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## ARTICLES

# CRIMINALIZING MATCH-FIXING AS AMERICA LEGALIZES SPORTS GAMBLING

JODI S. BALSAM\*

### INTRODUCTION<sup>1</sup>

In May 2018, the Supreme Court decided *Murphy v. NCAA*,<sup>2</sup> striking down the Professional and Amateur Sports Protection Act (PASPA) that prohibited states from allowing sports betting.<sup>3</sup> At this writing, more than two years after PASPA's judicial repeal, eighteen states have enacted legal sports betting, five states plus Washington, D.C. have passed legislation that is pending launch, and twenty-four more have introduced sports gambling bills.<sup>4</sup> Somewhat myopically, these legislative efforts fail to address the game integrity concerns flagged by the sports leagues and other entities that create the contests on which

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\* Associate Professor of Clinical Law, Director of Externship Programs, Brooklyn Law School. I received excellent research assistance from Nick Rybarczyk, Matthew Schechter, Madison Smiley, and Katherine Wilcox. Thank you to Daniel Wallach and to participants in the Brooklyn Law School Faculty Workshop for their time and helpful comments and suggestions. I also benefited enormously in writing this article from my experience as in-house counsel at the National Football League from 1994 through 2006, but all opinions expressed herein are entirely my own.

<sup>1</sup> This article builds on my prior scholarship examining the history of American match-fixing scandals; how leagues and law enforcement have attempted to deter, detect, and punish the malefactors; and how with the onset of legal sports betting state governments have missed the opportunity to regulate for game integrity. Jodi S. Balsam, *Legislating for Game Integrity as U.S. States Legalize Sports Betting*, LAWINSPO 4–6 (Sept. 6, 2019), <https://ssrn.com/abstract=3455424>.

<sup>2</sup> 138 S. Ct. 1461 (2018).

<sup>3</sup> 28 U.S.C. §§ 3701–3704 (2020).

<sup>4</sup> See Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (June 9, 2020), [https://www.espn.com/chalk/story/\\_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization); see also Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Dec. 12, 2020).

bets are being placed.<sup>5</sup> Little attention is paid to the increased risk of match-fixing and in-play manipulation associated with expanded sports betting.

In particular, the enacted and proposed legislation introduce virtually no new criminal penalties in the event of betting-related manipulation of the underlying athletic competitions. To the extent sports gambling bills authorize new criminal offenses, almost all solely penalize failure to comply with licensure and betting integrity provisions, and do not define offenses relating to the integrity of sports.<sup>6</sup> Instead, the new laws implicitly rely on general penal code provisions to deter and punish the fraudsters and criminals who will seek to exploit the normalization of sports betting.<sup>7</sup> Furthermore, where existing state laws address sports corruption, they principally target sports bribery under penal code analogues to the federal Sports Bribery Act, which makes it a felony to “influence . . . by bribery any sporting contest.”<sup>8</sup> Such provisions do not cover non-bribery situations where other means are used to corrupt athletic contests, such as extortion, blackmail, and duress.<sup>9</sup> Nor does the sports bribery offense address tipping of confidential information or betting on games by a sports participant who has the ability to affect outcomes.<sup>10</sup> These lacunae create real vulnerability in globalized betting markets that provide increasingly fertile ground for corrupt actors.<sup>11</sup>

Part II of this article offers an understanding of the moral and legal dimensions of honest athletic competition and the importance of defining game manipulation as a crime. Part III describes the American experience with sports

<sup>5</sup> In his 1992 testimony before Congress in support of PASPA, then NFL Commissioner Paul Tagliabue testified: “[S]ports gambling threatens the integrity of, and public confidence in, team sports. Sports lotteries inevitably foster a climate of suspicion about controversial plays and intensify cynicism with respect to player performances, coaching decisions, officiating calls and game results.” *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102d Cong. 25 (1992) [hereinafter *S. 473 and S. 474 Hearing*]; see also discussion *infra* Part IV.

<sup>6</sup> See John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 379–80 (2019) (identifying “two layers of integrity issues” in legal sports gambling: integrity of sportsbooks and of the underlying sports events). A notable exception is West Virginia. See W. VA. CODE § 29-22D-21(b)(1) (2018) (making it a felony to bribe someone for the purpose of influencing the outcome of an athletic contest, or to tip inside information relevant to a sports wager).

<sup>7</sup> See, e.g., N.J. STAT. ANN. § 5:12A-11(c) (West 2018) (defining a single new criminal offense of operating a sports pool without a license, and imposing modest fines for “disorderly conduct” when sports insiders bet on their own games).

<sup>8</sup> 18 U.S.C.A. § 224 (West 1994), commonly referred to as the Sports Bribery Act. Forty-six states and the District of Columbia have enacted a similar prohibition. See *infra* notes 133–36 and accompanying text.

<sup>9</sup> See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 454, 465 (2015); Holden, *supra* note 6, at 341; Kelly Hudson & Rod Findley, *Corruption: Agreeing to Match-Fixing Under Duress: Analysis*, WORLD SPORTS L. REP. 8(6) (June 2010); see also discussion *infra* Part IV.

<sup>10</sup> See John T. Holden & Ryan M. Rodenberg, *Lone-Wolf Match-Fixing: Global Policy Considerations*, 9 INT’L J. SPORT POL’Y & POL. 137, 138 (2017).

<sup>11</sup> See Kevin Carpenter, *Why Are Countries Taking So Long to Act on Match-Fixing?*, TRANSPARENCY INT’L, [https://www.transparency.org/files/content/feature/Feature\\_TakingLongMatchFixing\\_Carpenter\\_GCR\\_Sport.pdf](https://www.transparency.org/files/content/feature/Feature_TakingLongMatchFixing_Carpenter_GCR_Sport.pdf) (last visited July 31, 2020).

gambling, the common types of sports bets, and how they correlate to game manipulation risks. Part IV critiques existing penal provisions addressed to corruption in sports and the failure of post-*Murphy* sports betting legislation to address gaps in those provisions. Part V examines the European experience with match-fixing and growing acknowledgment of the necessity of defining criminal offenses specific to sports corruption. Building on that experience, it proposes a federal penal provision that makes competition manipulation a separate criminal offense, rather than relying on existing general provisions incriminating fraud, bribery, corruption, or deception. The article concludes with recommendations for a public-private collaboration to safeguard sport integrity.

### I. HONEST ATHLETIC COMPETITION AND ITS MANIPULATION AS A CRIME

In ordinary usage, sports integrity means playing the game according to the rules, resulting in “fair and honest performances and outcomes, unaffected by illegitimate enhancements or external interests.”<sup>12</sup> While sports integrity has both on-field and off-field components,<sup>13</sup> this article focuses on the former and specifically the manipulation of how the athletic contest is played.<sup>14</sup> To preserve the multibillion-dollar sports industry and its role in American society, it is essential for the public to believe in the integrity of the games or events—“that the outcome of a sporting competition is genuine.”<sup>15</sup>

A key characteristic of on-field integrity is outcome uncertainty—“competitive sport is supposedly unscripted, leaving open the possibility of an

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<sup>12</sup> *National Integrity of Sport Unit*, AUSTRALIAN GOVERNMENT DEPARTMENT OF HEALTH, <https://www.health.gov.au/internet/main/publishing.nsf/content/national-integrity-of-sport-unit> (Aug. 3, 2016); Michelle Minton, *Legalizing Sports Betting in the United States*, COMPETITIVE ENTER. INST. (Mar. 15, 2018), <https://cei.org/content/legalizing-sports-betting-united-states> (“The integrity of sports depends on the outcome of any given match being the result of fair play on the field”); Int’l Olympic Comm., *Code of Ethics*, art. 10 (2018) (stating participants must not “manipulate the course or result of a competition, or any part thereof, in a manner contrary to sporting ethics, infringe the principle of fair play or show unsporting conduct”); SORBONNE-ICSS INTEGRITY REP., PROTECTING THE INTEGRITY OF SPORT COMPETITION: THE LAST BET FOR MODERN SPORT 36 (2012–14), <http://theicss.org/2019/02/20/protecting-the-integrity-of-sport-competition-the-last-bet-for-modern-sport/> [hereinafter SORBONNE-ICSS REP.].

<sup>13</sup> Matthew J. Mitten, *How Is the Integrity of Sport Protected in the United States?*, 19 TEX. REV. ENT. & SPORTS L. 89, 90 n.4 (2019). The designation “on-field” and “off-field” is meant generically, to describe the location of any athletic competition, including those that take place on court, ice, track, gym mat, or water. Off-field integrity encompasses expectations of good and honest sports governance and protection of athletes from discrimination, harassment, and abuse. See, e.g., Adam Epstein & Barbara Osborne, *Teaching Ethics with Sports: Recent Developments*, 28 MARQ. SPORTS L. REV. 301, 309, 343 (2018).

<sup>14</sup> In addition to competition manipulation, the two other leading methods of disrupting on-field integrity are illegal performance enhancement, e.g., doping, and sabotage or cheating, e.g., injuring a competitor or spying on opponents. See ANTHONY CABOT & KEITH MILLER, SPORTS WAGERING IN AMERICA: POLICIES, ECONOMICS, AND REGULATION 117 (2018).

<sup>15</sup> Richard H. McLaren, *Corruption: Its Impact on Fair Play*, 19 MARQ. SPORTS L. REV. 15, 15 (2008); CABOT ET AL., *supra* note 14, at 108; Holden, *supra* note 6, at 380 (observing “both leagues and sportsbooks have an interest in protecting the integrity of the underlying sporting events from corruptors”).

unexpected outcome.”<sup>16</sup> The very legitimacy of the sport product and its appeal to fans depends on this unpredictability and authenticity.<sup>17</sup> Authenticity in turn requires that all game participants use their best efforts.<sup>18</sup> Accordingly, competition manipulation has been defined as: “an intentional arrangement, act or omission aimed at improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others.”<sup>19</sup>

A competition “fix” may be motivated by financial gain, *e.g.*, enabling a winning bet, or by sporting advantage, *e.g.*, manipulating to affect seeding in a tournament or to guarantee advancement.<sup>20</sup> Either way, this behavior constitutes a “cultural crime” in that society loses when sports corruption is exposed and the values associated with sport are exposed as a “sham.”<sup>21</sup>

Manipulation of sport can also constitute a legal crime when it imposes tangible injury on real victims, namely the sport’s governing body, and its fans, sponsors, related industries, and non-complicit participants.<sup>22</sup> Fixing deprives ticket holders and other spectators of the outcome uncertainty that comprises the

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<sup>16</sup> Holden et al., *supra* note 8, at 454, 461; Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 316 (2018) (“[F]ans [must] believe[] game results were the product of bona fide competition and not a predetermined script”).

<sup>17</sup> See McLaren, *supra* note 14, at 16 (observing that “[i]ntegrity in sport is crucial to its success and to the enjoyment of participants and spectators” and that “[o]nce lost it is very difficult to ever retrieve”).

<sup>18</sup> AUSTL. DEP’T OF HEALTH, NATIONAL POLICY ON MATCH-FIXING IN SPORT (June 10, 2011), [https://www1.health.gov.au/internet/main/publishing.nsf/Content/687CADCF3C1BEF8ACA257C310021CD5C/\\$File/national\\_policy\\_match-fixing.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/687CADCF3C1BEF8ACA257C310021CD5C/$File/national_policy_match-fixing.pdf) (in the “context” section, defining manipulation to include, among other things, “deliberate under-performance,” “withdrawal (tanking),” and “an official’s deliberate misapplication of the rules of the contest”).

<sup>19</sup> COUNCIL OF EUR., COUNCIL OF EUROPE CONVENTION ON THE MANIPULATION OF SPORTS COMPETITIONS 3 (2014), <https://rm.coe.int/16801cdd7e> [hereinafter “Macolin Convention”]. More to the point, match-fixing occurs when contestants are “willing to reduce their effort contribution for specific matches if the rewards for doing so are large enough” for example because gambling provides “an opportunity to generate returns on the insider information.” Ian Preston & Stefan Szymanski, *Cheating in Contests*, 19 OXFORD REV. OF ECON. POL’Y 612 (2003).

<sup>20</sup> INT’L OLYMPIC COMM., HANDBOOK ON PROTECTING SPORT FROM COMPETITION MANIPULATION 19 (2016), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Betting/Education-Awareness-raising/Interpol-IOC-Handbook-on-Protecting-Sport-from-Competition-Manipulation.pdf> [hereinafter INTERPOL-IOC HANDBOOK]. Interpol is the international criminal police organization that works with its 194 member countries to fight international crime. See, *e.g.*, Epstein & Osborne, *supra* note 13, at 341 (describing intentional “tanking” in Olympic badminton to manipulate tournament brackets); CABOT ET AL., *supra* note 14, at 131 (describing tanking by NBA teams to reach a better position to draft future players).

<sup>21</sup> See DAVID FORREST, SPORTS BETTING: LAW AND POLICY 14, 16 (Paul M. Anderson et al. eds., 2011).

<sup>22</sup> CABOT ET AL., *supra* note 14, at 137–38; COUNCIL OF EUR., EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON THE MANIPULATION OF SPORTS COMPETITIONS 21 (2014) (identifying victims of competition manipulation to include “other persons having placed bets, the opposing team, or, where applicable, the national or international federation responsible for organising [sic] the competition”), <https://rm.coe.int/16800d383f> [hereinafter COUNCIL OF EUR. EXPLANATORY REP.]; see generally Paul Gaffney, *Playing with Cheaters*, 63 N.Y.L. SCH. L. REV. 197, 208–09 (2018–2019) (observing that when a teammate corrupts the game, honest athletes are harmed by, among other things, assumed complicity, damage to team morale, and whistleblowing risks).

event's main attraction. Revenues from broadcasting, sponsorship, and licensing will decline if sports corruption disillusiones and alienates consumers.<sup>23</sup> Sports governing bodies will need to expend resources on detection and enforcement of honest play rules. Given these quantifiable injuries (and others), gambling-related manipulation of sport resembles various types of property and financial crimes.<sup>24</sup>

To be fair, the risk of gambling-related corruption is present whether sports wagering is legal or not.<sup>25</sup> Indeed, many argue that legalized and regulated sports gambling offers advantages in protecting game integrity because it brings transparency and oversight.<sup>26</sup> Especially in the digital era, taking gambling out of the black market provides access to data to track customers' activity and identify betting anomalies that suggest possible corruption.<sup>27</sup> The question remains, once a fixer is caught, what criminal laws are necessary to facilitate prosecution of the sport integrity violation, impose punishment, and thereby deter future corruption?<sup>28</sup> To draft those criminal laws, a necessary step is to understand the underlying conduct,<sup>29</sup> namely, common types of sports bets and the game manipulation risks associated with different types of bets.

## II. COMMON SPORTS BETS AND GAME-MANIPULATION RISK FACTORS

Americans have been betting on sports since the earliest days of horseracing.<sup>30</sup> With the founding of the first professional baseball leagues in the 1870s, betting became an "integral part of the game," including bets on the game's outcome and also on events during the game, such as whether the next

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<sup>23</sup> CABOT ET AL., *supra* note 14, at 138.

<sup>24</sup> See FORREST, *supra* note 21. A related form of sports corruption is "insider trading" on confidential, competitively sensitive information (e.g., player injuries) to defraud the betting markets. See Ryan Grandeau, *Securing the Best Odds: Why Congress Should Regulate Sports Gambling Based on Securities-Style Mandatory Disclosure*, 41 CARDOZO L. REV. 1229, 1254, 1259–60 (2020) (recommending mandatory disclosure requirements for sports leagues and teams to counter "the threat of illicitly-gained informational asymmetries"). While this article focuses on corruption of the athletic competition, not the betting markets, it should be acknowledged that solicitation of inside information to gain a betting advantage can lead to match-fixing when insiders are game participants whose breach of confidentiality rules exposes them to pressure to corrupt the match.

<sup>25</sup> See Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under*, 5 ARIZ. ST. SPORTS & ENT. L.J. 6, 8, 11–13 (2015).

<sup>26</sup> See, e.g., *id.* at 9; DAVID FORREST & RICK PARRY, THE KEYS TO SPORTS INTEGRITY IN THE UNITED STATES: LEGALIZED, REGULATED SPORTS BETTING 2–3, 15 (2016).

<sup>27</sup> See Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 47 (2016); Todd Dewey, *Las Vegas Bookmakers Know a Fix When They See One*, L.V. REV.-J. (Sept. 8, 2017), <https://www.reviewjournal.com/sports/betting/las-vegas-bookmakers-know-a-fix-when-they-see-one/> (reporting on Las Vegas bookmakers tipping law enforcement as to suspected point-shaving in by Arizona State University basketball players).

<sup>28</sup> CABOT ET AL., *supra* note 14, at 146–47.

<sup>29</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 331 (2007).

<sup>30</sup> ARNE K. LANG, SPORTS BETTING AND BOOKMAKING: AN AMERICAN HISTORY 37–38 (2016).

pitch would be a ball or a strike or whether a batter would score.<sup>31</sup> By the early twentieth century, scandals involving state-run revenue lotteries resulted in bans on all forms of gambling in most states.<sup>32</sup> Nonetheless, illegal sports betting persisted, including the most notorious episode of betting-related match-fixing—the crooked 1919 World Series.<sup>33</sup>

Economic necessity in the mid-twentieth century brought a resurgence of legalized gambling as a way to replenish state coffers, with Nevada as the first state to sponsor casino gambling (in 1931) and betting on sports (in 1949).<sup>34</sup> Sports betting—both legal and illegal—picked up steam over the next few decades with three developments: the invention of the point-spread, the advent of televised sports, and the reduction of the federal tax on legal sports bets.<sup>35</sup> By the mid-1970s, sports betting came into its own; Nevada reported almost \$900 million in sports bets in 1984, the first year that number was tracked.<sup>36</sup> For 2017, that number had increased by 440% to \$4.9 billion bets placed (the “handle”) in Nevada sportsbooks.<sup>37</sup> Illegal U.S. sports wagering for that same year, just prior to the invalidation of PASPA, has been estimated at between \$67 and \$150 billion.<sup>38</sup>

The simplest type of sports wager is the “straight bet”—an individual wager on a game or event that will be determined by the “money line” or the “point spread.”<sup>39</sup> A straight bet on the money line is a wager on the odds of a team winning a game outright, and is more common in low scoring events like baseball or hockey and in individual sports. So, a sportsbook might offer 5/1 odds that Major League Baseball’s Chicago Cubs will win its next game against the Pittsburgh Pirates, or that Simona Halep will defeat Serena Williams in the Wimbledon finals.<sup>40</sup> The money line is also used in betting on future events such as whether a particular team will win the season championship. For example, a

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<sup>31</sup> RICHARD O. DAVIES & RICHARD G. ABRAM, *BETTING THE LINE: SPORTS WAGERING IN AMERICAN LIFE* 19 (2001).

<sup>32</sup> ROGER DUNSTAN, *GAMBLING IN CALIFORNIA: HISTORY OF GAMBLING IN THE UNITED STATES*, CAL. RES. BUREAU: CAL. ST. LIBR. CRB-97-003, II-7 (1997), <https://www.library.ca.gov/Content/pdf/crb/reports/97-003.pdf>.

<sup>33</sup> See EDWARD J. LORDAN, *SPORTS AND SCANDALS: HOW LEAGUES PROTECT THE INTEGRITY OF THEIR GAMES* 20-27 (2014) (describing how eight members of the Chicago White Sox accepted bribes from gamblers to throw the World Series).

<sup>34</sup> See DUNSTAN, *supra* note 32, at II-8; Edelman, *supra* note 16, at 317.

<sup>35</sup> Barbara Mantel, *Betting on Sports*, 26 CQ RESEARCHER 891, 900 (Oct. 28, 2016).

<sup>36</sup> See CABOT ET AL., *supra* note 14, at 56; *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>.

<sup>37</sup> *A Look Inside the Numbers of Sports Betting in the U.S. and Overseas*, *supra* note 36.

<sup>38</sup> Jay L. Zagorsky, *Market for Illegal Sports Betting in US Is Not Really a \$150 Billion Business*, THE CONVERSATION (May 14, 2018), <https://theconversation.com/market-for-illegal-sports-betting-in-us-is-not-really-a-150-billion-business-96618>.

<sup>39</sup> CABOT ET AL., *supra* note 14, at 5–17. The European betting markets more often use the term “handicap” to refer to the point spread.

<sup>40</sup> See *id.* at 5–7.

sportsbook might offer 60/1 odds that the National Football League's New York Jets will win the next Super Bowl.<sup>41</sup>

Bettors also wager on the point spread, which represents the margin of points by which the favored team must win to “cover the spread.” For example, in a game between the NBA's Golden State Warriors and New York Knicks, the point spread might be the Warriors by eight points. A bettor who wagered on the Warriors would win that bet if the team won by at least nine points, for example, by a score of 100-91.<sup>42</sup> A variation on a point-spread bet is an “over/under” bet, in which the bettor wagers that the combined point total of two teams will be more than a specified total, without necessarily specifying a winner. In the Warriors-Knicks example, a bettor who wagered that the total game score would exceed 200 points would lose that bet. Point-spread and over/under betting are referred to as “binary betting formulas” because they allow a dissociation between the sporting result and the betting result.<sup>43</sup>

Proposition or “prop” bets are wagers on aspects of a game besides the final score or outcome. These have become more popular lately, although they date back to at least since the early days of professional baseball, as noted above.<sup>44</sup> For example, in American football, common prop bets include which team will incur most penalty yards, which team will kick the first field goal, or whether a running back will rush for a certain number of yards.

In the digital age “in-game” wagering has proliferated—with bettors on-site and off-site using electronic means to place bets in real-time while the game is happening.<sup>45</sup> In-game wagers can be made on propositions or outcomes. For example, an in-game bettor might wager on whether the next football play will be a run or a pass or whether the next basketball possession will result in a score.<sup>46</sup> In-game bets can also be made on a shifting money line that reflects changes in the odds since the contest started, for example, because the favorite is losing. In-game wagering has been a key driver of online sports betting revenues in recent years.<sup>47</sup> Gamblers often use these bets to hedge against anticipated losses on straight bets or bets made before the event started.<sup>48</sup>

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<sup>41</sup> See *id.* at 22–23.

<sup>42</sup> See *id.* at 10–13. If the margin of victory is exactly the point-spread, the bet is a “push” and the bookie simply reimburses the wager amount.

<sup>43</sup> SORBONNE-ICSS REPORT, *supra* note 12, at 27.

<sup>44</sup> Proposition bets are also referred to as novelty or spot bets.

<sup>45</sup> See CABOT ET AL., *supra* note 14, at 22. This type of bet is sometimes referred to as “in-play” betting or “live betting.” See INTERPOL-IOC HANDBOOK, *supra* note 20, at 35.

<sup>46</sup> CABOT ET AL., *supra* note 14, at 162.

<sup>47</sup> See BEN VAN ROMPUY, THE ODDS OF MATCH FIXING: FACTS & FIGURES ON THE INTEGRITY RISK OF CERTAIN SPORTS BETS 5 (2015), <https://www.asser.nl/media/2623/the-odds-of-matchfixing-report-2015.pdf> [hereinafter ASSER INST. MATCH FIXING FACTS & FIGURES] (reporting that in-game bets were estimated to account for more than 70% of all European sports bets placed online).

<sup>48</sup> *Should You Use Live Betting to Hedge Bets?*, LIVEBETTING.NET, <https://www.livebetting.net/strategy/hedging/> (last visited July 31, 2020).



Of these categories of wagers, sports fixers are attracted to betting markets with high liquidity (a large handle) because those markets operate most efficiently, with the lowest prices, most stable money lines, and largest choice of wagers.<sup>49</sup> In such markets, large bets are more acceptable, and pay-outs more predictable, maximizing the profits from organizing a fix.<sup>50</sup> Most importantly, high liquidity means a fixer's bet will be less conspicuous, minimizing the risk of detection by law enforcement or a sport's governing body.<sup>51</sup> At present, the highest liquidity resides in the markets for more conventional straight bets. Empirical data from European football (soccer) shows that betting-related match fixing is predominantly associated with the final score of a game and in particular with total goals scored by each team.<sup>52</sup>

Within the category of straight bets, the risk of corruption escalates with binary betting formulas, that is when the sporting result is separate from the betting result.<sup>53</sup> With point-spread and over/under bets, the cost of the fraud is lower. The fix does not require arranging for someone to intentionally lose a game, but only to manipulate the margin of victory.<sup>54</sup> Often that can be accomplished by a single player, even in team sports. In individual sports like tennis, such fraud is rampant.<sup>55</sup> By contrast, the fix is far costlier for a money line straight bet, where the fixer has to induce one or more individuals to intentionally lose the game, which increases the risk of failure and detection.<sup>56</sup>

Accordingly, most instances of game manipulation in the U.S. have involved a team attempting to win by less than the betting point-spread, a method known as "point-shaving."<sup>57</sup> Statistical evidence points to the likelihood of widespread point-shaving in NCAA college basketball, but "the crime is almost imperceptible" and is rarely prosecuted.<sup>58</sup> A referee can also affect the point-spread through how he officiates the game, as suggested (but not proven) in the

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<sup>49</sup> See FORREST, *supra* note 21.

<sup>50</sup> CABOT ET AL., *supra* note 14, at 140; FORREST, *supra* note 21.

<sup>51</sup> CABOT ET AL., *supra* note 14, at 138.

<sup>52</sup> See ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 33. For clarity and convenience going forward, "football" refers to the American game, and "soccer" refers to the international game.

<sup>53</sup> See SORBONNE-ICSS REP., *supra* note 12, at 27.

<sup>54</sup> See ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 34.

<sup>55</sup> ADAM LEWIS ET AL., FINAL REPORT - INDEPENDENT REVIEW OF INTEGRITY IN TENNIS 2 (2018) [hereinafter "TENNIS INTEGRITY REP.,"] (reporting a "tsunami" of betting-related breaches of integrity).

<sup>56</sup> See CABOT ET AL., *supra* note 14, at 135; SORBONNE-ICSS REPORT, *supra* note 12, at 27; ASSER INST., CTR. FOR EUR. AND INT'L L., STUDY ON RISK ASSESSMENT AND MANAGEMENT AND PREVENTION OF CONFLICTS OF INTEREST IN THE PREVENTION AND FIGHT AGAINST BETTING-RELATING MATCH FIXING IN THE EU 28, FINAL REPORT 13 (July 2014) [hereinafter ASSER INST. EU 28 STUDY].

<sup>57</sup> See Holden et al., *supra* note 9, at 461.

<sup>58</sup> See Shaun Assael, *Portrait of a Point Shaver*, ESPN (Mar. 6, 2014), [https://www.espn.com/mens-college-basketball/story/\\_/id/10545391/former-assistant-tj-brown-brandon-johnson-center-university-san-diego-point-shaving-scandal-espn-magazine](https://www.espn.com/mens-college-basketball/story/_/id/10545391/former-assistant-tj-brown-brandon-johnson-center-university-san-diego-point-shaving-scandal-espn-magazine) (analyzing over 35,000 NCAA games and identifying anomalies in teams failing to cover the point spread); see Balsam, *supra* note 1, at 4–6.

NBA-Tim Donaghy betting scandal.<sup>59</sup> This risk is especially salient in sports like basketball where the referee's decision to call a foul can directly result in a scoring opportunity for one team.

With the dramatic increase in prop bets and in-game wagering, concern has arisen about "spot fixing"—when a player seeks to manipulate a specific event in an athletic contest to allow the fixer to win a proposition or an in-game bet.<sup>60</sup> At the moment, empirical support is lacking for the assertion that prop bets pose significant risk of game manipulation.<sup>61</sup> In the more mature European betting markets, criminal elements have not demonstrated interest in exploiting prop bets because of low liquidity and restrictions on the size of bets.<sup>62</sup> But the risk cannot be discarded given that it takes only one individual to affect an in-game event (e.g., a baseball pitcher intentionally throwing a ball or strike).<sup>63</sup> When prop bets are made on insignificant events within a game, manipulation is extremely difficult to detect.<sup>64</sup> And because spot fixing usually has a small or no impact on the outcome of the game, athletes may discount the ethical, criminal, and sporting transgression.<sup>65</sup>

In-game wagering poses distinct risks of game manipulation because fixers can maximize profits by virtue of the higher betting limits and variations in the odds.<sup>66</sup> Some countries have banned in-game bets because they believe it is more vulnerable to match fixing and corruption is harder to detect, given the short period between the placing of bets and the event being bet on.<sup>67</sup> But again, because of the low liquidity of in-game betting markets at present, limited evidence exists that the risks are greater than those associated with pre-event betting.<sup>68</sup>

Finally, apart from the type of bet, certain categories of athletic competitions are more susceptible to manipulation, especially when little is at stake in terms of sports glory.<sup>69</sup> Thus, the Council of Europe in its report on manipulation of sports competitions, recommends nations prohibit betting on youth

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<sup>59</sup> United States v. Donaghy, 2007 WL 4189121 ¶¶ 9–13 (E.D.N.Y.); 18 U.S.C. § 1346. See discussion *infra* Part III.A of this betting scandal and prosecution.

<sup>60</sup> See INTERPOL-IOC HANDBOOK, *supra* note 20, at 39; CABOT ET AL., *supra* note 14, at 128.

<sup>61</sup> See ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 34.

<sup>62</sup> See *id.* A small number of spot fixing instances have been documented, see, e.g., *Football Legend Matthew Le Tissier Admits His Part in Attempted £10,000 Betting Scam*, DAILY MAIL REP. (Sept. 3, 2009), <http://www.dailymail.co.uk/news/article-1210882/Football-legend-Matthew-Le-Tissier-admits-10-000-Premier-League-betting-scam.html>.

<sup>63</sup> See CABOT ET AL., *supra* note 14, at 128.

<sup>64</sup> See Holden et al., *supra* note 9, at 461; ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 5-6; INTERPOL-IOC HANDBOOK, *supra* note 20, at 39.

<sup>65</sup> See ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 5.

<sup>66</sup> See *id.*; SORBONNE-ICSS REP., *supra* note 12, at 27.

<sup>67</sup> See ASSER INST. EU 28 STUDY, *supra* note 56, at 13 (identifying Germany and Austria).

<sup>68</sup> See U.K. Gambling Comm., *In-play (in-running) Betting: Position Paper 5* (Sept. 2016), <https://www.gamblingcommission.gov.uk/PDF/In-running-betting-position-paper.pdf>; SORBONNE-ICSS REPORT, *supra* note 12, at 81.

<sup>69</sup> See ASSER INST. MATCH FIXING FACTS & FIGURES, *supra* note 47, at 6.

competitions, friendly matches, and matches in lower leagues.<sup>70</sup> For example, independent review of the integrity of professional tennis, which has identified epidemic match-fixing, reported that corruption is most prevalent among young players in the lower levels of the sport.<sup>71</sup>

In sum, developing technology and new wager categories place any game, at any level, anywhere in the world, within the scope of global betting markets. Globalization also means that corrupt actors are able to distribute the risk of detection by placing bets in different geographic locations from where games are being played. When “anyone can have a personal and direct financial interest in the course or outcome of any given competition,” it is no surprise that the global sports industry has experienced a significant increase in game manipulation over the last twenty years.<sup>72</sup> But more than sport integrity is at stake, according to the Council of Europe: “The manipulation of sports competitions poses a challenge to the rule of law because it is linked to fraud, organised [sic] crime and corruption.”<sup>73</sup>

### III. THE PENAL CODE LACUNAE IN U.S. LEGAL SPORTS BETTING REGIMES

As the U.S. joins global sports betting markets, it too becomes “ripe for would-be match-fixers.”<sup>74</sup> Rule of law concerns are just as salient, behooving that federal and state governments enact “basic criminal code provisions” regarding competition manipulation and to prioritize detection and prosecution of sports corruption.<sup>75</sup> That advice has yet to be taken in post-*Murphy* America.

#### A. Existing Federal Criminal Laws Inadequately Target Match-Fixing

With the invalidation of PASPA, a single federal penal provision targets the manipulation of athletic competition—the Sports Bribery Act.<sup>76</sup> The Act had its origins in a series of college basketball match-fixing scandals in the 1940s, 50s

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<sup>70</sup> COUNCIL OF EUR. EXPLANATORY REP., *supra* note 22, at 6.

<sup>71</sup> See TENNIS INTEGRITY REP., *supra* note 55, at 13. During the 2020 Covid-19 pandemic, match-fixers quickly adapted to the shutdown of major league sports by “targeting lower-tier games and youth games that could provide data for the betting markets.” *UEFA Issues Match Fixing Warning as Fixers Adapt to Covid-19 Restrictions*, INSIDE WORLD FOOTBALL (Apr. 6, 2020), <http://www.insideworldfootball.com/2020/04/06/uefa-issues-match-fixing-warning-fixers-adapt-covid-19-restrictions/>.

<sup>72</sup> COUNCIL OF EUR. EXPLANATORY REP., *supra* note 22, at 1.

<sup>73</sup> *Id.* at 2.

<sup>74</sup> See Holden et al., *supra* note 9, at 466; see also *Match-Fixing & Corruption in Sport—An Historical Timeline*, THE STATS ZONE (Mar. 3, 2016), <https://www.thestatszone.com/archive/match-fixing-corruption-historical-timeline-14094> (listing episodes of match-fixing since 2000 across soccer, tennis, cricket, horse-racing, boxing, basketball, football, and snooker and observing “it would be naïve to think [match-fixing] does not exist somehow in every sport”); Steve Keating, *Match-Fixing Not Doping Poses Greatest Risk to Sport*, REUTERS (Apr. 25, 2019), <https://www.reuters.com/article/us-sport-matchfixing/match-fixing-not-doping-poses-greatest-risk-to-sport-idUSKCN1S12UR>.

<sup>75</sup> CABOT ET AL., *supra* note 14, at 146.

<sup>76</sup> 18 U.S.C. § 224, commonly referred to as the Sports Bribery Act.

and 60s, in which gamblers bribed student-athletes to shave points.<sup>77</sup> The Act prohibits “any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest.”<sup>78</sup> “[S]porting contest” is further defined as “any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence.”<sup>79</sup>

To the extent other federal statutes target sports gambling-related behaviors and activities, they focus on illegal betting or the integrity of legal betting.<sup>80</sup> For example, the Interstate Wire Act criminalizes cross-border wire communications that transmit “bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.”<sup>81</sup> The Travel Act prohibits use of the mail and other methods to send illegal gambling materials or make an illegal bet.<sup>82</sup> The Unlawful Internet Gambling Enforcement Act criminalizes the transfer of funds between a financial institution and an internet gambling website.<sup>83</sup> And of course the government has used the Racketeer Influenced and Corrupt Organizations Act (RICO) since its 1970 enactment to combat organized crime by attacking activities like gambling, which can include sportsbooks.<sup>84</sup>

Despite these tools to combat sports betting-related corruption, federal enforcement efforts have been anemic.<sup>85</sup> In over fifty-five years, the Sports Bribery Act has generated only eighteen publicized prosecutions: eight involving college athletics,<sup>86</sup> seven involving horse-racing, two involving professional boxing, and one involving ice dancing at the 2002 Winter

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<sup>77</sup> Holden et al., *supra* note 9, at 456.

<sup>78</sup> 18 U.S.C. § 224(a).

<sup>79</sup> 18 U.S.C. § 224(c)(2).

<sup>80</sup> See generally Holden, *supra* note 6, 380 (identifying “two layers of integrity issues” in legal sports gambling: integrity of sportsbooks and of the underlying sports events).

<sup>81</sup> Interstate Wire Act, 18 U.S.C. § 1084 (2020).

<sup>82</sup> Travel Act, 18 U.S.C. § 1952.

<sup>83</sup> Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361, *et seq.*; see also Illegal Gambling Business Act, 18 U.S.C. § 1955 (prohibiting operating an illegal gambling business).

<sup>84</sup> 18 U.S.C. § 1962; see United States v. Zizzo, 120 F.3d 1338, 1346 (7th Cir. 1997).

<sup>85</sup> BO J. BERNHARD ET AL., PROFESSIONAL TEAM SPORTS IN LAS VEGAS: WHAT THE RESEARCH SAYS 31 (Feb. 1, 2015) (“the enforcement of gambling laws is exceedingly rare—and becoming even more rare—in the United States”), [https://www.unlv.edu/sites/default/files/page\\_files/27/IGI-PublishedResearch-NFLStudy.pdf](https://www.unlv.edu/sites/default/files/page_files/27/IGI-PublishedResearch-NFLStudy.pdf); see Memorandum Opinion for the Acting Assistant Attorney General, Criminal Division, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 OP. O.L.C. 4-5 (Nov. 2, 2018) (citing to the handful of prosecutions under the Wire Act); Jennifer Roberts & Greg Gemignani, *Who Wore It Better? Federal v. State Government Regulation of Sports Betting*, 9 UNLV GAMING L.J. 77, 89 n.4 (2019).

<sup>86</sup> See Balsam, *supra* note 1, at 4-6 (describing prosecutions of point-shaving in college basketball). The number of Sports Bribery Act prosecutions involving college athletics increased from seven to eight in late 2019, when the U.S. Attorney for the Eastern District of New York indicted mob members for attempting to fix an NCAA game. See Indictment, United States v. Bifalco, No. 19-CR-444 (ARR) (E.D.N.Y. 2019), <https://www.justice.gov/usao-edny/pr/20-defendants-charged-crimes-including-racketeering-extortion-loansharking>.

Olympics.<sup>87</sup> Only six other reported decisions discuss the Act in any substantive way.<sup>88</sup> No prosecution under the Act has involved professional sporting contests in the major U.S. team sports or individual sports like golf or tennis.<sup>89</sup>

Significantly, the Sports Bribery Act does not cover situations where means other than bribery are used to manipulate athletic contests, such as extortion, blackmail, and duress.<sup>90</sup> In the notorious Boston College point-shaving incident, immortalized in the film *Goodfellas*, the mobster/informant Henry Hill reported that when the college players resisted bribes, he threatened to break their fingers.<sup>91</sup> Nor does the Act reach “lone-wolf” betting on games by a sports participant who has the ability to affect outcomes.<sup>92</sup>

Thus, a prosecutor would be hard-pressed to fit into the federal Sports Bribery Act any of the following scenarios:

- A college basketball player bets on professional and college football games in violation of the NCAA’s absolute ban on sports wagering by its athletes. He is caught and the university imposes the maximum penalty for a first offense—a six-game suspension. The student-athlete nonetheless continues to gamble until he is heavily in debt, at which point his bookie threatens to expose him. To avoid scandal and further NCAA discipline or ineligibility, the athlete agrees to a point-shaving scheme.<sup>93</sup>
- A minor league baseball player is befriended by gamblers who pick up restaurant tabs, lend him a car, and introduce him to young women. He wakes up groggy after joining

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<sup>87</sup> See Holden et al., *supra* note 9, at 457–58, citing U.S. v. Donaway, 447 F.2d 940 (9th Cir. 1971); U.S. v. Pinto, 503 F.3d 718 (2d Cir. 1974); U.S. v. Turcotte, 515 F.2d 145 (2d Cir. 1975); U.S. v. DiNapoli, 557 F.2d 962 (2d Cir. 1975); U.S. v. Gerry, 515 F.2d 130 (2d Cir. 1975); U.S. v. Walsh, 554 F.2d 156 (4th Cir. 1976); U.S. v. Winter, 22 F.3d 15 (1st Cir. 1994).

<sup>88</sup> See Winter, 22 F.3d at 15; Pinto, 503 F.2d at 720; *In re Vericker*, 446 F.2d 244 (2d Cir. 1971); Colbert v. Indiana Gaming Commn./Athletic Div., Civ. Action No. 11 2102, 2011 WL 6005276 (D.D.C.); Bigby v. Gov’t of V.I., 125 F. Supp. 2d 709 (D.V.I. 2000); State Farm Mut. Auto. Ins. v. Abrams, No. 96 C 6365, 2000 WL 574466 (N.D. Ill.).

<sup>89</sup> See Holden et al., *supra* note 9, at 460 (suggesting three explanations for this infrequency: (1) bribery-induced match fixing doesn’t afflict professional sports; (2) leagues cover up such incidents; (3) the Act doesn’t reach extortion or blackmail).

<sup>90</sup> See Hudson et al., *supra* note 9; Kevin Carpenter, *Global Match-Fixing and the United States’ Role in Upholding Sporting Integrity*, 2 BERKELEY J. ENT. & SPORTS L. 214, 220 (2013) (noting reports that soccer players are being trafficked from Africa to play in minor professional soccer leagues, forced to match-fix, and then abandoned).

<sup>91</sup> See Henry Hill, *How I Put the Fix In*, VAULT - SPORTS ILLUSTRATED (Feb. 16, 1981), <https://vault.si.com/vault/70925#&gid=ci0258be14200126ef&pid=70925---016--image>.

<sup>92</sup> See Holden et al., *supra* note 9, at 138 (explaining that lone-wolf match-fixing “arises when an individual unilaterally manipulates a sporting event, he is neither bribed nor influenced by others”).

<sup>93</sup> See Ira Berkow, *College Basketball: Caught in Gambling’s Grip; A Promising Career Unravels at Northwestern*, N.Y. TIMES: ARCHIVES (Apr. 20, 1998), <https://www.nytimes.com/1998/04/20/sports/college-basketball-caught-gambling-s-grip-promising-career-unravels-northwestern.html>.

them on a night on the town to learn they now possess photographs of him in a compromising situation. Threatening to make the photos public, they blackmail him to extract nonpublic information about his team's injuries, line-ups, and other subjects that are of odds-making significance to sports gamblers.<sup>94</sup>

- Four members of a college football team place bets on their own games. During one of the games they wager on, one player is suspected of fumbling on purpose to manipulate the score. No bribery is involved in this internal fraud, and the prosecutors bring charges only for perjury because the students lied to the grand jury when they denied placing the wagers.<sup>95</sup>
- A professional basketball referee violates league rules by betting on games, including those he officiated, winning 75-80 percent of his wagers. His exceptional sportsbook success comes to the attention of low-level mob associates who threaten to expose him unless he tips confidential information about the identity of officiating crews for upcoming games, referee/team relations, and the physical condition of certain players. They also demand he provide predictions of which teams would win upcoming games, and then pay him for correct picks. The referee continues to bet on games, including those he officiates.<sup>96</sup>

The last example tracks the case of Tim Donaghy, a long-time referee for the National Basketball Association (NBA), who conspired with operators of an illegal sportsbook to profit from inside information on NBA games. The NBA-Tim Donaghy affair illustrates why the criminal law status quo is problematic. The government prosecuted and ultimately convicted Donaghy and his co-conspirators for wire fraud and transmitting wagering information, based on Donaghy's communications with mob-associated bookmakers in which he would "pick winners" in point-spread betting over the 2006-07 NBA season.<sup>97</sup> Because the mobsters did not pay Donaghy to influence games, the government

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<sup>94</sup> See John T. Holden, *Match Fixers Have More Tools to Manipulate Sports Betting Outcomes Than Just Bribery*, LEGAL SPORTS REP. (June 6, 2018), <https://www.legalsportsreport.com/20984/match-fixing-primer-part-ii/>.

<sup>95</sup> Bill Dedman, *College Football; 4 Are Indicted in Northwestern Football Scandal*, N.Y. TIMES (Dec. 4, 1998), <https://www.nytimes.com/1998/12/04/sports/college-football-4-are-indicted-in-northwestern-football-scandal.html>.

<sup>96</sup> *United States v. Donaghy*, 570 F. Supp.2d 411, 417-18 (E.D.N.Y. 2008), *aff'd sub nom.* *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009).

<sup>97</sup> See *United States v. Donaghy*, 2007 WL 4189121 (E.D.N.Y.); 18 U.S.C. § 1343; 18 U.S.C. § 1084; *Donaghy*, 570 F. Supp. 2d at 415.

could not invoke the Sports Bribery Act. As for Donaghy's suspected "lone wolf" game manipulation prior to the charged conspiracy, that conduct implicates neither sports bribery nor wire fraud. As opposed to multi-party organized match-fixing, individually motivated match-fixing can be perpetrated in the absence of communication with or payment from others, rendering inadequate all aspects of the available statutory regime.<sup>98</sup>

In the absence of a U.S. Code provision directly criminalizing game manipulation, the government built its case on the theory that Donaghy deprived the NBA of his honest services when he accepted payment from gamblers for winning picks.<sup>99</sup> The dishonesty specified in the charging document was that Donaghy "compromised his objectivity as a referee because of his personal financial interest in the outcome of NBA games."<sup>100</sup>

Thus, throughout the Donaghy criminal proceedings, the government expressly disclaimed reliance on the fact that the referee himself bet on NBA games,<sup>101</sup> or the suggestion that he "ever intentionally made a particular ruling during a game in order to increase the likelihood that his gambling pick would be correct."<sup>102</sup> The government's decision not to expend more resources to investigate underlying game manipulation makes sense given that no additional statutory predicate was available to charge such conduct.

Yet strong evidence existed that lone-wolf game manipulation occurred.<sup>103</sup> Consider Donaghy's conduct predating the single season of the charged conspiracy. Three years earlier, Donaghy started using a friend from high school to place bets on games he officiated, by some accounts winning eighty-eight percent of the time.<sup>104</sup> From 2003 to 2006, he bet on almost every game he

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<sup>98</sup> See Holden et al., *supra* note 9, at 141.

<sup>99</sup> 18 U.S.C. §§ 1341, 1346. Section 1341 broadly criminalizes the use of the mails or wires in furtherance of "any scheme or artifice to defraud," or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Section 1346 defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling v. United States*, 561 U.S. 358, 407 (2010), the Supreme Court limited wire fraud prosecutions under an honest services theory to "offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes." See also *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (holding that the federal honest services fraud statute bars only schemes to obtain money or property). This limitation renders honest services fraud equally inadequate to the task of criminalizing game manipulation.

<sup>100</sup> See Donaghy, 2007 WL 4189121 at ¶¶ 9-13.

<sup>101</sup> *Donaghy*, 570 F. Supp. 2d at 417.

<sup>102</sup> *United States v. Donaghy*, No. 07-587 (CBA), Letter from Benton J. Campbell, U.S. Attorney, to Hon. Carol Bagley Amon, U.S. District Judge, at 5 (May 8, 2008).

<sup>103</sup> See Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Feb. 19, 2018), [https://www.espn.com/nba/story/\\_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games](https://www.espn.com/nba/story/_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games) (reporting the perception that Donaghy was calling more fouls on teams he bet against); cf. NBA Press Release, *NBA Response to ESPN's Tim Donaghy Story*, NBA OFFICIAL (Feb. 22, 2019), <https://official.nba.com/nba-response-espn-tim-donaghy-story/>; LAWRENCE B. PEDOWITZ ET AL., REPORT TO THE BOARD OF GOVERNORS OF THE NATIONAL BASKETBALL ASSOCIATION (Oct. 1, 2008), <https://www.nba.com/media/PedowitzReport.pdf> (finding, after independent review of NBA officiating program, no evidence of game manipulation).

<sup>104</sup> See Eden, *supra* note 103.

officiated.<sup>105</sup> According to box scores of those games, Donaghy was calling more fouls on the team he bet against and fewer fouls on the team he bet on.<sup>106</sup> Notably this conduct was not offered as the basis for any offense charged by the prosecution.<sup>107</sup>

Instead, the Donaghy prosecution focused exclusively on the four-month period from December 1, 2006 to April 30, 2007, by which point the bookmakers had noticed the unusual size and success of Donaghy's bets and hijacked his scheme. They initiated the charged conspiracy by extorting Donaghy to limit his own wagers to avoid arousing suspicion in the betting markets. They then demanded he tip them his point-spread picks on a wide range of NBA games in exchange for a fee when their bets won.<sup>108</sup> This conduct also falls through the gaps of the Sports Bribery Act because it involved threats and coercion, not bribery, and did not explicitly require game manipulation.<sup>109</sup>

In its letter to the sentencing judge detailing Donaghy's cooperation with respect to this charged conspiracy, the government made two somewhat contradictory statements on the subject of game manipulation that highlight the difficulty it faced in basing a prosecution on such conduct:

- “[Donaghy] compromised his objectivity as a referee because of his personal financial interest in the outcome of NBA games, and that this personal interest might have subconsciously affected his on-court performance.”
- “There is no evidence that Donaghy ever intentionally made a particular ruling during a game in order to increase the likelihood that his gambling pick would be correct.”<sup>110</sup>

With no additional charging options available to prosecute game manipulation, the government had no reason to invest in resolving this cognitive dissonance. The resulting criminal case outcome vastly understates the harms inflicted by Donaghy's corruption.

Victims of game manipulation exist, and the NBA certainly considered itself one, requesting restitution for the cost of its internal investigation of the full range of Donaghy's misconduct and for Donaghy's salary during the entire four-year period that he was betting on games, including before the conspiracy

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<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *United States v. Donaghy*, 2007 WL 4189121 (E.D.N.Y.).

<sup>108</sup> *See Eden, supra* note 103.

<sup>109</sup> *See id.*

<sup>110</sup> *United States v. Donaghy*, No. 07-587 (CBA), Letter from Benton J. Campbell, U.S. Attorney, to Hon. Carol Bagley Amon, U.S. District Judge, at 5 (May 8, 2008).



started.<sup>111</sup> The sentencing court allowed recovery of only those NBA outlays in connection with assisting the government's narrower investigation and Donaghy's salary for the one conspiracy season. The court's ruling accentuates the statutory gap:

Donaghy's offense of conviction was not his broad scheme to defraud the NBA, but rather, a narrower conspiracy to enter into a scheme with [his bookies], the unlawful goal of which was to defraud the NBA. [Federal law] . . . does not allow for recovery for what are acts in furtherance of a broader uncharged scheme being carried out *alone* by one of the co-conspirators.<sup>112</sup>

In other words, existing federal law provides paltry grounds for addressing and remedying the harms to the honesty of athletic contests.<sup>113</sup>

After PASPA's repeal, the only effort at the federal level to enact minimum integrity standards for legal sports betting resided in the Hatch-Schumer bill introduced in the Senate in late 2018.<sup>114</sup> The now moribund bill set forth a framework for public-private coordination and enforcement of anti-corruption efforts including: use of official league data to determine betting outcomes; sharing of betting data among sportsbooks, leagues, and law enforcement; league authority to veto types of wagers; prohibition of sports wagers by league personnel; and mandatory sportsbook disclosure of suspicious betting activity.<sup>115</sup> Laudably, the bill also offered "improvements" to the Sports Bribery Act to criminalize other methods used by match-fixers such as extortion and blackmail, codifying the sponsors' fear of "the likelihood that players will be exposed to bribes, exploitation, and other forms of corruption endemic to an environment where sports betting is poorly regulated."<sup>116</sup> The bill expired at the end of the 115<sup>th</sup> Congress, and no alternative has since been introduced.

Whether the federal government is the appropriate enforcer of sports integrity is fair to debate given the states' traditional role in regulating gaming.<sup>117</sup> States (and tribes) currently regulate casino gambling, horse racing, lotteries, and the like, and have developed expertise in doing so.<sup>118</sup> However,

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<sup>111</sup> *United States v. Donaghy*, 570 F. Supp. 2d 411, 419, 424 (E.D.N.Y. 2008); *see also* Ross et al., *supra* note 25, at 27 (observing that "[t]he Donaghy scandal caused substantial harm to the NBA").

<sup>112</sup> *Donaghy*, 570 F. Supp. 2d at 427 (emphasis added).

<sup>113</sup> CABOT ET AL., *supra* note 14, at 147.

<sup>114</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115<sup>th</sup> Cong. §§ 101 *et seq.* (2018).

<sup>115</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115<sup>th</sup> Cong. § 103(b)(3), (4), (5), (13).

<sup>116</sup> Sports Wagering Market Integrity Act of 2018, S. 3793, 115<sup>th</sup> Cong. § 302 (also providing whistleblower protections to those who disclose possible violations); Orrin G. Hatch, *Sports Betting Is Inevitable--Let's Make Sure It's Done Right*, SPORTS ILLUSTRATED (May 23, 2018), <http://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation>.

<sup>117</sup> *See State v. Rosenthal*, 559 P.2d 830, 836 (Nev. 1977).

<sup>118</sup> Roberts et al., *supra* note 85, at 89.

those gambling businesses offer an integrated entertainment experience where both the wager and the future contingent event on which the wager is placed—the roll of the dice, the equestrian performance—take place physically within the state, subject to regulatory oversight. The state regulator has the authority to control not only the terms and performance of the wagering contract, but also the rules and integrity of the future contingent event.<sup>119</sup>

Sports wagering is different because the underlying contingent event—the athletic contest—is (for the most part) beyond the physical and legal control of the betting operator and the state regulators. Sports contests that serve as the future contingent event for an in-state wager frequently occur beyond the state's borders.<sup>120</sup> Thus, it's been argued that at least as it concerns sports integrity, where states have no authority to superintend events beyond their jurisdiction, federal involvement is necessary.<sup>121</sup> That need is amplified by the states' lack of interest in regulating game integrity, as the next section shows.

### *B. Weak Sports Integrity Protection at the State Level*

By 2021, sports bettors in nearly half of U.S. jurisdictions will no longer have to seek out an illegal bookmaker or go to Las Vegas to place their bets.<sup>122</sup> Yet, those jurisdictions have devoted little regulatory attention to the integrity of the underlying sports contests. The new state laws enabling sports gambling primarily focus on sportsbook licensure requirements and taxation of the revenue.<sup>123</sup> Most states are following the Nevada model and empowering existing regulatory bodies to oversee sports gambling rather than creating oversight boards specific to this one type of wager.<sup>124</sup> This mirrors their approach to the match-fixing risk—states are relying in large part on existing

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<sup>119</sup> Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 166-67 (2018).

<sup>120</sup> *Id.* (observing that the federal government has asserted regulatory authority over casino operations when it implicates cross-border transactions such as money laundering).

<sup>121</sup> Roberts et al., *supra* note 85, at 90.

<sup>122</sup> Twenty-four jurisdictions have now legalized sports betting and another twenty-four have introduced sports gambling bills. Rodenberg, *supra* note 4; *see also* Gouker, *supra* note 4. The jurisdiction with legal sports gambling, some pending launch, are Arkansas, Colorado, Delaware, District of Columbia, Illinois, Indiana, Iowa, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington, and West Virginia.

<sup>123</sup> *See, e.g.*, 10 DEL. ADMIN. CODE § 204 (2020); MONT. ADMIN. R. 23.16 (2020); An Act Relating to State Affairs and Gov't – Video Lottery Games, Table Games, and Sports Wagering, R.I. S.B. 37 (2019).

<sup>124</sup> *See generally* Becky Harris, *Regulated Sports Betting: A Nevada Perspective*, 10 UNLV GAMING L.J. 75 (2020); *see also* John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 597 (2020); Patrick Moran, *Anyone's Game: Sports-Betting Regulations After Murphy v. NCAA*, CATO INST. (Mar. 11, 2019) (reporting on states that have delegated to existing gaming commissions, lotteries, and racing boards), <https://www.cato.org/publications/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa#full>.

general penal code provisions rather than defining criminal offenses specific to preserving honest athletic competition.<sup>125</sup>

None of the twenty-four jurisdictions that have thus far legalized sports wagering include in the enabling legislation a provision that criminalizes match-fixing. The principal way the new state sports gambling regimes acknowledge game integrity issues is by requiring sportsbook operators to monitor and report suspicious activities and betting anomalies that suggest match-fixing or a bettor's access to inside information with competitive significance.<sup>126</sup> "Beyond that, the risk of sports corruption is implicitly acknowledged in the statutes' attempts to narrow opportunities for corruption by restricting who may bet, on what type of contests [or 'wagering events,'] and in what amounts."<sup>127</sup> The frailty of these protections came to the fore during the Covid-19 pandemic of 2020 when the cessation of U.S. sports led states to hastily approve new "wagering events."<sup>128</sup> In a "pandemic move" that prioritized revenue over integrity, numerous states authorized betting on table tennis events taking place in Russia and Ukraine that were later discovered to be fixed.<sup>129</sup>

Only one state—West Virginia—incorporates in its sports gambling statute a penal provision that directly addresses game integrity, as distinguished from betting integrity. In language redundant of the state's extant sports bribery law, West Virginia's Sports Wagering Act makes it a felony when someone "offers, promises, or gives anything of value to anyone for the purpose of influencing the outcome of a . . . sporting event . . ."<sup>130</sup> This offense basically mirrors the federal Sports Bribery Act.<sup>131</sup>

The explanation for sports gambling legislation's inattention to integrity issues may reside in the fact most state penal codes already criminalize sports bribery.<sup>132</sup> Thirty-six states and the District of Columbia criminalize bribery of both officials and participants in professional and amateur sports.<sup>133</sup> Another ten

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<sup>125</sup> *E.g.*, ALASKA STAT. ANN. § 11.46.660 (West 2019); DEL. CODE ANN. tit. 11, § 881 (1995); WIS. STAT. ANN. § 134.05 (West 2019).

<sup>126</sup> *See, e.g.*, Miss. Gaming Comm. Reg. Part 9, R. 3.19 Sports Integrity (requiring licensees to establish internal controls to identify suspicious wagers, and report those to the gaming commission).

<sup>127</sup> *See* Balsam, *supra* note 1, at 12-14.

<sup>128</sup> *See, e.g.*, N.J. ADMIN. CODE § 13:69N-1.11 (2020) (requiring sportsbooks to establish the bona fides of sports contests on which it proposes to accept patron wagers).

<sup>129</sup> David Purdum, *New Jersey Suspends Betting on Ukrainian Table Tennis After Match-Fixing Alert*, ESPN (July 9, 2020), [https://www.espn.com/chalk/story/\\_id/29436278/new-jersey-suspends-betting-ukrainian-table-tennis-match-fixing-alert](https://www.espn.com/chalk/story/_id/29436278/new-jersey-suspends-betting-ukrainian-table-tennis-match-fixing-alert); *see also* Paula Lavigne et al., *Gambling on Table Tennis Is Blowing Up—But Are the Matches Legit?*, ESPN (May 25, 2020), [https://www.espn.com/chalk/story/\\_id/29206521/gambling-table-tennis-blowing-the-matches-legit](https://www.espn.com/chalk/story/_id/29206521/gambling-table-tennis-blowing-the-matches-legit).

<sup>130</sup> W. VA. CODE § 29-22D-21 (2019); *compare* W. VA. CODE ANN. § 61-10-22 (West 2020) (making it a felony when someone "gives, promises or offers to any professional or amateur [sports participant or official] any valuable thing with intent to influence him to lose or try to lose or cause to be lost a [sporting event]").

<sup>131</sup> *See* 18 U.S.C. § 224.

<sup>132</sup> *See id.*

<sup>133</sup> *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, *MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES* 296-297 (ABC-CLIO 2018).

states define the crime to target bribery only of sports participants.<sup>134</sup> Only four states do not have special criminal statutes penalizing sports bribery.<sup>135</sup>

In addition, thirty-eight states define a general commercial bribery offense, including three of the four states without a sports bribery offense.<sup>136</sup> Most such laws are substantively consistent with the Model Penal Code bribery statute that criminalizes a secret payment to the employee or agent of a private business to influence its operations.<sup>137</sup> These laws potentially cover bribery in sports as well, depending on the statutory language and factual setting. However, the separate treatment of sports bribery in many state penal codes is in part an acknowledgment of the unique public trust placed in the honesty of sports contests, and of the difficulty of applying a general commercial bribery statute to an athlete's failure to give "best efforts" or to game manipulation by an unpaid amateur athlete.<sup>138</sup>

State sports bribery offenses often track the federal Sports Bribery Act, making it a felony to give or receive a benefit in exchange for influencing the outcome of a sports contest.<sup>139</sup> It is worth examining the state versions for their expressive value and largely unmet aspirations. For example, Illinois's statute penalizes:

[a]ny person who, with intent to influence any person participating in, officiating or connected with any professional or amateur athletic contest, sporting event or exhibition, gives, offers or promises any money, bribe or other thing of value or advantage to induce such participant, official or other person not to use his best efforts in connection with such contest, event or exhibition.<sup>140</sup>

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<sup>134</sup> See *id.* at 299 (Arkansas, Georgia, Indiana, Massachusetts, Mississippi, Missouri, New Mexico, Virginia, West Virginia, and Wisconsin).

<sup>135</sup> See *id.* (Alaska, Idaho, South Dakota, and Vermont).

<sup>136</sup> See *id.* at 296; Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151, 163 app. (2012). Idaho is the only state without either a general commercial bribery or sports bribery offense.

<sup>137</sup> See MODEL PENAL CODE § 224.8 (2019).

<sup>138</sup> See ROBINSON ET AL., *supra* note 133, at 296-97.

<sup>139</sup> For analogous state sports bribery statutes, see, e.g., ARIZ. REV. STAT. ANN. § 13-2309 (2020); CAL. PENAL CODE § 337a-e (West 2020); FLA. STAT. ANN. § 838.12 (West 2020); LA. STAT. ANN. § 14:118.1 (2020); OR. REV. STAT. ANN. § 165.085–165.090 (West 2020). The Sports Bribery Act provides that it "shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State." 18 U.S.C. § 224(b).

<sup>140</sup> 720 ILL. COMP. STAT. ANN. 5/29-1(a) (West 2020).

In notable contrast to the federal version, eleven of the jurisdictions with sports bribery laws classify the offense only as a misdemeanor, potentially impairing its deterrent and expressive value.<sup>141</sup>

“Sports participants” are usually defined in state statutes to include players and other game participants.<sup>142</sup> Florida casts a particularly wide net of culpability, with a sports bribery statute that captures players, owners, managers, coaches, trainers, any relative of the above, and “any person having any direct, indirect, remote or possible connection” with a team or match participant.<sup>143</sup> What constitutes game manipulation by a sports participant can extend beyond influencing the outcome to limiting the margin of victory or altering the course of play.<sup>144</sup> Some statutes go further and apply to “sports officials,” defined as the neutrals who serve as judges, referees, or umpires in athletic contests.<sup>145</sup> Criminal culpability can attach whenever a bribe induces improper performance of an official’s duties, even if it does not change the outcome of the game.<sup>146</sup> In addition to criminalizing sports bribery, some states impose a duty on sports officials and participants to report the offer of a bribe.<sup>147</sup> Lacking whistle-blower protections, however, the statutory framework may not provide sufficient incentive to come forward.<sup>148</sup>

Fifteen states also criminalize “tampering with a sports contest,” which targets more broadly cheating in sports, however carried out by any offender, even third parties not affiliated with the contest.<sup>149</sup> For example, Texas makes it

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<sup>141</sup> See ALA. CODE § 13A-11-141-2 (2020); DEL. CODE ANN. tit. 11, § 881-2 (2020); HAW. REV. STAT. ANN. § 708-881 (West 2020); IOWA CODE ANN. § 722.3 (West 2020); MD. CODE ANN., CRIM. LAW § 9-204 (West 2020); NEV. REV. STAT. ANN. § 207.290 (West 2020); PA. STAT. AND CONS. STAT. ANN. § 4108 (West 2020); S.D. CODIFIED LAWS §22-43-2 (2020); TENN. CODE ANN. § 39-17-1103 (West 2020); TEX. PENAL CODE ANN. § 32.44 (West 2020); UTAH CODE ANN. § 76-6-508 (West 2020); see also Jeffrey Boles, *Examining the Law Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 158 (2014) (recommending uniformly classifying commercial bribery as a felony to “properly communicate[] the seriousness of the crime to the public, . . . raise social awareness and carry a deterrent effect”).

<sup>142</sup> See, e.g., KAN. STAT. ANN. § 21-6507(c)(2)-(3) (West 2020) (defining “sports participant” as “any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team;” and “sports official” as “any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest”).

<sup>143</sup> FLA. STAT. ANN. § 838.12 (West 2020).

<sup>144</sup> *Id.*

<sup>145</sup> KAN. STAT. ANN. § 21-6507(c)(3) (West 2020).

<sup>146</sup> See KAN. STAT. ANN. § 21-6507(a)(4) (West 2020).

<sup>147</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 5/29-3 (West 2020).

<sup>148</sup> See Holden et al., *supra* note 9, at 472.

<sup>149</sup> See, e.g., ALA. CODE § 13A-11-143 (2020); COLO. REV. STAT. ANN. § 18-5-403 (West 2020); CONN. GEN. STAT. ANN. § 53a-162 (West 2020); HAW. REV. STAT. ANN. § 708-881 (West 2020); KAN. STAT. ANN. §21-6508 (West 2020); KY. REV. STAT. ANN. § 518.060 (West 2020); ME. REV. STAT. ANN. tit. 17-A, § 901(1)(I) (2020); NEB. REV. STAT. ANN. § 28-614 (West 2020); N.H. REV. STAT. ANN. § 638:8(I)(c) (2020); N.H. REV. STAT. ANN. § 638:8 (2020); N.J. STAT. ANN. § 2C:21-11 (West 2020); N.Y. PENAL LAW § 180.50 (McKinney 1982); N.D. CENT. CODE ANN. § 12.1-12-07 (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 4109 (West 2020); TEX. PENAL CODE ANN. § 32.44 (West 2020); see generally ROBINSON ET AL., *supra* note 133, at 299.

a misdemeanor to, “with intent to affect the outcome . . . of a publicly exhibited contest . . . tamper with a person, animal, or thing in a manner contrary to the rules of the contest.”<sup>150</sup> If Massachusetts had a similar penal provision in 2015, Tom Brady and company could potentially have been criminally prosecuted for deflating footballs during a post-season playoff game, in addition to league disciplinary sanctions.<sup>151</sup>

All told, almost every jurisdiction had previously enacted some penal provision arguably relevant to match-fixing, either a general commercial bribery statute or a specific sports bribery or tampering offense.<sup>152</sup> States that host significant sports activity, such as New York and Texas for professional sports, Alabama for college sports, and Kentucky for horseracing, have tended to legislate more comprehensively in this area, although not consistently so.<sup>153</sup> Limited statutory attention may indicate legislative inertia or the absence of any major match-fixing scandal in that state.<sup>154</sup>

But most state penal codes nonetheless suffer from the same gaps as the federal Sports Bribery Act, and are inadequate to address game manipulation perpetrated by extortion, blackmail, duress, or lone-wolf conduct.<sup>155</sup> And as with federal counterparts, state prosecutions of sports bribery or tampering are exceedingly rare.<sup>156</sup> Of the forty–six jurisdictions with sports bribery/tampering statutes, Westlaw’s “notes of decisions” and “citing references” record a combined total of nine prosecutions, none more recent than 1987.<sup>157</sup> Like the federal Sports Bribery Act, none of those prosecutions involves a major professional team sporting contest. This paucity likely reflects that, as a matter of both federal and state law enforcement priorities, commercial bribery is “the most under-prosecuted crime in penal law.”<sup>158</sup> Reasons for this disinterest include “the extreme challenge prosecutors face in discovering the wrongful conduct, gathering evidence, and prosecuting the offense.”<sup>159</sup> With respect to

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<sup>150</sup> TEX. PENAL CODE ANN. § 32.44 (West 2020).

<sup>151</sup> See CABOT ET AL., *supra* note 14, at 109.

<sup>152</sup> See ROBINSON ET AL., *supra* note 133, at 299.

<sup>153</sup> See *id.* at 300.

<sup>154</sup> See *id.*

<sup>155</sup> See *supra* Part III.A; see, e.g., *United States v. Malizia*, 720 F.2d 744, 746 (2d Cir. 1983) (reversing RICO conviction predicated on violation of New York Sports Bribery statute because groom was bribed to drug competitors’ horses to help his horses win, not lose).

<sup>156</sup> See Holden et al., *supra* note 9; CABOT ET AL., *supra* note 14, at 148.

<sup>157</sup> See generally *State of Minnesota v. Spencer*, 414 N.W.2d 528, 532 (Minn. Ct. App. 1987) (horseracing); *State of Louisiana v. Trosclair*, 443 So. 2d 1098, 1101 (La. 1983) (horseracing); *State v. Ciulla*, 115 R.I. 558, 351 A.2d 580 (1976) (horseracing); *State of North Carolina v. Goldberg*, 134 S.E.2d 334 (N.C. 1964) (college basketball); *State of Hawaii v. Yoshida*, 361 P.2d 1032 (Haw. 1961) (college basketball); *People v. Aragon*, 316 P.2d 370 (Cal. Ct. App. 1957) (boxing); *State of Iowa v. Di Paglia*, 71 N.W.2d 601, 602 (Iowa 1955) (college basketball); *Glickfield v. State*, 101 A.2d 229, 231 (Md. 1953) (college football); *People v. Phillips*, 173 P.2d 392 (Cal. Ct. App. 1946) (boxing).

<sup>158</sup> Boles, *supra* note 141, at 158, 165 (observing that the secrecy surrounding a bribery transaction makes it difficult to detect and prosecute it).

<sup>159</sup> *Id.*

sports bribery, that challenge argues for more precisely defining criminal offenses encompassing game manipulation.

In the current landscape of legal sports gambling, preoccupied with getting sportsbooks up and running and generating tax revenue, more attention should be paid to protecting the source of that revenue—the underlying athletic competitions. At a minimum, the outdated “patchwork” of federal and state laws addressing sports corruption requires “updating.”<sup>160</sup> Detecting and prosecuting competition manipulation requires “a set of effective [criminal] laws, and the motivation to enforce those laws.”<sup>161</sup> One model for such laws can be found in work being done internationally to combat a growing plague of match-fixing.<sup>162</sup>

#### IV. LEARNING FROM INTERNATIONAL EXPERIENCE WITH GAMBLING-RELATED MATCH-FIXING

Betting-related match-fixing has intensified in international markets, driven by sophisticated criminal organizations.<sup>163</sup> Match-fixing expert Declan Hill describes the current wave of gambling-related corruption in sport as a “revolution”—“an utterly modern phenomenon [that] will destroy sports as we know them.”<sup>164</sup> His alarm springs from the merging of worldwide sports gambling markets, facilitated by technology and globalization, and increasingly dominated by the profoundly corrupt and largely illegal Asian markets.<sup>165</sup> The Chinese soccer league has been described as a “national disgrace,” and match fixing has been confirmed in Vietnam, Hong Kong, Indonesia, South Korea, Cambodia, Laos, Thailand, Malaysia, and Singapore.<sup>166</sup>

The sham that has become Asian soccer has left its fans hungry for alternative honest contests to wager on, and that has led the Asian fixers to Europe and other parts of the world.<sup>167</sup> Asian and European criminal gambling interests now collude on match-fixing, as exposed in the 2009 European soccer betting scandal. That scheme originated out of Singapore, with funding from Chinese organized crime groups, to fix as many as 380 matches in nine European countries, implicating around 200 people, including players, referees, coaches,

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<sup>160</sup> Holden, *supra* note 6, at 382.

<sup>161</sup> CABOT ET AL., *supra* note 14, at 146. I addressed in an earlier paper the role of sports governing bodies in policing game integrity, and the inadequacies and disincentives of private parties to secure effective deterrence and punishment. See Balsam, *supra* note 1, at 9-11.

<sup>162</sup> See, e.g., ASSER INST. EU 28 STUDY, *supra* note 56, at 139.

<sup>163</sup> Carpenter, *supra* note 90, at 215.

<sup>164</sup> Declan Hill, *The Revolution*, in SPORTS BETTING: LAW AND POLICY, 9-13 (Paul M. Anderson et al. ed., 2011).

<sup>165</sup> See Hill, *supra* note 164, at 10-11.

<sup>166</sup> *Id.* at 11.

<sup>167</sup> See *id.* at 12-13 (describing Asian gambling companies monitoring matches across the spectrum, including those as minor as the Tivoli Cup, a youth tournament for Denmark teens).

and other match officials.<sup>168</sup> Authorities on sports betting and game integrity conclude it would be “naïve” to think that match-fixing has not also penetrated almost every sport.<sup>169</sup>

As the plague of match-fixing spread, in 2011, Interpol, the international law enforcement organization, created an Integrity in Sport unit. Among other things, the unit compiles a bi-weekly bulletin on global corruption across all sports, including soccer, tennis, cricket, rugby, esports, and basketball.<sup>170</sup> Just in the latter half of 2019, European soccer alone generated six match-fixing reports:<sup>171</sup>

- Spain—fixing of 2019 La Liga match between Valencia and Real Valladolid.
- Albania—Skenderbeu club president organized match-fixing of two Champions League qualifying games and two Europa League group-stage games in 2015, and around fifty domestic matches since 2011.
- Belgium—three Belgium under-sixteen players reported being approached and offered \$50,000 to fix a game in 2018.
- Sweden—thirteen matches in Division 2 soccer league in 2019 suspected of being influenced by gambling activity.
- Ireland—four 2019 League of Ireland matches suspected of being fixed after large bets placed on winning team, and other team suffered unusual number of fouls and yellow cards.
- Italy—gambling interests arranged to fix four Serie A games in 2014.

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<sup>168</sup> See INTERPOL-IOC HANDBOOK, *supra* note 20, at 25. This scandal is known as the Bochum Competition Manipulation, after the town in Germany where the scheme was initially detected. It involved domestic league games in nine European countries: Germany, Belgium, Switzerland, Croatia, Slovenia, Turkey, Hungary, Bosnia-Herzegovina and Austria. It also involved twelve qualifying matches in the UEFA Europa League, and three in the UEFA Champions League.

<sup>169</sup> See *Match-Fixing & Corruption in Sport—An Historical Timeline*, *supra* note 74 (listing episodes of match-fixing since 2000 across soccer, tennis, cricket, horse-racing, boxing, basketball, football, and snooker); Keating, *supra* note 74.

<sup>170</sup> Interpol, *Corruption in Sport*, <https://www.interpol.int/en/Crimes/Corruption/Corruption-in-sport> (last visited July 31, 2020).

<sup>171</sup> See *Id.* Collectively these bulletins identify approximately forty episodes of match-fixing in this six-month period, across Africa, Asia, Europe, Oceania, and South America, involving, in addition to soccer, Australian rules football, badminton, basketball, cricket, esports, rugby, tennis, and volleyball; see also Louis Weston, *Sports Integrity (Betting and Financial Corruption)—the Year in Review 2019/20*, LAWINSPO (June 12, 2020), [https://www.lawinsport.com/topics/item/sports-integrity-betting-and-financial-corruption-the-year-in-review-2019-20#\\_ftn11](https://www.lawinsport.com/topics/item/sports-integrity-betting-and-financial-corruption-the-year-in-review-2019-20#_ftn11).



A Sorbonne study calls the manipulation of athletic contests a “worldwide phenomenon threatening the foundations of modern sport.”<sup>172</sup> FederBet, an international non-profit organization that advocates for operators and consumers in the gaming sector, estimates that betting-related game manipulation currently occurs in over 1,000 European athletic contests each year.<sup>173</sup> The match-fixing epidemic has already reached North America. The semi-professional Canadian Soccer League has been repeatedly compromised by match-fixing originating from the Asian gambling markets.<sup>174</sup> Even the 2020 Covid-19 pandemic did not offer respite from the growing integrity risk to sport, despite the temporary cessation of most competitions.<sup>175</sup> Leading authorities on sports corruption expressed concern that, as the pandemic impacts athlete salaries “and the economic situation places pressure on sport, criminal groups and corruptors may seek to exploit this situation to gain influence.”<sup>176</sup>

### A. International Criminal Justice Response to Match-Fixing

International public and non-governmental organizations have responded to the integrity threat by urging a criminal justice response to match-fixing “as a complement to independent sporting sanction systems.”<sup>177</sup> In the *Handbook on Protecting Sport from Competition Manipulation*, Interpol and the International Olympic Committee (IOC) make the case for a stronger partnership between sports governing bodies and law enforcement:

Traditionally, the principle of sports autonomy has meant that the world of sports and law enforcement have seldom

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<sup>172</sup> See SORBONNE-ICSS REP., *supra* note 12, at 4. The report estimates that criminal groups launder \$140 billion a year by match fixing and illegal betting, with 53% of illegal bets coming from Asia. *Id.* at 22.

<sup>173</sup> See *Match Fixing*, FEDERBET, <http://federbet.com/match-fixing/> (last visited July 31, 2020); see also FEDERBET, FEDERBET ANNUAL FIXED MATCHES REPORT 2016, [https://www.sportsintegrityinitiative.com/wp-content/uploads/2016/06/DR8\\_Federbet\\_2016\\_report-1.pdf](https://www.sportsintegrityinitiative.com/wp-content/uploads/2016/06/DR8_Federbet_2016_report-1.pdf) (last visited July 31, 2020) (specifically identifying over 220 fixed matches across a dozen sports, based on betting patterns). Illegal gains from such match-fixing represent up to \$8.8 billion. See Carpenter, *supra* note 90 at 219–20.

<sup>174</sup> See Declan Hill, *Semi-Pro Canadian Soccer League a Hotspot of Match-Fixing*, THE STAR (Dec. 12, 2016), <https://www.thestar.com/news/canada/2016/12/12/semi-pro-canadian-soccer-league-a-hotspot-of-match-fixing.html>.

<sup>175</sup> GLOBAL LOTTERY MONITORING SYS., A STUDY OF BETTING OPERATORS AND THEIR SPONSORSHIP OF SPORT 7 (July 2020), [https://glms-sport.org/wp-content/uploads/2020/07/20\\_GLMS\\_SPONSORSHIP\\_REPORT\\_Final-July-2020.pdf](https://glms-sport.org/wp-content/uploads/2020/07/20_GLMS_SPONSORSHIP_REPORT_Final-July-2020.pdf).

<sup>176</sup> UNITED NATIONS OFF. ON DRUGS AND CRIME, INTERNATIONAL OLYMPIC COMMITTEE, AND INTERPOL, *PREVENTING CORRUPTION IN SPORT AND MANIPULATION OF COMPETITIONS 2* (July 2020), [https://www.unodc.org/documents/Safeguardingsport/Documents/COVID-19\\_and\\_Anti-Corruption\\_FINAL\\_VERSION\\_2.pdf](https://www.unodc.org/documents/Safeguardingsport/Documents/COVID-19_and_Anti-Corruption_FINAL_VERSION_2.pdf).

<sup>177</sup> UNITED NATIONS OFF. ON DRUGS AND CRIME AND INT’L OLYMPIC COMM., *CRIMINALIZATION APPROACHES TO COMBAT MATCH-FIXING AND ILLEGAL/IRREGULAR BETTING: A GLOBAL PERSPECTIVE 1* (July 2013), [www.unodc.org/documents/corruption/Publications/2013/Criminalization\\_approaches\\_to\\_combat\\_match-fixing.pdf](http://www.unodc.org/documents/corruption/Publications/2013/Criminalization_approaches_to_combat_match-fixing.pdf) [hereinafter UNODC-IOC 2013 CRIMINALIZATION STUDY]; see also SORBONNE-ICSS REP., *supra* note 12, at 102–09; ASSER INST. EU 28 STUDY, *supra* note 56, at 139.

cooperated. However, sport cannot deal alone with the criminal threat posed by competition manipulation and requires police support, particularly with regards to obtaining the evidence in order to sanction an individual under their jurisdiction.<sup>178</sup>

Put plainly, sports governing bodies lack the necessary jurisdiction over non-participants, the subpoena authority to obtain evidence, and the expertise and resources to undertake complex investigations into corrupt schemes likely to encompass fraud, bribery, organized crime, and money-laundering.<sup>179</sup> In addition to these justifications is the expressive power of a criminal justice response against match-fixing, which “would demonstrate that sporting manipulation is not [*sic*] a ‘simple’ breach of sporting rules, but also an offence against the public in a broader sense.”<sup>180</sup>

A criminal justice response was officially endorsed by the Council of Europe as of September 2019 when its Convention on the Manipulation of Sports Competitions (the Macolin Convention) entered into force.<sup>181</sup> Hailed as “potentially the most significant legal instrument relating to match-fixing worldwide,” the Macolin Convention sets out a framework and policy for the fight against manipulation of sport.<sup>182</sup> Its signature innovation is the concept of the “national platform”—an official entity that joins public and private stakeholders to coordinate and centralize operational, informational, strategic, and enforcement activities relating to competition manipulation.<sup>183</sup> Treaty ratifiers commit to establish an institutional structure under which disparate agencies, including police and prosecutorial entities, sports governing bodies, and betting regulators, work together to combat sports corruption.<sup>184</sup>

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<sup>178</sup> See INTERPOL-IOC HANDBOOK, *supra* note 20, at 57; see also Balsam, *supra* note 1, at 7-8 (critiquing U.S. sports governing bodies’ rules and sanctions for betting on sports and game manipulation); Holden, *supra* note 6, at 381–82 (observing that sport governing bodies “lack the law enforcement capabilities . . . such as the power to obtain search warrants and conduct investigations”).

<sup>179</sup> Interpol-IOC Handbook, *supra* note 19, at 65.

<sup>180</sup> UNODC-IOC 2013 CRIMINALIZATION STUDY, *supra* note 177.

<sup>181</sup> Macolin Convention, *supra* note 19. As of July 2020, 30 of the 47 Council members have signed the treaty, seven of which have also ratified it. The treaty is open for signature by non-member nations, and Australia has signed on. See *Details of Treaty No.215*, COUNCIL OF EUROPE CONVENTION ON THE MANIPULATION OF SPORTS COMPETITIONS, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215> (last visited July 31, 2020).

<sup>182</sup> Kevin Carpenter, *Combating Match-Fixing in Sport—a Guide to the Council of Europe’s Convention on the Manipulation of Sports Competitions*, LAWINSPO (Oct. 4, 2014), [https://www.lawinsport.com/topics/criminal-law/item/combating-match-fixing-in-sport-a-guide-to-the-council-of-europe-s-convention-on-the-manipulation-of-sports-competitions?category\\_id=149](https://www.lawinsport.com/topics/criminal-law/item/combating-match-fixing-in-sport-a-guide-to-the-council-of-europe-s-convention-on-the-manipulation-of-sports-competitions?category_id=149).

<sup>183</sup> Macolin Convention, *supra* note 19, at 8.

<sup>184</sup> *Id.*; see generally Marc Henzelin et al., *Why ‘National Platforms’ Are the Cornerstone in the Fight Against Match-Fixing in Sport: The Macolin Convention*, LAWINSPO (June 18, 2018), <https://www.lawinsport.com/topics/item/why-national-platforms-are-the-cornerstone-in-the-fight-against-match-fixing-in-sport-the-macolin-convention>.

With respect to criminal sanctions, the Macolin Convention requires each signatory nation to “ensure that its domestic laws enable to criminally sanction manipulation of sports competitions when it involves either coercive, corrupt or fraudulent practices, as defined by its domestic law.”<sup>185</sup> The treaty permits parties to either rely on existing general laws or create new offenses, as long as the route taken adequately covers three categories of conduct: (1) violence, coercion, or threat; (2) corruption or bribery; and (3) fraud and free agreement by sports participants.<sup>186</sup>

Experience, however, has shown that general penal provisions are often inadequate to address the specific context of sports.<sup>187</sup> In a series of joint studies on best practices in protecting sports integrity, the United Nations Office on Drugs and Crime (UNODC) and the International Olympic Committee (IOC) blame numerous “substantial loopholes” in national criminal codes for impeding the efforts of law enforcement agencies and judicial authorities to combat match-fixing.<sup>188</sup> Examples include the 2012 Swiss prosecution of three soccer players involved in the infamous Bochum match-fixing scandal who manipulated games to try to generate winnings on electronic betting platforms.<sup>189</sup> The Swiss federal court acquitted the athletes under a general fraud provision stating that it was unsuitable to allow their conviction.<sup>190</sup> A federal commission was convened to review the disappointing outcome, ultimately leading to adoption of a specific criminal offense for match-fixing in sports.<sup>191</sup> Germany, likewise shaken by the Bochum scheme, revised its criminal code

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<sup>185</sup> Macolin Convention, *supra* note 19, at 9.

<sup>186</sup> COUNCIL OF EUR. EXPLANATORY REP., *supra* note 22, at 21; *see* SORBONNE--ICSS REP., *supra* note 12, at 39. The Macolin Convention builds on other international legal instruments that address corruption and organized crime, namely the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. UNITED NATIONS OFF. ON DRUGS AND CRIME AND THE INT’L OLYMPIC COMM., MODEL CRIMINAL LAW PROVISIONS FOR THE PROSECUTION OF COMPETITION MANIPULATION 13 (2016), [https://www.unodc.org/documents/corruption/Publications/UNODC-IOC\\_Model\\_Criminal\\_Law\\_Provisions\\_for\\_the\\_Prosecution\\_of\\_Competition\\_Manipulation\\_Booklet.pdf](https://www.unodc.org/documents/corruption/Publications/UNODC-IOC_Model_Criminal_Law_Provisions_for_the_Prosecution_of_Competition_Manipulation_Booklet.pdf) [hereinafter UNODC-IOC MODEL CRIM. CODE].

<sup>187</sup> UNITED NATIONS OFF. ON DRUGS AND CRIME AND THE INT’L OLYMPIC COMM., CRIMINAL PROVISIONS FOR THE PROSECUTION OF COMPETITION MANIPULATION 10 (2016), <https://www.unodc.org/documents/corruption/Publications/2017/UNODC-IOC-Study.pdf> [hereinafter UNODC-IOC 2016 CRIMINALIZATION STUDY] (“a specific criminal offence may be more effective than relying on general criminal law provisions”).

<sup>188</sup> UNODC-IOC 2013 CRIMINALIZATION STUDY, *supra* note 177, at 14; *See* Carpenter, *supra* note 11.

<sup>189</sup> *See* INTERPOL-IOC HANDBOOK, *supra* note 168, and accompanying text.

<sup>190</sup> *Footballers Cleared of Fraud Charges*, SWISSINFO.CH (Nov. 13, 2012), [https://www.swissinfo.ch/eng/court-ruling\\_footballers-cleared-of-fraud-charges/33951902](https://www.swissinfo.ch/eng/court-ruling_footballers-cleared-of-fraud-charges/33951902) (finding the defendants, who placed only online bets, did not defraud a human being as required by the statute).

<sup>191</sup> Philippe Vladimir Boss, *Tackling Match-Fixing in Switzerland*, LAWINSPORT (July 31, 2019), <https://www.lawinsport.com/topics/item/tackling-match-fixing-in-switzerland-the-new-duties-on-international-sports-federations-to-monitor-report-suspected-match-manipulations#:~:text=Expert%20Services,Tackling%20match%2Dfixing%20in%20Switzerland%3A%20the%20new%20duties%20on%20International,monitor%20%26%20report%20suspected%20match%20manipulations&text=Although%20the%20Convention%20has%20not,effect%20on%201%20January%202019.>

when prosecutions of the athletes and referees involved revealed difficulties in applying its general fraud provisions to that setting.<sup>192</sup>

Sweden completely overhauled its gambling legislation in 2019 in part to address game integrity issues after fifty-four cases of match-fixing in soccer were suspected during 2012-2017, but only four cases led to a criminal conviction.<sup>193</sup> The new Swedish law defines match-fixing itself as a criminal offense in order to make it easier to achieve convictions.<sup>194</sup> India, which continues to prohibit sports gambling, suffered a spate of match-fixing and spot-fixing scandals over the past decade in its most popular sport of cricket.<sup>195</sup> This development, along with rampant illegal sports betting, led the Law Commission of India to urge expressly criminalizing match-fixing and sports fraud.<sup>196</sup> That recommendation was endorsed by the International Cricket Council (ICC) in anticipation of India hosting two of its major global events in 2021 and 2023.<sup>197</sup> According to the ICC's Anti-Corruption Unit (ACU), without a specific offense incriminating match-fixing, the Indian police will be "operating with one hand tied behind their back."<sup>198</sup> The ACU describes match-fixing legislation as "a game-changer" and "the single-most-effective thing to happen in terms of protecting sport."<sup>199</sup>

Consensus is thus forming around the utility of nations establishing specific criminal offenses concerning the manipulation of a sporting event.<sup>200</sup> Not only are such laws more effective in practice, they "reinforce the educational and

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<sup>192</sup> Christian Keidel, *A Guide to Germany's New Criminal Law Against Betting Fraud and Match-Fixing in Sports*, LAWINSPO (Sept. 4, 2017), <https://www.lawinsport.com/topics/item/a-guide-to-germany-s-new-criminal-law-against-betting-fraud-and-match-fixing-in-sports>.

<sup>193</sup> Jamie McDonald, *How Sweden's New Gaming and Betting Market Works and Its Potential Impact on the Sports Industry*, LAWINSPO (Apr. 10, 2019), <https://www.lawinsport.com/topics/articles/item/how-sweden-s-new-gaming-and-betting-market-works-and-its-potential-impact-on-the-sports-industry>.

<sup>194</sup> *Id.*

<sup>195</sup> Kevin Carpenter, *Establishing the Optimum Sports Betting Regulatory System to Protect the Integrity of Indian Sports*, LAWINSPO (Nov. 21, 2018), <https://www.lawinsport.com/topics/item/establishing-the-optimum-sports-betting-regulatory-system-to-protect-the-integrity-of-indian-sports#sdfootnote26anc>.

<sup>196</sup> L. COMM. OF INDIA, LEGAL FRAMEWORK: GAMBLING AND SPORTS BETTING INCLUDING CRICKET IN INDIA 121 (July 2018), [https://www.prsindia.org/sites/default/files/parliament\\_or\\_policy\\_pdfs/LCI%20Report%20Summary%20-%20Betting%20and%20Gambling\\_ST\\_For%20Upload.pdf](https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/LCI%20Report%20Summary%20-%20Betting%20and%20Gambling_ST_For%20Upload.pdf).

<sup>197</sup> Steve Richardson Believes Match-Fixing Law in India Will Be a 'Game-Changer', ROYAL CHALLENGERS (June 26, 2020), <https://www.royalchallengers.com/rcb-cricket-news/news/steve-richardson-believes-match-fixing-law-in-india-will-be-a-game-changer?amp>.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> UNODC-IOC 2013 CRIMINALIZATION STUDY, *supra* note 177, at 1; UNODC-IOC 2016 CRIMINALIZATION STUDY, *supra* note 187, at 10; UNODC-IOC MODEL CRIM. CODE, *supra* note 186, at 10 (observing that general criminal laws leave "gaps . . . which allow offenders to avoid the most severe consequences of their deeds"); *see also* UNITED NATIONS OFF. ON DRUGS AND CRIME, RESOURCE GUIDE ON GOOD PRACTICES IN THE INVESTIGATION OF MATCH-FIXING 17 (2016) [hereinafter UNODC GOOD PRAC.], [https://www.unodc.org/documents/corruption/Publications/2016/V1602591-RESOURCE\\_GUIDE\\_ON\\_GOOD\\_PRACTICES\\_IN\\_THE\\_INVESTIGATION\\_OF\\_MATCH-FIXING.pdf](https://www.unodc.org/documents/corruption/Publications/2016/V1602591-RESOURCE_GUIDE_ON_GOOD_PRACTICES_IN_THE_INVESTIGATION_OF_MATCH-FIXING.pdf).

preventive aspects related to match-fixing by making it clear that cheating in a sports event can per se qualify as a criminal offence.”<sup>201</sup> To support national governments in enacting such legislation, the UNODC and IOC jointly published model criminal provisions for prosecuting competition manipulation.<sup>202</sup> The model provisions built on legal analysis of fifty-two national jurisdictions which incriminate match-fixing, twenty-eight of which have adopted a specific offense or were considering proposals to do so.<sup>203</sup> This number includes the United States on the basis of the federal Sports Bribery Act, despite its acknowledged deficits.<sup>204</sup>

From the UNODC-IOC study emerged four key “good practice” elements:<sup>205</sup>

- Apply match-fixing offenses to all sports and competitions.<sup>206</sup>
- Define the offense broadly so that it includes both active and passive manipulation, for material or non-material gain, affecting either final outcomes or intermediary components of contests.
- Subject all perpetrators to match-fixing offenses, including the corruptors (e.g., bribe-givers), the competition stakeholders (e.g., athletes, coaches, officials), and any intermediaries, accomplices, or other providers of assistance to the scheme.
- Distinguish match-fixing offenses from betting offenses.

While these four “good practices” makes sense, they notably fail to include a fifth, elucidated in the previous Part’s critique of the U.S. Sports Bribery Act: extend culpability to the wide array of methods and tactics that match-fixers are known to use beyond bribery, including blackmail, extortion, duress, violence, and lone-wolf schemes.<sup>207</sup>

As a result of this omission, the UNODC-IOC project has generated regrettably narrow model provisions:<sup>208</sup>

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<sup>201</sup> UNODC-IOC 2016 CRIMINALIZATION STUDY, *supra* note 187, at 11.

<sup>202</sup> UNODC-IOC MODEL CRIM. CODE, *supra* note 186.

<sup>203</sup> UNODC-IOC 2016 CRIMINALIZATION STUDY, *supra* note 187, at 23–34 (Argentina, Australia, Brazil, Bulgaria, People’s Republic of China, Denmark, El Salvador, France, Germany, Greece, India, Italy, Japan, Republic of Korea, Latvia, Malta, New Zealand, Paraguay, Poland, Portugal, Russian Federation, South Africa, Spain, Switzerland, Turkey, Ukraine, United Kingdom, United States).

<sup>204</sup> See 18 U.S.C.A. § 224 (West 1994), and accompanying text in note 8.

<sup>205</sup> UNODC-IOC MODEL CRIM. CODE, *supra* note 186, at 15-18.

<sup>206</sup> Broad application of the offense is essential as manipulators may seek to avoid detection by targeting lower-profile sports competitions (second or third-leagues, friendly matches, less popular sports). UNODC-IOC MODEL CRIM. CODE, *supra* note 186, at 15.

<sup>207</sup> See *supra* Part IV.A.

<sup>208</sup> UNODC-IOC MODEL CRIM. CODE, *supra* note 186, at 19.

1. Any person who, directly or indirectly, promises, offers or gives any undue advantage to another person, for himself, herself or for others, with the aim of improperly altering the result or the course of a sports competition, shall be punished by \_\_\_\_\_.
2. Any person who, directly or indirectly, solicits or accepts any undue advantage or the promise or the offer thereof, for himself, herself or for others, with the aim of improperly altering the result or the course of a sports competition, shall be punished by \_\_\_\_\_.

These model provisions incriminate only bribery or the provision of some type of benefit to a contest participant in exchange for altering the course or outcome of competition. Prosecutors would not be able to shoehorn into either model provision a case involving coercion or unilateral behavior by participants capable of manipulating a contest.

The constricted scope of the UNODC-IOC model provisions is at odds with the Macolin Convention's admonitions, in Article 15, that a criminal justice response to match-fixing must encompass offenses involving coercive acts such as "extortion, blackmail, poisoning or violence."<sup>209</sup> Defining culpability this broadly is crucial especially in connection with Article 21 of the Macolin Convention.<sup>210</sup> That article mandates physical protection of whistle-blowers and witnesses in match-fixing cases, acknowledging that criminal organizations routinely use "threats, coercion or blackmail towards competition stakeholders or their support personnel" to thwart detection and evidence gathering.<sup>211</sup>

Among Macolin's signatories are a number of nations that have broadly incriminated game manipulation, regardless of the methods and tactics used.<sup>212</sup> Australia is regarded as a world leader in this area because of its specific match-

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<sup>209</sup> Macolin Convention, *supra* note 19, at 9; COUNCIL OF EUR. EXPLANATORY REP., *supra* note 22, at 21 (offering the "reminder that such conduct is among the methods employed in certain manipulations of sports competitions").

<sup>210</sup> Macolin Convention, *supra* note 19, at 10–11.

<sup>211</sup> COUNCIL OF EUR. EXPLANATORY REP., *supra* note 22, at 27–28. The UNODC and IOC may well revisit their model provisions as a result of their participation in the International Partnership Against Corruption in Sport (IPACS), an anti-corruption platform they founded along with the Council of Europe, the Organization for Economic Cooperation and Development, and UKSport, the United Kingdom's sports ministry. *See About, IPACS*, <https://www.ipacs.sport/>, (last visited Dec. 12, 2020). In 2019, IPACS established a task force to promote cooperation between law enforcement/criminal justice authorities and sports organizations, which will, among other things, take stock of existing anti-bribery legislation and recommend additional tools to tackle corruption in sports. *See INT'L P'SHIP AGAINST CORRUPTION IN SPORT, TERMS OF REFERENCE FOR TASK FORCE 4* (2019), [https://stillmed.olympic.org/media/Images/Ipac/PDF/task-force/ToR\\_Task\\_Force\\_4.pdf](https://stillmed.olympic.org/media/Images/Ipac/PDF/task-force/ToR_Task_Force_4.pdf).

<sup>212</sup> UNODC-IOC 2016 CRIMINALIZATION STUDY, *supra* note 187, at 23–34 (nations studied whose match-fixing crimes go beyond bribery to inculcate other forms of corruption, fraud, and coercion include: Australia, Brazil, Bulgaria, Greece, Latvia, Portugal, New Zealand, and South Africa).

fixing legislation.<sup>213</sup> After a 2010 corruption incident involving rugby, the federal government adopted a National Policy on Match-fixing in Sport and created a special sports integrity unit.<sup>214</sup> Although Australia's federal structure results in some inconsistency among state/territorial approaches, most have followed the lead of New South Wales which amended its Crimes Act in 2012 to make it illegal to "engage[] in conduct that corrupts a betting outcome of an event."<sup>215</sup> Conduct is defined broadly as "an act or an omission to perform an act," and therefore can encompass far more than bribery.<sup>216</sup>

As of 2015, Greek law specifically criminalizes any "intervention" in a sporting contest to influence its course or outcome.<sup>217</sup> Unlike a bribery law, this provision would cover the conduct alleged in the 2011 Greek soccer match-fixing prosecution that the corrupt actors bombed a referee's bakery because he refused to slant his calls to favor one team.<sup>218</sup> The Latvia Sports Law defines the criminal offense of manipulation of sports competition as "any activity that focuses on violating the unpredictability of the course of the competition or its results."<sup>219</sup> Portugal imposes criminal liability on any "unsporting behavior" that may fraudulently alter the results of a sports competition.<sup>220</sup>

Other nations not signatories to the Macolin Convention have charted a similar course. New Zealand, expressly responding to uncertainty over whether existing fraud and anti-corruption offenses would apply to match-fixing, amended its Crimes Act in 2014 to clarify that criminal "deception" includes "manipulating . . . sports competitions."<sup>221</sup> Brazil's criminal code makes it an

<sup>213</sup> KIRSTIN HALLMANN ET AL., MATCH-FIXING AND LEGAL SYSTEMS-AN ANALYSIS OF SELECTED LEGAL SYSTEMS IN EUROPE AND WORLDWIDE WITH SPECIAL EMPHASIS ON DISCIPLINARY AND CRIMINAL CONSEQUENCES FOR CORRUPTION IN SPORT AND MATCH-FIXING 6 (Oct. 2019), [https://www.playfaircode.at/fileadmin/data/downloads/schulungsmaterial/Report\\_LegalTeam\\_Final.pdf](https://www.playfaircode.at/fileadmin/data/downloads/schulungsmaterial/Report_LegalTeam_Final.pdf).

<sup>214</sup> AUSTRAL. DEP'T OF HEALTH, NATIONAL POLICY ON MATCH-FIXING IN SPORT (June 10, 2011), [https://www1.health.gov.au/internet/main/publishing.nsf/Content/687CADCF3C1BEF8ACA257C310021CD5C/\\$File/national\\_policy\\_match-fixing.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/687CADCF3C1BEF8ACA257C310021CD5C/$File/national_policy_match-fixing.pdf). It is widely acknowledged that Australia's reforms were a response to "tortuous" proceedings in a rugby spot-fixing prosecution "based on analogous fraud, attempting to gain financial advantage through deception or generalised prevention of conspiracy to corrupt/bribe, which did not always fit the nature of the misconduct." Jack Anderson, *Prevention, Detection and Co-Operation in Match-Fixing – Part 1* (July 3, 2013), <https://www.lawinsport.com/blogs/jack-anderson/item/prevention-detection-and-co-operation-in-match-fixing-part-1>.

<sup>215</sup> *Crimes Act 1900* (NSW) pt 4ACA ("Cheating at gambling"), <https://www.legislation.nsw.gov.au/#/view/act/1900/40/whole>, archived at <https://perma.cc/X5SZ-C7WL>. The relevant amendments were made by the *Crimes Amendment (Cheating at Gambling) Act 2012* (NSW), <https://www.legislation.nsw.gov.au/#/view/act/2012/64/whole>, archived at <https://perma.cc/CD3U-W75V>; see HALLMANN ET AL., *supra* note 213, at 7.

<sup>216</sup> *Crimes Amendment Act 2012* (NSW) pt 4ACA.

<sup>217</sup> HALLMANN ET AL., *supra* note 213, at 45.

<sup>218</sup> *Greece Charges 41 over Match-Fixing as Football Scandal Deepens*, NEWSWEEK (May 27, 2015), <https://www.newsweek.com/greece-charges-41-over-match-fixing-football-scandal-deepens-327763>.

<sup>219</sup> Latvia Sports Law, Section 15.1(1) (enacted 2002), <http://likumi.lv/ta/en/en/id/68294>.

<sup>220</sup> UNODC-IOC 2016 CRIMINALIZATION STUDY, *supra* note 187, at 31.

<sup>221</sup> New Zealand Crimes Act 1961 § 240A (enacted 2014); see Law and Order Committee, *Commentary on Crimes (Match-Fixing) Amendment Bill 203-2* (Nov. 2014).

offense to distort by any means the results of a sports competition.<sup>222</sup> South Africa criminalizes corrupt activities relating to sporting events including effectuating “a scheme which constitutes a threat to or undermines the integrity of any sporting event.”<sup>223</sup>

After a series of match-fixing incidents involving cricket, Sri Lanka in 2019 became the first South Asian nation to criminalize corruption in sports.<sup>224</sup> Titled “Prevention of Offences Related to Sports,” the Sri Lankan law reaches far, covering any person who participates in manipulating a sporting contest, by any means, with a prison term of up to ten years. Competition stakeholders further risk prosecution for disclosing inside information to betting interests, providing corrupt figures access to current players, and failing to report a corrupt approach.<sup>225</sup>

### *B. Translating the International Experience into the U.S. Criminal Code*

The international approaches to criminalizing match-fixing described above offer a model for the United States.<sup>226</sup> To recap the five essential attributes of effective criminal laws in this area, match-fixing offenses should:

1. Cover all sports and competitions;
2. Include both active and passive manipulation, whether for material or non-material gain, and whether affecting final outcomes or intermediary components of contests;
3. Apply to all perpetrators, including the corruptors, game participants and personnel, and any intermediaries, accomplices, or other providers of assistance to a corrupt scheme;
4. Distinguish match-fixing offenses from betting offenses; and
5. Extend culpability to the wide array of methods and tactics that match-fixers are known to use beyond bribery,

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<sup>222</sup> Law no 10.671 – of 15 May 2003 (as amended by Law no. 13.155 of 4 August 2015); original text available at: [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2015/Lei/L13155.htm#art40](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13155.htm#art40).

<sup>223</sup> Prevention and Combatting of Corrupt Activities Act 12 of 2004, Ch. 15(c) (S. Afr.), <https://www.justice.gov.za/legislation/acts/2004-012.pdf>.

<sup>224</sup> Andrew Fidel Fernando, *Sri Lanka Passes Bill Criminalizing Match-Fixing*, ESPN CRICINFO (Nov. 11, 2019), [https://www.espnricinfo.com/story/\\_/id/28057905/sri-lanka-passes-bill-criminalising-match-fixing](https://www.espnricinfo.com/story/_/id/28057905/sri-lanka-passes-bill-criminalising-match-fixing).

<sup>225</sup> *Id.* Pakistan’s Cricket Board in 2020 asked the government to enact laws similar to Sri Lanka. *PCB Looks at Legislation to Criminalise Match-Fixing Menace*, OUTLOOKINDIA.COM (Apr. 15, 2020), <https://www.outlookindia.com/newscroll/pcb-looks-at-legislation-to-criminalise-matchfixing-menace/1803011>.

<sup>226</sup> Industry-specific criminal offenses exist elsewhere in the U.S. Code. For example, the Health Care Fraud Act criminalizes “knowingly and willfully execut[ing] . . . a scheme or artifice . . . to defraud any health care benefit program.” 18 U.S.C.A. § 1347(a)(1) (West 2010).



including blackmail, extortion, duress, violence, and lone-wolf schemes.<sup>227</sup>

A new federal criminal offense should accordingly define the *actus rei*, or overt acts, and *mens rea*, or state of mind, that captures these attributes while providing sufficient notice and warning to sports corrupters of their criminal liability.<sup>228</sup>

One proposal that serves well is the Model Sports Wagering Act briefly advocated in 2018 by the NBA and MLB.<sup>229</sup> Its Section 8 on “criminal liability” imposes up to a \$5 million fine and 10-year prison sentence on:

(1) . . . (b) knowingly engages in, facilitates, or conceals conduct that intends to improperly influence a betting outcome of a sporting event for purposes of financial gain, in connection with betting or wagering on a sporting event . . . .<sup>230</sup>

The proposal broadly covers all sporting events, all manner of corrupt conduct, and all participants in the corruption.<sup>231</sup> For example, it would provide a predicate for charging Tim Donaghy’s lone-wolf conduct in which he bet on NBA games he officiated.<sup>232</sup> The Model Act’s phrasing, particularly the use of the term “betting outcome,” tracks the New South Wales, Australia Crimes Act considered an exemplar.<sup>233</sup> “Betting outcome” effectively encompasses any future contingent event on which sports wagers are offered, including during the course of play and contest results. By imposing severe punishment on offenders, the Model Act draws on the utilitarian theory that greater consequences must

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<sup>227</sup> See reports cited *supra* notes 200–02 and accompanying text.

<sup>228</sup> *Elonis v. United States*, 575 U.S. 723, 723 (2015) (citing the “general rule” is that a guilty mind is “a necessary element in the indictment and proof of every crime”) (citation omitted); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (noting “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”).

<sup>229</sup> Model Sports Wagering Act (Gaming States), <https://sportshandle.com/wp-content/uploads/2018/02/Model-Sports-Wagering-Legislation-SportsHandle.pdf> (last visited July 31, 2020).

<sup>230</sup> Model Sports Wagering Act (Gaming States) § 8(1)(b). The act also criminalizes placing a bet based on “material nonpublic information.” *Id.* at § 1(a).

<sup>231</sup> Section 8 of the Model Act also empowers sports governing bodies to sue “[a]ny person or gaming facility who violates subsection (1)(b).” *Id.* at § 3. This provision echoes one in PASPA that commentators found most troubling in permitting sports leagues to “obtain injunctions against generally immune state governments and agents.” I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 687 (2012); see also Ryan M. Rodenberg, *Due Process, Private Nondelegation Doctrine, and the Regulation of Sports Betting*, 9 UNLV GAMING L.J. 99, 116 (2019) (arguing that a federal law granting sports leagues the power to veto certain types of sports wagers would violate the private nondelegation doctrine).

<sup>232</sup> See cases and articles cited *supra* notes 96–113 and accompanying text.

<sup>233</sup> See *supra* notes 212–13 and accompanying text.

ensue where offenses are difficult to detect.<sup>234</sup> The breadth of the provision's coverage is balanced by the rigorous mental state requirement of knowing conduct and a specific intent to influence a betting outcome.

Beyond defining the criminal offense, the federal legislative response should also provide statutory tools to aid detection and prosecution. While prosecutors already possess subpoena power, legislation can incentivize those with information to come forward through grants of immunity to whistleblowers and those compelled to testify.<sup>235</sup> Legislation should also expand access to critical information in the possession of sportsbook operators and sports governing bodies by imposing mandatory reporting of match-fixing implicated behavior and betting patterns.<sup>236</sup>

Equally important given the interstate nature of professional sports, is multilateral government cooperation between and among federal and state governments. Even if states maintain their own systems of licensing, regulation, and taxation of sports books, a hybrid structure could nonetheless establish a federal mechanism to share information and address integrity issues. To this point, the Macolin Convention, as well as Australia's experience, have established the efficacy of a national integrity of sport unit that expands networks across governments, sports, the betting industry, and law enforcement agencies, to aggregate data, develop industry capacity to deter and detect corruption, and support law enforcement efforts.<sup>237</sup>

## CONCLUSION

The states' haste to legalize sports gambling after the judicial repeal of PASPA has been accompanied by a disconcerting myopia about the intensifying global threat of match-fixing. The legislation that has emerged from most states reveals a fixation on licensing requirements and revenue capture, combined with antipathy toward any input or interference from the federal government and sports governing bodies. This represents a missed opportunity to enact statutory

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<sup>234</sup> Harmelin v. Michigan, 501 U.S. 957, 989 (1991) ("crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties"); see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1290 (2001) (noting the desirability of employing higher punishments where the probability of detection for the offense is low); Oriekhov v. UEFA, CAS 2010/A/2172, ¶ 80 (Court of Arbitration for Sport Jan. 18, 2011) (exhorting "zero-tolerance against all kinds of corruption and . . . sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in [match-fixing]"), <http://arbitration.kiev.ua/uploads/kucher/2172.pdf>.

<sup>235</sup> See Boles, *supra* note 141, at 167-68.

<sup>236</sup> See Ross et al., *supra* note 25, at 44; Holden et al., *supra* note 9, at 470-71.

<sup>237</sup> Macolin Convention, *supra* note 19, at 8; AUSTL. DEP'T OF HEALTH, *supra* note 214, at § 3.10. The United Kingdom's Gambling Commission has similarly established a Sports Betting Integrity Unit that works closely with the betting industry and sports governing bodies to understand potential threats, in particular criminal activity directed at events and parties in Great Britain. See *Sports Betting Intelligence Unit*, GAMBLING COMM'N, <https://www.gamblingcommission.gov.uk/news-action-and-statistics/Match-fixing-and-sports-integrity/Sports-Betting-Intelligence-Unit.aspx> (last visited Aug. 2, 2020).

predicates and establish strategic partnerships that will preserve the integrity of the underlying athletic contests and thereby the financial prospects of the sports betting industry.

Accordingly, this article proposes a measured federal response to the legitimate critique that “[f]ew countries have been as slow to modernize their statutes that protect sports integrity as the United States.”<sup>238</sup> The proposed response encompasses defining a federal criminal offense of match-fixing and supporting the new law with prosecutorial aides and institutional structures that respect state autonomy while encouraging multilateral government cooperation. These recommendations are informed by international trial and error in combatting sports corruption, including demoralizing prosecution efforts to apply inadequate criminal laws that fail to capture the fixers’ conduct. Appeals for more effective criminal laws and enforcement tools have dominated the international conversation about match-fixing, as evidenced in treaties, law reform commissions, task forces, and a wide range of cross-sector cooperation efforts.

Widespread legalization of wagering on sports connects the U.S. ever more firmly to global betting markets and the criminal elements that prey on those markets. Thus, it is time for the U.S. to join the international movement to equip law enforcement and industry with the mechanisms to tackle corrupt manipulation of athletic contests.

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<sup>238</sup> Holden et al., *supra* note 10, at 137.