making a rational choice based on their knowledge and economic conditions. It is the same logic we all use to make decisions every day. Yet, unlike any person on the street who uses a heuristic to decide which job to take or meal to buy, the collegiate athlete will be criminalized for their rational choice.

This Article seeks to explain how creating sports betting mechanisms is a detriment to the players more than it is to the game. To set a foundation for the sheer imminence argument, Part II will analyze the recent legal history and testimony on sports betting. Parts III and IV will then explain how (particularly Black) athletes have been commodified and criminalized in sports and society. Finally, Part V will marry the recent legislation with the history of athlete exploitation and provide economic arguments and examples as to why legalized sports betting results in social costs that we should not accept.

II. OVERVIEW: RECENT LEGISLATION AND TESTIMONY ON COLLEGE SPORTS BETTING

Prior to 2018, PASPA precluded state regulation and taxation of sports betting except where specifically authorized (including in Nevada, for instance).⁹ Initially passed in 1992, the law was often referred to as the “Bradley Act” for its chief sponsor Senator Bill Bradley of New Jersey.¹⁰ The Act actually provided a carveout for New Jersey sports betting *if* the state could enact a regimen for such betting within one year of PASPA’s passage.¹¹ No enactment came. In 2011, however, New Jersey voters approved a referendum to create a constitutional amendment permitting sports betting.¹² The next year, the legislature followed suit with a law permitting sports gambling in the state, which effectively enabled the amendment.¹³

PASPA provided a private right of action for sports governing bodies by which those organizations could sue, and enjoin, any later attempts to revive state-level sports gambling efforts.¹⁴ In 2012, five major sport leagues—the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB)—joined the NCAA in suit against the state.¹⁵ The case, later known as *Christie I*, was ultimately heard by the Third Circuit Court of Appeals.¹⁶ That court ruled the New Jersey

9. 28 U.S.C. §§ 3701–04.

10. See Jill R. Dorson, *What Is PASPA, the Federal Ban on Sports Betting?*, SPORTSHANDLE (July 1, 2020), <https://sportshandle.com/what-is-paspa-sports-betting-ban-professional-amateur-sports/> [https://perma.cc/Z5P4-WWB3].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Nat’l Collegiate Athl. Ass’n v. Christie, 926 F. Supp. 2d 551, 553 (D.N.J. 2013).

16. Nat’l Collegiate Athl. Ass’n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).

law violated PASPA.¹⁷ The Supreme Court denied certiorari.¹⁸ In an initially unavailing attempt to revive sports gambling, New Jersey passed new legislation in 2014.¹⁹ This was again challenged in court²⁰ and the Third Circuit, hearing the matter en banc in 2016, found the 2014 law to also violate PASPA.²¹ The Supreme Court granted certiorari.²²

Ultimately, the Supreme Court's decision (then styled as *Murphy v. NCAA* since the state had a new governor), reversed the rulings below.²³ Despite the state's duplicate argument being denied certiorari in the *Christie I* saga,²⁴ the Court ruled in its favor in *Murphy*.²⁵ Specifically, the state argued that PASPA violated the anti-commandeering principle of the Tenth Amendment²⁶ and was entirely unconstitutional on the principle of non-severability.²⁷

The post-PASPA world is open for state gambling. Twenty-one states and the District of Columbia now allow sports betting.²⁸ Four more have passed bills, but do not yet have operational sports betting.²⁹ As of August 2020, nine other states had active bills without yet going to a vote.³⁰ Twelve states' legislatures have introduced measures to no avail.³¹ Only seven states had no sports betting law on the book and introduced no sports betting legislation in 2020.³² Analysis suggests that this year may have been even bigger for the betting industry if the coronavirus were not so heavily affecting in-person gatherings, where betting often happens.³³

So why have organizations like the NCAA not taken advantage of the potential revenue boon offered by sports betting? Well, it depends upon who you ask. The NCAA, along with many privacy experts, wonder about the effect of student injuries on the games and odds.³⁴ If a star quarterback of one team is injured and the team announces his absence ahead of the game, what will trading look like on that game? This, of course, plays into the commodification of the athletes. Their worth to a team, to a school, to society, almost entirely depends on their ability to keep their body in pristine physical condition.

17. *Id.* at 240.

18. *Christie v. Nat'l Collegiate Athl. Ass'n*, 573 U.S. 931 (2014).

19. *Nat'l Collegiate Athl. Ass'n v. Christie*, 61 F. Supp. 3d 488, 491 (D.N.J. 2014).

20. *Id.*

21. *Nat'l Collegiate Athletic Ass'n, v. Governor of New Jersey*, 832 F.3d 389, 401–02 (3d Cir. 2016).

22. *Christie v. NCAA*, 137 S.Ct. 2327, 2328 (2017).

23. 138 S.Ct. 1461, 1485 (2018).

24. *Nat'l Collegiate Athl. Ass'n v. Governor of N.J.*, 730 F.3d 208, 241 (3d Cir. 2013).

25. *Murphy*, 138 S.Ct. at 1485.

26. By a 7–2 vote. *Murphy*, 138 S.Ct. at 1481.

27. By a 6–3 vote. *Id.* at 1487.

28. Rodenberg, *supra* note 3.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

34. Terrin Wack, *NCAA Injury Debate Pits Player Privacy vs. Gambling Concerns*, SPOKESMAN-REV. (Aug. 10, 2018), <https://www.spokesman.com/stories/2018/aug/10/ncaa-injury-debate-pits-player-privacy-vs-gambling/> [https://perma.cc/Z2WS-LWBC].

Some also make the more nebulous “integrity” argument.³⁵ The NCAA and other stakeholders base concerns in the general effects of legalized gambling: increase in gambling addiction, exposure to younger audiences and fear for the welfare of athletes.³⁶ While the NCAA has yet to provide a great deal of elaboration on their reasoning, this Article explores one potential integrity-based argument the NCAA has so far neglected: match fixing and the criminalization of student-athletes.³⁷ Some work already explores match-fixing in college sports post-PASPA,³⁸ but not with respect to the effect on college athletes’ future and their present commodification and criminalization.³⁹

This Article will explore that relationship further. First, Part III will provide an overview of how sports, both generally and at the collegiate level, commodify (primarily Black) athletes. Then, Part IV will briefly explain the inevitable further criminalization of student athletes amidst increased profitability of their sports. Finally, Part V will explain how, in spite of the greater potential for criminalization and match-fixing, the primarily white sports betting organizers will be the real winners of a legalized sports betting arena.

III. BLACK YOUTHS LOST: THE COMMODIFICATION OF BLACK COLLEGE ATHLETES

*I have nothing to lose tonight.
All my men surround me, panting,
as I spin the ball above our heads
on my middle finger.
It’s a shimmering club light
and I’m dancing, slick in my sweat.
Squinting, I aim at the hole*

35. See, e.g., Rod Boshart, *Betting on College Sports Pivotal to Gambling Debate*, GAZETTE (Mar. 22, 2019) <https://www.thegazette.com/subject/news/business/iowa-sports-betting-college-sports-20190322> [<https://perma.cc/N74M-5R9L>]; Dustin Goker, *NCAA Head: Sports Betting Is ‘Going to Threaten the Integrity of College Sports in Many Ways’*, LEGAL SPORTS REP. (Jan. 25, 2019), <https://www.legalsportsreport.com/28038/ncaa-says-sports-betting-will-threaten-integrity/> [<https://perma.cc/7BVH-QUBM>]; Dustin Gouker, *Will the NCAA Keep Banning Championship Events in States That Try to Legalize Sports Betting?*, LEGAL SPORTS REP. (Nov. 9, 2017), <https://www.legalsportsreport.com/16327/ncaa-and-sports-betting-laws/> [<https://perma.cc/P2PB-QVU2>].

36. See Derevensky & Paskus, *supra* note 7.

37. For more discussion on match-fixing within a world of legalized sports betting, see Friend of Congress Memorandum from Michael K. Fagan, *Realistically-Unresolvable Foreseeable Problems Which Will Arise from Expanded Legalized Commercialized Sports Betting* (Sept. 27, 2018) (on file with authors); Les Bernal, *Taking Down This Monument to Injustice Will Improve the Lives of Millions* (Working paper, on file with authors).

38. See, e.g., John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. STATE U.L. REV. 329, 335, 381 (2019); John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 453–473 (2015); Mark Varga, *Chris Christie’s Quest to Legalize Sports Gambling Could Destroy Professional Athletics*, NEW REPUBLIC (Oct. 4, 2014), <https://newrepublic.com/article/119702/chris-christie-sports-gambling-case-new-jersey-keep-it-illegal> [<https://perma.cc/CYC4-AKVQ>].

39. For other discussions on commodification and criminalization of athletes aside from the betting issue, see Leonard & King, *supra* note 1, at 4–5, 8–12.

*fifty feet away. I let the tension go.
Shoot for the net. Choke it.
I never hear the ball
slap the backboard. I slam it
through the net. The crowd goes wild
for our win. I scored
thirty-two points this game
and they love me for it.
Everyone hollering
is a friend tonight.*⁴⁰

In 2001, the President Emeritus of Pennsylvania State University asked Sonny Vaccaro a question during Vaccaro's appearance on a Knight Commission on Intercollegiate Athletics panel.⁴¹ The longtime athletic footwear and clothing executive had said: "We want to put our materials on the bodies of your athletes, and the best way to do that is to buy your school. Or buy your coach."⁴² When the former Penn State president asked why a university should become an advertising medium, Vaccaro rebuked: "[t]hey shouldn't, sir You sold your souls, and you're going to continue selling them."⁴³

The collective souls of university sports were not the only ones sold. So were the souls of the athletes upon whose bodies those companies' logos would be so prominently displayed. And while Vaccaro characterized the universities as being too long complicit to argue,⁴⁴ he left out the harm on the athletes. Universities had some semblance of choice. Those athletes did not.

Sports, especially college sports, are an inarguably intrinsic aspect of American life.⁴⁵ Bars pack on weekends, albeit less so in 2020, as spectators root for their favorite teams. College sports take on particular meaning for many since they can be more readily associated with an experience, a pride of one's alma mater or family team.

As the spectators—donning expensive official jerseys and sipping overpriced drinks at their favorite local haunt—watch the game live, one must question exactly what the spectators are spectating. Is it the fast-paced game and calls? Is it the scoreboard? Is it the live commentators? Is it the players themselves? Regardless of where a particular spectator's gaze lands, the origin is all the same—every aspect of this unique and pervasive form of entertainment originates from the players on the field.

40. Essex Hemphill, "American Hero."

41. Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, available at <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/CJ9C-T5LA>].

42. *Id.*

43. *Id.*

44. *See id.*

45. *Id.*

The sports arena displays not only procedurally complex games, but also structurally complex intersections of culture, race, and society. It is an interdependence, and often a toxic one, between the spectator and the sport, between the people watching and the player on the field:

[W]hether looking into the predominantly white stands to media culture and to the backlash against those who threaten the existence of both a commodifiable and pleasurable black athletic body, it is crucial to think about the dialectics between race and commodification, to think about sports, in all its forms, as a playground, where black bodies become the feature and the most lucrative attraction thus elicits the greatest level of animosity when it (he) does not deliver profit, pleasure, and affirmation of dominant narratives and myths, all with a smile.⁴⁶

While white spectators root for their team, they neglect the individualisms of each player. They glorify their bodies and their names on the field but vilify them off it.⁴⁷

Underlying this commodification is the history of race and American capitalism. The appropriation, embellishment, and commodification of the Black athlete stems not from any new concept but from the long history of American (and Western) portrayal of Blackness in the post-industrial society. As scholar Gitanjali Maharaj succinctly and eloquently noted, the post-World War II American industrialization practices in fact *deindustrialized* Black communities.⁴⁸ This inverse growth relationship created the paradox we still see today: “that both the ‘nightmare’ of the urban ghetto and the ‘dream’ of being a celebrity professional athlete are manifestations of the economic and cultural workings of late capitalism.”⁴⁹

The young Black residents who find themselves in these segregated, underserved, and over-policed communities face the struggles of social and economic immobility.⁵⁰ Deindustrialization and “white flight” have replaced and displaced employment that best offers any opportunities to socioeconomically advance beyond one’s inchoate disadvantages.⁵¹ With low property values comes low quality of education,⁵² furthering the segregation of those who happened to be born in a certain ZIP code.

With an economic problem comes an economic response. As Professor Robin D.G. Kelley of UCLA’s Department of African American Studies charac-

46. Leonard & King, *supra* note 1, at 10.

47. *See infra* Part V.

48. Gitanjali Maharaj, *Talking Trash: Late Capitalism, Black (Re)Productivity, and Professional Basketball*, 50 SOC. TEXT 97, 98 (1997).

49. *Id.*

50. *See id.*

51. *See id.*; TIM BUTLER & PAUL WATT, UNDERSTANDING SOCIAL INEQUALITY 93 (2007).

52. Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/> [<https://perma.cc/VU9H-X325>].

terizes it, the allure of sports parks itself right within the constraints of a disadvantaged community.⁵³ And, along with this outlet, comes the economic blame shifting.⁵⁴ When a young child's dream of playing professionally becomes a career in basketball, it is displayed as a success story of hard work and grit.⁵⁵ Instead of focusing on the insurmountable obstacles against the many who never leave, media, culture, and sports focus on the romantic tale of the one who overcomes.⁵⁶

In this way, sports serve as an "out" for the economically disadvantaged, but only for a few. While sports represent an escape from the mundane for the white audience in the bar, they represent an escape from the multitudinous postindustrial economic plights for the (Black) players on the field.⁵⁷ While this is visible in professional sports, it does not begin there. The economic out begins with the scouts at the high school games. It begins with the colleges who sign them.

This is where the NCAA comes in. The NCAA describes itself as "a member-led organization dedicated to the well-being and lifelong success of its players."⁵⁸ It is better described as the governing body for inter-university/college sports (with club and intramural being excepted). According to its own website, the organization is "prioritizing academics, well-being and fairness so college athletes can succeed on the field, in the classroom, and for life."⁵⁹ Notice the order: an organization self-described as "dedicated to the well-being" of its student athletes lists their accomplishments on the field first.⁶⁰ This is the "playground"⁶¹ upon which the students break sweat, blood, and bones for the NCAA. Next, the NCAA lists their academics. Famously, upper echelon college sports programs have low average GPAs;⁶² not because their players are not smart or academically capable, but because their players are expected to be on the field, in the game, and on the screen—not in the classroom. Finally, it lists lifelong athlete success as the least of its chief concerns.⁶³ As Kareem Abdul-Jabbar explained:

Life for student-athletes is no longer the quaint Americana fantasy of the homecoming bonfire and a celebration at the malt shop. It's big business in

53. Robin D.G. Kelley, *Playing for Keeps: Pleasure and Profit on the Postindustrial Playground*, 195–231, in *THE HOUSE THAT RACE BUILT* (W. Lubiano ed., 1998).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *What is the NCAA?*, NAT'L COLL. ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Aug. 15, 2021) [<https://perma.cc/8L4P-KHM5>].

59. *Id.* (emphasis removed).

60. *Id.*

61. Leonard & King, *supra* note 1, at 10.

62. For example, see the University of Texas's announcement on last season's team-wide average GPA, which it noted was the highest in the program's history. What was that average? 2.89. Taylor Estes, *Texas Football Posts Highest Overall GPA in Team History*, 247 SPORTS (June 4, 2019), <https://247sports.com/college/texas/Article/Texas-Longhorns-football-highest-GPA-in-program-history-132573384/> [<https://perma.cc/6WUQ-UVBD>].

63. *What is the NCAA?*, *supra* note 58.

which everyone is making money—everyone except the eighteen to twenty-one-year-old kids who every game risk permanent career-ending injuries.

We're angry when we see a vulnerable group exploited for profit by big companies, when executives rake in big bucks while powerless workers barely scrape by. We were furious when it was reported that Nike made billions in 2001, while at the same time employing, through subcontracted companies, twelve-year-old Cambodian girls working sixteen-hour days for pennies an hour to make \$120 shoes.

We were outraged again in 2006, when the Labor and Worklife Program at Harvard Law School reported that about two hundred children as young as eleven years old were sewing clothing for Hanes, Walmart, JC Penney, and Puma in a factory in Bangladesh.

The children sometimes were forced to work nineteen to twenty-hour shifts, slapped and beaten if they took too long in the bathroom, and paid pennies for their efforts. According to the report, 'The workers say that if they could earn just thirty-six cents an hour, they could climb out of misery and into poverty, where they could live with a modicum of decency.'

Thirty-six cents an hour.

While such horrific and despicable conditions are rarer in the United States, we still have to be vigilant against all forms of exploitation so that by condoning one form, we don't implicitly condone others. Which is why, in the name of fairness, we must bring an end to the indentured servitude of college athletes⁶⁴

Who are the college athletes Kareem Abdul-Jabbar invokes here? At one time, it was himself. And now, it is many young people, a disproportionately large number of them Black, in a position not unlike he once was in. In 2017, 55% of American undergraduates were white, while 14% were Black, 7% were Asian, and 20% were Hispanic.⁶⁵ In Division I schools, 57% of students were white, 10% were Black, and 34% were otherwise categorized by the NCAA.⁶⁶ But what about those schools' sports teams? Division I schools are the top tier of college sports—these players have the best chances of later playing professionally, their faces appear more often on the flatscreen, and their names and likenesses are sold in marketing, video games, and fantasy leagues with little

64. Kareem Abdul-Jabbar, *College Athletes of the World, Unite*, JACOBIN (Nov. 12, 2014), <https://www.jacobinmag.com/2014/11/college-athletes-of-the-world-unite/> [https://perma.cc/4ZSD-27RD]. Compare these stark figures with B. David Ridpath, *It Is Time to Re-frame College Athletes' Time Commitments*, FORBES (Jan. 26, 2016, 2:37 PM), <https://www.forbes.com/sites/bdavidridpath/2016/01/26/it-is-time-to-re-frame-college-athletes-time-commitments/#6508e1ebbc62> [https://perma.cc/D373-5BUN], and Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 4:44 AM), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> [https://perma.cc/7J2M-6Y24].

65. *NCAA Demographics Database*, NAT'L COLL. ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/research/ncaa-demographics-database> (last visited Aug. 15, 2021) [https://perma.cc/HEF3-G7ZJ?type=image].

66. *Id.*

compensation.⁶⁷ In 2017, Division I schools had the following racial breakdown in their sports teams: 58% of their players were white, 21% were Black, the remaining were categorized otherwise.⁶⁸

While white athletes overrepresented their student body by a mere 1%,⁶⁹ the contrast between Black college students and Black athletes was starker. Division I Black athletes overrepresented Division I student bodies by 11% and the national population of Black undergraduate students by 7%.⁷⁰ And a 2013 report found even more shocking statistics when one analyzes the biggest of the big: in the biggest six NCAA conferences,⁷¹ Black men were 2.8% of students enrolled in those schools between 2007 and 2010.⁷² During that same time period, they were 57.1% of the conference's football team rosters and 64.3% of their basketball team rosters.⁷³

What becomes of the “one[s] who got out”? They become the American Hero[es] whom Essex Hemphill memorialized. He becomes the poster child for the audience—from bootstraps to the ballgame, he succeeds and lifts guilt from the immense structural violence placed upon him by a society that ignores his youth, his friends, and his family. We wear his jersey; we know his touchdown dance; we watch his press conferences. We celebrate his wins; we lament his losses. We are his friends when he is on the field.⁷⁴ He is “the worker[] who prepare[s] the meal and [is] the meal itself.”⁷⁵

We commodify his body in injury statistics, win/loss ratios, jersey sales, television appearances, revenue generation. We expect him to excel on the field but give him little time to succeed in the classroom. When he does, we ask him

67. Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 30, 2014), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm [<https://perma.cc/EMX5-XKXG>] (statement of lead co-counsel for athletes) (“To me, the definition of a professional is someone who earns a living at what they do. A payment of \$2,000 to \$4,000 is not earning a living.”).

68. *NCAA Demographics Database*, *supra* note 65.

69. *Id.*

70. *Id.*

71. SHAUN R. HARPER, COLLIN D. WILLIAMS JR. & HORATIO W. BLACKMAN, *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUALITIES IN NCAA DIVISION I COLLEGE SPORTS 1* (2013). The report defined this as the Atlantic Coast Conference (ACC), Big East Conference, Big Ten Conference, Big 12 Conference, Pac 12 Conference, and the Southeastern Conference (SEC). *Id.*

72. *Id.*

73. *Id.*

74. Alluding to Essex Hemphill, “American Hero.”

75. Dave Zirin, *Your March Madness Bracket Is Exploiting Student Athletes*, NATION (Mar. 13, 2017), <https://www.thenation.com/article/archive/your-march-madness-bracket-is-exploiting-student-athletes/> [<https://perma.cc/N6QV-33Q7>]; see also *March Madness and the Exploitation of 'Student Athletes'*, DALLAS MORNING NEWS (Apr. 2, 2014, 12:56 AM), <https://www.dallasnews.com/opinion/commentary/2014/04/02/march-madness-and-the-exploitation-of-student-athletes/> [<https://perma.cc/JTJ8-3EPP>]; Tim Nevius, *I Used to Enforce the NCAA's Exploitation of College Athletes; Now I Fight for the Players*, USA TODAY (Sept. 3, 2020, 10:00 AM), <https://www.usatoday.com/story/opinion/voices/2020/09/03/ncaa-athletes-college-coronavirus-safety-schools-exploitation-column/5690842002/> [<https://perma.cc/UJ3D-SBS9>]; cf. Roderick Scobie, *NCAA Searching for New Ways to Exploit Student Athletes After Cancellation of March Madness*, BEAVERTON (Mar. 20, 2020), <https://www.thebeaverton.com/2020/03/ncaa-searching-for-new-ways-to-exploit-student-athletes-after-cancellation-of-march-madness/> [<https://perma.cc/J6LB-TJRA>].

to pull up his bootstraps, talk about his grit, and move on with or without a college degree.

The college athlete is a source of entertainment for the audience. And, “[they] are told [they] can only entertain. But every team has doctors, lawyers, economists.”⁷⁶ When he is injured, we bet against him⁷⁷ or we boo his record. And after they are done entertaining, they do not necessarily leave the playground higher education has confined them to with a degree, or a career in professional sports. The study by University of Pennsylvania scholars also noted that, among four cohorts examined, 50.2% of Black male athletes graduated within six years.⁷⁸ This means almost 50% did not.

Some of the worst offending schools were in the Southeastern Conference (SEC), where Black athletes generate the most revenue and graduate the least often.⁷⁹ When he leaves the field, we no longer holler for him. We let him fade away, having provided little to none of the benefits of the prestigious college where he played. He is the commodity upon which American sport culture is based. The commodified, often Black, athlete receives no post-career thanks, no primetime spotlight where he may share his own ideas. He plays on the playground, and fades when he exits the field for the last time.

IV. IF I MOVE ON THE BLOCK: THE CRIMINALIZATION OF BLACK ATHLETES NOW AND LATER

*But there are towns,
certain neighborhoods
where I'd be hard pressed
to hear them cheer
if I move on the block.*⁸⁰

American fascination with the intersection of sports and crime is far from new.⁸¹ Both off the field (like the saga of former football star O.J. Simpson) and on (like the ever-present doping scandals in professional sports), it seems a player is always on the news for bad acts.⁸² The audience, however, seems to rarely stop

76. Here, the “he” is Chris Archer, pitcher for the Pittsburgh Pirates, who has played professional baseball for most of his adult life. See Michael A. Fletcher, ‘Dear Black Athlete’ Examines Issues of Race and Sports in this Moment of Protest, UNDEFEATED (Feb. 11, 2018), <https://theundefeated.com/features/dear-black-athlete-issues-of-race-sports-birmingham/> [<https://perma.cc/R87Z-9GGW>].

77. See *supra* Part II. Some are concerned that sports betting will lead to greater privacy violations for players whose value in a bet may decrease if teams announce their injuries ahead of games.

78. HARPER, WILLIAMS JR. & BLACKMAN, *supra* note 71, at 1. This was compared to 50.2% of Black students in the cohort overall, and 72.8% of undergraduate students overall. *Id.*

79. *Id.* at 14.

80. Essex Hemphill, “American Hero.”

81. In fact, whole podcasts are now dedicated to exploring this intersection. See, e.g., *SI True Crime* (available on Apple Podcasts); *Carruth* (available on Apple Podcasts); *Smoked* (available on Apple Podcasts); *Killing Lorenzen: Love | Basketball | Murder* (available on Apple Podcasts); *Sports Criminals* (available on Apple Podcasts); *Crime in Sports* (available on Apple Podcasts).

82. See, e.g., Dominick Dunne, *O.J. Simpson: Life After the Murder Trial*, VANITY FAIR (Dec. 1995), <https://www.vanityfair.com/magazine/1995/12/dunne199512> [<https://perma.cc/ABZ4-NZ2G>]; Christine Brennan, *Opinion: Latest Doping Scandal Is Worthy of Our Attention*, USA TODAY (Oct. 1, 2019, 6:35 PM),

and consider how players get to the point where they may take actions the rest of society deems utterly out of the realm of possibility. Yet, the origin may once again be commodification.

Over the past decade, David J. Leonard has detailed the criminalization of Black athletes.⁸³ He makes note in a 2010 article of commentary surrounding NBA-star Gilbert Arenas's suspension for bringing a gun (or guns, it was unclear) into the Wizards' locker room.⁸⁴ Commentators made reference to Arenas as a "common, street-level criminal . . . [in] tailored suits" and as a "convict in the making."⁸⁵ Leonard notes that such commentators make out Arenas to be an uneducated, unappreciative member of a "criminal ([B]lack) underclass" whose decisions reflect a broader culture within athletics.⁸⁶ But, "[i]n gun-crazy America, [B]lack athletes are routinely pilloried for legal firearm ownership, as if their post-game hobbies are drive-by shootings and robbing banks. There has never been breathless coverage of NASCAR gun ownership and no one asks [white] golfer Phil Mickelson whether he packs heat."⁸⁷

This double standard, eloquently noted by Zirin, pits a Black athlete against a white one. Even where both may legally own guns, we see the Black athlete as little more than what we so carelessly imagine his background to be. In contrast, the white athlete who also legally owns a gun is seen as exercising a basic constitutional right, not as a common criminal in a cashmere sweater. We only see the Black athlete positively when he is on the field. When he is off, we carefully watch his movements, criticize his associations, and call into question his activities. The white athlete receives no such scrutiny.⁸⁸

Similar to the debate on guns, Black athletes are routinely over-scrutinized when it comes to doping.⁸⁹ With game performance being the basis for an athlete's job, an athlete naturally wants to perform their best. While the late Kobe Bryant said so in another context, his Nike ad quoting him as saying "I'll do whatever it takes to win games. I don't leave anything in the chamber . . ." draws attention to the broader player need for high performance and success.⁹⁰ With collegiate athletes already overworked, underpaid (or never paid in many

<https://www.usatoday.com/story/sports/christinebrennan/2019/10/01/olympics-new-doping-scandal-worthy-our-attention/3835101002/> [<https://perma.cc/Y5AG-JCFH>].

83. See David J. Leonard, *Jumping the Gun: Sporting Cultures and the Criminalization of Black Masculinity*, 34 J. SPORT & SOC. ISSUES 252, 253 (2010).

84. *Id.* at 254–57.

85. *Id.* at 254–55.

86. *Id.*

87. Dave Zirin, *Al Sharpton Wants Gilbert Arenas Punished. Seriously.*, EDGE OF SPORTS (Jan. 5, 2010), <https://www.edgeofsports.com/2010-01-05-483/index.html> [<https://perma.cc/8DLG-46LY>].

88. Even when the majority of deadly mass shootings in the United States are actually perpetrated by white people. Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982-2020: Data from Mother Jones' Investigation*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/> [<https://perma.cc/A5J7-ATUB>].

89. See James Montague, *Hero or Villain? Ben Johnson and the Dirtiest Race in History*, CNN (July 23, 2012, 5:40 PM), <https://www.cnn.com/2012/07/23/sport/olympics-2012-ben-johnson-seoul-1988-dirtiest-race> [<https://perma.cc/C3R3-YSPZ>]; Marion Jones Admits to Steroid Use—Report, REUTERS (Oct. 4, 2007), <https://www.reuters.com/article/idINIndia-29861820071005> [<https://perma.cc/K4HR-AKEY>].

90. Leonard, *supra* note 83, at 252.

cases),⁹¹ and yet still subject to scrutiny and performance metrics on the field, why not turn to something that helps one achieve strength, agility, and physical prowess with greater ease? While performance-enhancing steroids are illegal,⁹² the draw is only natural.⁹³

But, when a Black athlete, faced with pressure many of us will never understand, turns to steroids or other drugs to improve their performance, they will be punished more than a white peer.⁹⁴ This is reflective of the broader racial disparity in drug convictions and punishment, but also of the public's views of Black athletes.⁹⁵ We see Black athletes as stars on the field, and criminals off the field.

This visibility will extend beyond drugs, guns, and other crimes if sports betting is legalized: collegiate athletes lack any financial leverage in their game despite risking their education, their career, and their health on a sport.⁹⁶ When sports betting is legalized, betting organizers and high-value gamblers will look to fix games.

Those who call the match-fixing fears overblown point to the current state of play: with illegal sports betting so rampant for so long, they suggest that the lack of historical and contemporaneous match-fixing evidence leads to the conclusion that legalized sports betting will similarly keep the trend low.⁹⁷ Yet, this ignores the basic underpinnings of crime, supply, and demand. Chiefly, where

91. This may soon change, as a recent unanimous Supreme Court decision, while overturning the NCAA's scholarship cap, questioned the NCAA's logic that collegiate athletes should not be paid because the "defining feature of college sports, according to the NCAA, is that the student athletes are not paid." *Nat'l Collegiate Athl. Ass'n v. Alston*, 141 S.Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring). There, Justice Kavanaugh also noted: "Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work." *Id.* at 2168.

92. See Peter B. Kraska, Charles R. Bussard & John J. Brent, *Trafficking in Bodily Perfection: Examining the Late-Modern Steroid Marketplace and Its Criminalization*, 27 *JUST. Q.* 159, 160 (2010) (describing the progressive illegalization and war on performance-enhancing steroids).

93. Michael Janofsky & Peter Alfano, *Victory at Any Cost: Drug Pressure Growing*, N.Y. *TIMES* (Nov. 21, 1988), <https://www.nytimes.com/1988/11/21/sports/victory-at-any-cost-drug-pressure-growing.html> [<https://perma.cc/P4CE-UPUS>]; Roomy Khan, *Doping in Sports—Cheating or Leveling of the Playing Field?*, *FORBES* (Dec. 31, 2017, 4:51 PM), <https://www.forbes.com/sites/roomykhana/2017/12/31/doping-in-sports-cheating-or-leveling-of-the-playing-field/#257fa58575ec> [<https://perma.cc/7MBL-ELBL>].

94. See Jonathan Hendel, *Crime and Punishment Through the Lens of Professional Sports: An Empirical Study of Racial Stereotyping* (2014) (Claremont McKenna College, Baccalaureate Thesis), https://scholarship.claremont.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1940&context=cmc_theses [<https://perma.cc/5G4N-7KT7>]; Todd Boyd, *You Can't Discuss Bonds Without Race*, *ESPN* (May 9, 2007 2:37 PM), <http://www.espn.com/espn/page2/story?page=boyd/070508> [<https://perma.cc/H8S4-JA32>].

95. *Race and the Drug War*, DRUG POL'Y ALLIANCE, <https://www.drugpolicy.org/issues/race-and-drug-war> (last visited Aug. 15, 2021) [<https://perma.cc/MT25-6LUU>].

96. See *Alston*, 141 S.Ct. at 2167 (Kavanaugh, J., concurring) ("The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have *no meaningful ability to negotiate* with the NCAA over the compensation rules.") (emphasis added).

97. Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE (Nov. 13, 2017), <https://sportshandle.com/gambling-laws-legislation-united-states-history/> [<https://perma.cc/SN86-Q5F3>].

an activity is illegal, even if ubiquitous, there are greater consequences for participating in the practice at all. Even further, illegal sports betting did not involve all of the actors: it is between the betting facilitator and the gambler, and the league, coaches, schools, and players are all third parties for whom externalities present. Even in this landscape, match-fixing happened, albeit on a smaller scale.⁹⁸ Further, existing research points to college athletes being the prime target of illegal match-fixers.⁹⁹

With legalized sports betting, the parties privy to the practice grow. Now, instead of just a facilitator and the gamblers, we see the league, facilitator, coaches, and the gamblers involved. The player remains external to the deal, but a vital commodity upon which informed bets will be placed.¹⁰⁰ Moreover, in a legalized world, sports betting is more prevalent and accessible to the player. The facilitators will be at games, their websites accessible from a basic internet search, their contact cards in the pockets of players. With the NCAA itself acknowledging that collegiate athletes are at a vulnerable age to develop gambling habits,¹⁰¹ what is to say they will not go as far as to be lured into gambling on themselves, fixing the games in which they play?

The NCAA has demonstrated no interest in preserving the welfare of college athletes.¹⁰² When athletes, especially Black athletes, are overworked, under (or never) paid, and expected to devote their life to the game, finding compensation from external sources is a logical extension of a basic compensation economics.¹⁰³ Specifically, economics suggests that those most susceptible to bribing and fixing in sports betting are the least compensated individuals.¹⁰⁴ While subsequent research has applied this to the illegal fixing of games by referees,¹⁰⁵ it is even more applicable to the uncompensated college players.

At the outset, it is implied but worth noting that the NCAA does prohibit sports betting.¹⁰⁶ Much like a referee, the uncompensated player will look to im-

98. See David Welch Suggs Jr., *A Risky Future on College Sports Betting*, INSIDE HIGHER ED. (May 15, 2018), <https://www.insidehighered.com/views/2018/05/15/legalization-sports-gambling-poses-problems-colleges-ncaa-opinion> [<https://perma.cc/BQE8-WC4J>].

99. Holden & Rodenberg, *supra* note 38, at 458, 464–65.

100. See discussion *supra* Part III.

101. See Derevensky & Paskus, *supra* note 7.

102. See discussion *supra* Part III.

103. This is the body of economics in which Coasean solutions, Pigouvian taxes, and compensation games live. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (Routledge ed., 2017).

104. Ian Preston & Stefan Szymanski, *Cheating in Contests*, 19 OXFORD REV. ECON. POL'Y 612, 612–24 (2003). 19(4), 612–624.

105. David Forrest, Ian McHale & Kevin McAuley, “Say It Ain’t So”: *Betting-Related Malpractice in Sport*, 3 INT’L J. SPORT FIN. 156, 156 (2018); Christian Deutscher, Eugen Dimant & Brad Humphreys, *Match Fixing and Sports Betting in Football: Empirical Evidence from the German Bundesliga* (SSRN Elec. J. Working Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910662 [<https://perma.cc/34RX-M3X9>].

106. The NCAA defines “sports wagering” as including “placing, accepting or soliciting a wager (on a staff member’s or student-athlete’s own behalf or on the behalf of others) of any type with any individual or organization on any intercollegiate, amateur or professional team or contest.” NCAA, 2020-21 NCAA DIVISION I MANUAL § 10.02.1, at 45 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/64VG-G2NT>].

prove their condition. In addition to being uncompensated, the overworked, commodified athlete suffers in the classroom,¹⁰⁷ in their personal life, and in crafting their professional future because of the compounding inequities resulting from their agreement to play. This is not to say that the player is at fault—whether in general or when match-fixing, the player is merely playing the game. The uncompensated, commodified athlete will be even more susceptible to match fixing than when sports betting was wholly illegal. And if the NCAA ever moves toward permitting betting, and if all states move in the same direction, the incentives will only increase. The player will be able to fix games at home and away. They can fix regular games, post-season, and bowl games. And their doing so will only be a natural extension of their situation—a rational individual will always look to improve their self-interest, and for an uncompensated athlete, a bribe sure may do that.

And what happens when the (Black) athlete does fix a game? Misses a shot he could definitely make? Fumbles when he could go for the touchdown? We (society, the oblivious white audience) will criminalize him. Even with PASPA long gone, criminal prohibitions on certain gambling activities remain.¹⁰⁸ Among the many, a player could become subject to the Illegal Gambling Business Act (criminalizing intrastate illegal gambling via organized crime/RICO charges),¹⁰⁹ general RICO,¹¹⁰ Sports Bribery Act,¹¹¹ and numerous other state and federal charges.¹¹² Even if any carry little to no penalty (which is doubtful), having such a record will disproportionately affect the Black athlete, whose future is already affected by other compounding inequities.

Most existing scholarship on the intersection of sports betting and collegiate athlete match-fixing has almost entirely focused on how the *viewer* loses confidence in the game, not how the *player* who fixes a game just to make ends meet loses their future.¹¹³ This, again, is reflective of the larger conversation on sports and commodification of Black lives. On the field, the Black athlete serves to entertain. The beneficiaries of that entertainment keep the attention of the NCAA, who keeps the purse strings clutched tightly when the Black athlete so much as strays from the playground to which we have confined him. When he acts outside of the game constructed for him, we criminalize and vilify him.

107. Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 479–80 (2020).

108. *See, e.g.*, sources cited notes 109–12.

109. 18 U.S.C. § 1955.

110. 18 U.S.C. § 1952.

111. 18 U.S.C. § 224; *see also* Holden & Rodenberg, *supra* note 38, at 453.

112. *See, e.g.*, 18 U.S.C. § 371 (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”); MICH. COMP. LAWS SERV. § 750.310 (LexisNexis <2021>) (“This chapter . . . shall apply to the selling of pools or to a transaction whereby money or a valuable thing shall be paid as a gain or speculation on the result of a contest, race, game, or event not known to the parties to be certain and concerning which the parties to the transaction do not render service directly related to the holding of the contest, race, or game or the bringing about of the event.”).

113. *But see* Bernal, *supra* note 37.

When he moves on the block, we do not cheer—instead, we ask for his sports statistics and a copy of his criminal record.

V. WHITE FORTUNES FOUND: THE HISTORY AND ANALYSIS OF SPORTS BETTING

As evidenced by the fall of PASPA, sports betting is an issue left to the states.¹¹⁴ But, what happens when sports betting exists in a patchwork of legality? That is, what happens when one state legalizes the practice, but others do not? Especially when the most lucrative sports on which to bet, such as football, baseball, basketball, hockey, and college leagues (who all sued to protect PASPA), are organized at a national level?

As with tobacco, casinos and sports betting produce costs that impact states other than the one where the bet occurred: Decades ago almost all the states joined in several suits against the tobacco manufacturers to recover their social costs.¹¹⁵ The suits were settled for \$206 billion.¹¹⁶ The suits by the states against the tobacco manufacturers have attracted a great deal of attention and raised the question of whether other activities might be subject to similar suits by the states.¹¹⁷ The most obvious candidates are alcohol and firearms.¹¹⁸

Economics posits that the price of a good is determined by the intersection of the supply curve and the demand curve.¹¹⁹ For the price to be efficient the supply curve must reflect all of the costs that go into producing the product.¹²⁰ With some goods the price of the product is artificially low because some of the costs are shifted to others.¹²¹ An example of this is air pollution, where a foundry manufactures steel and pollutes the air causing damage to the inhabitants of the nearby community.¹²² Before the Clean Air Act, the steel did not reflect the cost of the pollution.¹²³ Tobacco is similar in that tobacco is sold at a reduced price

114. *Murphy* held that the federal government prohibiting sports betting was a violation of Tenth Amendment powers, which reserve rights not enumerated to the federal government (with many constitutional caveats), to the states. *See* *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018).

115. *See* Frank J. Vandall, *The Legal Theory and the Visionaries that Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 478 (1998).

116. *Lorillard Sues Anti-Tobacco Group Over Ads*, L.A. TIMES, Feb. 20, 2002, at C3.

117. *See* Raymond E. Gangarosa, Frank J. Vandall & Brian M. Willis, *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 88, 104–05 (1994).

118. *See id.* at 83, 85, 98. Dean Galligan argues that these cases have created a new public tort. Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1027, 1052 (2001).

119. *See* Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 192 (1996).

120. PAUL SAMUELSON, *ECONOMICS* 640 (10th ed. 1976).

121. *See id.* (describing how information costs for example can cause a product's price to remain artificially low).

122. *See* Clean Air Act, 42 U.S.C. §§ 7401(a)(2).

123. EPA OFFICE OF AIR & RADIATION, *The Benefits and Costs of the Clean Air Act from 1990 to 2020: Summary Report*, at 6 n.4 (2011), <https://www.epa.gov/sites/production/files/2015-07/documents/summary-report.pdf> [<https://perma.cc/N57A-HR2Y>].

because many of the costs related to tobacco, such as cancer caused by smoking, are passed on to the various states.¹²⁴

Other examples of such products are alcohol and guns. Such costs are not borne by the manufacturer of the product but are instead passed on to the community or the states and borne by the taxpayers.¹²⁵ For example, in the suits against the tobacco manufacturers the social costs were the costs of treating Medicare patients for tobacco-induced diseases.¹²⁶ Similarly, in the suits brought by the cities against the gun manufacturers, the alleged costs are the increased costs of law enforcement and the psychological costs of dealing with the victims of the shooting.¹²⁷

The criminalization of a large number of Black college athletes is a huge unexplored cost for American society. In the trial of the student athlete for accepting a bribe to throw a basketball or football game, the athlete-defendant will not be able to argue that he did not know that throwing the game was a crime.¹²⁸ He will be held to have assumed the risk.¹²⁹ [Note that the person (likely a white man) taking the bet will not be subject to prosecution because in states with legalized sports betting, taking the sport bet is no longer a crime.¹³⁰]

Assume that Lucky has flown to the state of Nitro from his home state of Peach intending to gamble and lose perhaps two to three hundred dollars but instead has lost \$50,000. This triggers the loss of his car, house, job, and eventually his wife. What issues are involved for the state of Peach?

A preliminary analysis of the possible suit by Peach (to recover their costs) against the gambling casinos in Nitro (in the above hypo) presents the following issues.

The first defense to be put forward by the casinos would be assumption of risk.¹³¹ The gambler knew that at the end of the day he would likely have lost money and he voluntarily entered the casino and put his bet on the table. Indeed, they would argue that it was obvious that when you enter a casino that you are going to lose money. Although this may be true for unaddicted adults, it is not accurate in regard to the state of Peach. Peach did not know the risk and did not assume it. In this regard, Peach is an innocent third party who is merely burdened with costs flowing from Lucky's gambling.

This is similar to the assumption of risk defense that faced individual plaintiffs in the cigarette suits.¹³² It was overcome in the state suits by arguing that the

124. See Gangarosa, Vandall & Willis, *supra* note 117, at 84–85.

125. See Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 548, 575 (1999).

126. See Gangarosa, Vandall & Willis, *supra* note 117, at 92.

127. See Vandall, *supra* note 125, at 549; cf. Frank J. Vandall, *Suing the NRA for Damages*, 69 EMORY L.J. 1077, 1077 (2020) (arguing for tort liability against the National Rifle Association to, among other things, compensate for the loss of victims of gun violence).

128. See *supra* Part IV.

129. See *supra* Part IV.

130. See *supra* Part II.

131. See Gangarosa, Vandall & Willis, *supra* note 117, at 133.

132. See *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 554–55 (3d Cir. 1990), *aff'd in part, rev'd in part*, 505 U.S. 504 (1992).

states were damaged by the expense of treating diseases caused by smoking, but the states had not assumed the risk.¹³³ The states were innocent third parties and thus the assumption of risk argument failed.¹³⁴

The home state of the Black college student who has been sentenced to prison for throwing a game may want to argue that it has suffered a public nuisance because of his incarceration.¹³⁵ After all, it has lost one of its citizens to the imprisoning state. The state will likely lose because where legislation has passed, sports betting is legal:¹³⁶

The plaintiff's attorney, in evaluating a suit for the state of Peach against the casino located in the state of Nitro, will likely consider a large number of causes of action such as fraud, negligence, breach of warranty, unjust enrichment, RICO, and strict liability.¹³⁷ The strongest cause of action for Peach, however, will likely be public nuisance. The key concept in a public nuisance action is that a public interest has been damaged.¹³⁸ The charge to the court in a public nuisance suit is to do the right thing. In resolving the question of public nuisance, it is not important whether a service or a product is involved.¹³⁹ The key is that there has been an injury to a public interest in the state of Peach.¹⁴⁰ Public nuisance is being advanced as a viable cause of action in some of the gun suits.¹⁴¹

The betting establishment will argue against the nuisance suit that there are benefits to permitting sports betting such as the purchase of goods and services and jobs: the chief benefit to the state is the new taxes the betting corporation will pay.¹⁴² In a public nuisance suit, all elements of the case will be considered

133. See Vandall, *supra* note 115, at 478–482.

134. *Id.* at 479–480.

135. This would bring bad press and generally go against the history of ignoring Black athletes when they are no longer profitable (except, of course, in the case of a scandal).

136. See *supra* Part II.

137. Cf. Gangarosa, Vandall & Willis, *supra* note 117, at 116–117.

138. See W. P. KEETON, D. B. DOBBS, R. E. KEETON, D. G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 643–61 (1984).

139. See Ann O'Connell, *Private vs. Public Nuisance Claims Against Property Owners*, ALLLAW, <https://www.alllaw.com/articles/nolo/personal-injury/private-public-nuisance-claims-property-owners.html> (last visited Aug. 15, 2021) [<https://perma.cc/M8TM-9VAJ>].

140. See *id.*

141. In Illinois families of victims have been able to proceed against gun manufacturers under public nuisance, in New Jersey, Newark's suit against the gun manufacturers has advanced under public nuisance, but Camden County's (New Jersey) public nuisance suit against gun manufacturers has been dismissed. *Newark's Suit Against Gun Makers Proceeds; N.J. Court Says Nuisance Suit is Appropriate*, 30 PROD. & SAFETY LIAB. REP., BUREAU NAT'L AFFS. 28, 29 (Jan. 14, 2002); *Illinois Appeals Court Panel Allows Public Nuisance Suit Against Gun Industry*, PROD. SAFETY & LIAB. REP., BUREAU NAT'L AFFS., 4 (Jan. 14, 2002). Since 2008, the gun manufacturers immunity Act (PLCCA 2005) has immunized gun manufacturers from all suits. See Protection of Lawful Commerce in Arms Act 15 U.S.C. § 7903.

142. See, e.g., integrity fees and property taxes. Integrity fees are applied to sports betting to compensate for the inherent societal risk of the practice. Maury Brown, *MLB's Gamble on Integrity Fees and Its Official Data Stream Getting Pushback from Gaming Operators*, FORBES (May 7, 2019 7:00 AM), <https://www.forbes.com/sites/maurybrown/2019/05/07/mlbs-gamble-on-integrity-fees-and-its-official-data-stream-getting-push-back-from-gaming-operators/#5a81ae668014> [<https://perma.cc/36BM-68FY>].

including benefits and costs of the activity.¹⁴³ Cost-benefit evaluation is the foundational concept of microeconomic analysis.¹⁴⁴ In this regard, the casinos will allege that they are of enormous benefits to the state of Nitro because of the jobs they produce, the taxes they pay, and the substantial gifts that they bestow upon the arts.¹⁴⁵ Revenue, jobs, and taxes are especially important in Canada where the casinos are owned by the Canadian government.¹⁴⁶

As with casino gambling, people who bet on sports will lose large amounts and these will generate further costs for the gamblers' state:

The costs that the state of Peach will seek to recover flow from the allegation that because Lucky lost \$50,000 at the casino located in Nitro, he then lost his car, his job, or his business, was divorced by his wife, the wife and Lucky needed psychiatric counseling paid for by the state and perhaps hospitalization for depression, and Lucky's children failed to thrive because the father was not in the home. Perhaps the children became juvenile delinquents and caused crime in Peach or contributed to the drug problem. For purposes of analysis we might assume that, because of Lucky's loss at the gambling casino, the state of Peach suffered \$250,000 of related injury. The problem, of course, is that in the state of Peach there are perhaps 10,000 people such as Lucky who have lost \$50,000 each at the gambling casino and brought upon Peach an additional \$250,000 each in damages.

Precise analysis is challenging because the costs to Peach are masked or hidden and it is unlikely that Peach has kept track of why the patient is suffering and needs psychiatric or marital counseling or why his children are not doing well at school. Peach merely pays the bills and passes the expense on to its taxpayers.

The huge unexplored cost is the loss of numerous collegiate Black athletes because of accepting bribes to throw games. The sports betting franchise will argue that betting did not "cause-in-fact" the losses by the states.¹⁴⁷ They will also argue that betting was not the proximate cause of the state's losses.¹⁴⁸ In addition they will argue that there is a presumption that athletes will not throw games.¹⁴⁹

143. See KEETON ET AL., *supra* note 138, at 644–52.

144. See GUIDO CALABRESI, *THE COST OF ACCIDENTS* 24 (1970); A. Mitchell Polinsky & Steven Shavell, *Should Liability be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J.L. ECON. & ORG. 427, 427 (1994). But see Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. REV. 114, 117 (2001).

145. Arguably there are benefits to the gambler who enjoys the activity.

146. See John Warren Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 MANG. DECIS. ECON. 17, 30 (2001).

147. See *id.* at 23.

148. Some have suggested that, instead, the state will blame the organized sports fixing for the costs of ensuing investigation and prosecution. See Patrick Moran, *Anyone's Game: Sports-Betting Regulations After Murphy v. NCAA*, CATO LEGAL POL'Y BULL. (Mar. 11, 2019), <https://www.cato.org/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa> [<https://perma.cc/6QBL-3GRC>].

149. See *supra* Part IV.

A substantial issue is whether it is possible to prove that the damages the state of Peach suffers were caused in fact by the casino.¹⁵⁰ For example, the casino will insist that Lucky's casino losses were not a substantial factor in the dissolution of his marriage. The casino will argue that these damages are remote and not directly connected to the activities of the gambling casino. This is the holding in the recent New York gun litigation: the gun manufacturers are not liable to the shooting victims because the criminality is remote and not directly caused in Chicago and New York by the saturation gun sales in the south.¹⁵¹ The casinos will argue that their recreational activities are not the proximate cause of the losses that are visited upon the state of Peach.

In defending against the nuisance suit, the betting franchise will argue that sports betting is now legal:¹⁵²

The casinos located in the state of Nitro will argue that their activity is legal in the state of Nitro and therefore cannot be subject to suit in the state of Peach. The argument that the activity should be immune from civil suit because it is legal is an old defense and will not likely be determinative. For example, it is legal to sell tobacco but that did not prevent tobacco manufacturers from settling their suits for \$206 billion.¹⁵³ It is legal to produce goods that result in air pollution and toxic spills, but that does not mean that the producer is immune from liability for excess air pollution.¹⁵⁴ Indeed, dealing with toxic spills is a cost of doing business for some corporations.¹⁵⁵

The betting franchise will also argue that the state bringing the public nuisance suit lacks "clean hands": The "clean hands" doctrine provides that in order to come into a court for relief, the petitioner must have "clean hands."¹⁵⁶ This means essentially that she must not be a party to the wrongful act.¹⁵⁷ A serious problem with a nuisance suit is that some states will be held to have "dirty hands" and are therefore not able to recover for public nuisance.¹⁵⁸ The "dirty hands" defense arises because many states have various forms of legal gambling such as

150. See Gangarosa, Vandall & Willis, *supra* note 117, at 125.

151. See *Hamilton v. Beretta U.S.A. Corp.* 750 N.E.2d 1055, 1061–62 (N.Y. 2001).

152. See *supra* Part II.

153. *Who is Really Benefitting From the Tobacco Settlement Money?*, AM. LUNG ASS'N: EACH BREATH (Feb. 3, 2016), <https://www.lung.org/blog/who-benefit-tobacco-settlement> [<https://perma.cc/8USR-7CCN>]; see discussion, *supra* Part IV; see also sources cited *supra* notes 116–18.

154. See John W. Bagby, Paula C. Murray & Eric T. Andrews, *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENV'T. L.J., 232 (1995).

155. See Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Business Sites*, 23 VT. L. REV. 59, 59 (1998) (noting that businesses spend over \$30 million, on average, per Superfund site, and have spent over \$11.3 billion on CERCLA cleanups).

156. Mark Pettit, Jr., *Freedom, Freedom of Contract and the Rise and Fall*, 79 B.U.L. REV. 263, 327 n.276 (1999) (citing *Drennan v. Douglas* 102 Ill. 341 (1882)).

157. See *id.*

158. See *Drennan*, 102 Ill. at 345; See, e.g., Michael C. Blumm, *A Dozen Landmark Nuisance Cases and Their Environmental Significance*, 62 ARIZ. L. REV. 403, 418, n.71 (2020).

Lotto.¹⁵⁹ It may be possible, however, to draw a distinction between Lotto which is somewhat self-limiting in regard to the size of the loss, and casino gambling which allows for and encourages enormous losses by some gamblers.

The casino may also argue that by legalizing other forms of gambling, the state of Peach has assumed the risk. The theory of assumption of risk is that one who knows the risk and voluntarily assumes it will not be able to sue.¹⁶⁰

Some who bet on sports under the “new” federal law will be addicted to gambling: [The Black football player who throws the game will do it for the money, however.¹⁶¹]

Arguably, the personalities of all gamblers can be lined up on a continuum from those who say they are only going to lose \$100 and walk away from the tables when they do, to those who say they are going to lose \$100 but lose \$50,000 and do this quite routinely. A case may be made that some gamblers are pathological or “addicted.”¹⁶² The law has never favored taking advantage of the less fortunate and therefore if it can be shown that gambling casinos identify and prey upon those who are addicted to gambling, it might make a stronger case for the state of Peach in recovering its welfare costs from the gambling casinos.¹⁶³

At this time, it is foreseeable that college athletes, especially those from underserved backgrounds, will accept bribes to throw games and that they will be prosecuted, incarcerated, and vilified. The tax revenue on sports betting will have no value to the Black basketball or football player who has had his life ruined because he threw the game and went to prison:

The casinos will argue that the best way to deal with the problem is merely to increase the taxes that are presently paid by the casinos. In some states, the casinos pay taxes of fifteen percent of casino revenues.¹⁶⁴ This may appear as a red flag that they are undertaxed when the casinos in Canada are completely owned by the government and arguably pay 100% in taxes.¹⁶⁵ The more important point, however, is the taxes paid in the state of Nitro are not shared with the state of Peach, which we assume has no legalized gambling.

With the removal of PASPA, sports betting could easily become legal in every state. The more states that legalize sports betting, the more the Black athlete will be caught in the trap between commodification without compensation and criminalization.

159. See Drennan, 102 Ill. at 345; *Legal Gambling vs. Illegal Gambling*, HG.ORG, <https://www.hg.org/legal-articles/legal-gambling-vs-illegal-gambling-49748> (last visited Aug. 15, 2021) [<https://perma.cc/A5JF-79TR>].

160. See KEETON ET AL., *supra* note 138, at 480–98.

161. See *supra* Part IV.

162. See U.S. SURGEON GEN., U.S. DEP’T OF HEALTH & HUM. SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS 72 (1980) (arguing that nicotine is addictive).

163. See KEETON ET AL., *supra* note 138, at 62. John Kindt argues that the casinos pursue the addicted gamblers through credit card lists, census data, and direct-mail lists. Kindt, *supra* note 146, at 28.

164. See *id.* at 30.

165. See *id.*

VI. CONCLUSION

A clearly foreseeable result of legalizing sports betting is the dramatic expansion of the arrest, trial and incarceration of Black college athletes.¹⁶⁶ They understand that they have no real chance of making the professional teams and will therefore accept bribes to throw the games.¹⁶⁷ Huge amounts of bribes will flood the market and large numbers of Black athletes will accept bribes and as a result spend time in prison, risking their personal and professional futures. In contrast, white adult males who operate the betting corporations will earn wind-fall profits. Bribers will also profit and some will also end up in prison.¹⁶⁸ The lives of both the Black athletes and the bribers will be forever ruined.

Alongside the degradation of college athletics as a result of thrown games, white males who own betting parlors and other gambling enterprises will earn millions of dollars and that is the point of each states' newly enacted or proposed bills. The foreseeable imprisonment of large numbers of Black college athletes is accepted as collateral damage necessary to support the greater good: white profits.¹⁶⁹

As surely as the sun comes up each day, legalizing sports betting will carry with it the prosecution of Black college athletes for throwing college games. The obvious solutions are first, to not legalize betting on college games or second, to include a provision in state bills that college athletes will be immune from prosecution for accepting bribes for throwing games. Black college athletes must not become the losers in the business of sports betting and white profits.

166. *See supra* Part IV.

167. *See supra* Part IV.

168. Likely under Illegal Gambling Business Act, 18 U.S.C. § 1955 (2020) (criminalizing intrastate illegal gambling via organized crime/RICO charges), general RICO, Sports Bribery Act, and numerous other state and federal charges. *See* 18 U.S.C. § 224; *see* Holden & Rodenberg, *supra* note 38, at 453.

169. *See supra* Part V.

