THE AUTHORIZATION OF SPORTS BETTING: AN ETHICAL DILEMMA?

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ABSTRACT

Since the Supreme Court's decision in Murphy v. National Collegiate Athletic Association *(2018), at least twenty-five states have authorized state-sponsored sports betting. With the authorization of state-sponsored sports betting comes ethical concerns. These ethical concerns include an individual state's liberalistic or paternalistic tendencies to either authorize or prohibit state-sponsored sports betting. Sports betting itself provides additional ethical considerations because the integrity of the sports being bet on is potentially at stake. This Note recognizes these ethical concerns but argues that a reconciliation can be reached between such ethical concerns and a state's authorization of sports betting. It is argued that states can both authorize sports betting and account for its ethical concerns through consistent regulation, transparent taxation, specific integrity requirements, and social safeguards.*

INTRODUCTION

In 2018, the Supreme Court in *Murphy v. National Collegiate Athletic Association*[1] struck down the Professional and Amateur Sports Protection Act ("PASPA")[2] as unconstitutional, paving the way for states to pass legislation authorizing sports betting. Following *Murphy*, at least twenty-five states have passed state legislation authorizing some form of sports betting, and many more have tried, or are trying, to pass such legislation.[3] With this legalization comes ethical concerns, namely: is sports betting, or gambling in general, ethical? And how can states regulate sports gambling

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1. 138 S. Ct. 1461 (2018).

2. 28 U.S.C. § 3702 (providing, in part, that "It shall be unlawful for--(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.")

3. *See infra* Part III.

while also upholding the integrity of the sports being bet on? This Note recognizes the ethical concerns surrounding a state's authorization of sports betting but argues that a reconciliation between these ethical concerns and the authorization of sports betting is possible.

Part I of this Note provides a historical overview of PASPA and discusses the policy reasons behind PASPA's prohibition on sports betting. Part II analyzes the anti-commandeering doctrine and the Supreme Court's ruling in *Murphy*. Part III examines the states' response to *Murphy* and provides a survey of recent states' legislation authorizing sports betting. Part IV provides recent gambling statistics and discusses general ethical concerns with gambling. Part V introduces the ethical theories of liberalism and paternalism and analyzes a democratic government's ability to prohibit gambling in general under each theory. Part VI takes a closer look at sports betting, distinguishing it from other common forms of gambling. This section applies the theories introduced in the previous section. Finally, Part VII rejects a paternalistic approach to sports gambling and proposes a pragmatic reconciliation between the ethical concerns surrounding sports betting and a state's authorization of sports betting. This section suggests ways in which states and professional sports leagues can uphold the integrity of the sports being bet on.

I. THE HISTORY OF PASPA AND THE PROHIBITION ON SPORTS BETTING

The modern prohibition on sports betting can be traced back to the 1950's, but "[t]he primary fixation of early modern sports gambling laws was less on sports gambling itself as a vice, but on sports gambling as a means of revenue generation for organized crime."[4] This may help explain the prohibition on transferring funds and information regarding sports betting via wire in the Interstate Wire Act of 1961.[5] As one commentator noted, the Wire Act "helped regulate interstate gambling activity, but did not specifically regulate intrastate activity."[6] Congress did not begin

4. John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 334 (2019).

5. *Id.* at 335. The Wire Act, as enacted in 1961, read, in part, "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both." Pub. L. No. 87–216, § 2, 75 Stat. 491 (codified as amended at 18 U.S.C. § 1084).

6. Alexandra Eichner, *Supreme Court Makes It Easier for People to Win Big*, 43 NOVA L. REV. 21, 28 (2018).

intrastate regulation of sports gambling until the early 1990s,[7] and even then, the first attempts at PASPA-related legislation were proposals to prevent copyright and trademark infringement of sporting events.[8] However, in 1991, the Senate introduced Senate Bill 474 with the stated purposes of prohibiting "sports gambling conducted by, or authorized under the law of, any State or other governmental entity"[9] and "maintain[ing] the integrity of our national pastime."[10] The Senate Report concluded that "[s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports. . . ."[11] Finding that "[o]f the approximately 8 million compulsive gamblers in America, 1 million of them are under 20," the committee was "especially concerned about the potential effect of legalized sports gambling on America's youth."[12] However, the bill "did not criminalize sports gambling, it empowered the Attorney General, as well as professional and amateur sports organizations, 'to bring civil actions to enjoin violations.'"[13] The Bill also "grandfathered-in" Nevada's legalized sports gambling, and state-sponsored sports lotteries in Oregon, Montana, and

7. *See* Holden, *supra* note 4, at 335. *See also* Eichner, *supra* note 6, at 28–29 (noting various laws enacted by Congress in the 1960's and early 1970's which directly and indirectly regulated *interstate* sports betting).

8. *See* Holden, *supra* note 4, at 337–38 (noting that "[t]he conception of PASPA was not as a criminal law or civil prohibition, but instead a proposal to amend the Lanham Act" and that "concerns about the integrity of the game were overshadowed by concerns about purported intellectual property rights in sporting events"). *See also* S. REP. NO. 102–248, at 4 (1991).

9. S. REP. NO. 102–248, at 3.

10. *Id.* at 4. *See also* Christopher Polisano, *Betting Against PASPA: Why the Federal Restrictions on Sports Gambling are Unconstitutional and How They Hurt the States*, 25 JEFFREY S. MOORAD SPORTS L.J. 453, 459 (noting that "[p]roponents of PASPA argued that it was necessary for the protection of the integrity of sports and the protection of minors from the so-called 'vice' of gambling.").

11. S. REP. NO. 102–248, at 4. *See also* Polisano, *supra* note 10, at 458–59 (noting the negative perception around well-known "match-fixing" scandals, including the 1919 Black Sox Scandal, where eight Chicago White Sox players were accused of fixing the World Series in exchange for money, and Major League Baseball's lifetime ban of its all-time hit leader, Pete Rose, who was accused of betting on baseball games while managing and playing for the Cincinnati Reds; Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 316–20 (2018) (noting both the 1919 Black Sox Scandal and the Pete Rose Scandal as precursors to PASPA).

12. S. REP. NO. 102–248, at 4. *See also* Polisano, *supra* note 10, at 482–83 (noting the moral concerns identified in Senate Judiciary Committee's report, including its potential to negatively affect young people).

13. Edelman, *supra* note 11, at 321 (quoting *Murphy*, 138 S. Ct. at 1470–71).

Delaware.[14] The Bill was ultimately approved on October 28, 1992 and became effective on January 1, 1993.[15]

PASPA remained in effect for approximately 25 years before the Supreme Court struck down the law as unconstitutional in *Murphy v. National Collegiate Athletic Association*.

II. THE ANTI-COMMANDEERING DOCTRINE AND *MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*

In the United States, the federal government and the individual states coexist in a system of dual sovereignty, meaning that both the federal government and individual state governments possess concurrent powers.[16] The anti-commandeering doctrine recognizes this principle by "withhold[ing] from Congress the power to issue orders directly to the States."[17] For example, in *New York v. United States*,[18] the Supreme Court held that the take-title provision in the federally enacted Low-Level Radioactive Waste Policy Amendments Act[19] violated the anti-commandeering doctrine.[20] The Court held that the provision forced state governments to "either accept[] ownership of waste or regulat[e] according to the instructions of Congress."[21] Both options, according to the Court, unconstitutionally commandeered state governments.[22]

In *Murphy v. National Collegiate Athletic Association*,[23] the Supreme Court held that PASPA's anti-authorization and anti-licensing clauses[24]

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14. S. REP. NO. 102–248, at 8. *See also* Polisano, *supra* note 10, at 461; Edelman *supra* note 11, at 321. The Bill, as passed, also gave New Jersey the option of legalizing sports gambling in Atlantic City within one year of PASPA's effective date. *See* 28 U.S.C. § 3704(a)(3) (2018); *see also Murphy*, 138 S. Ct. at 1471. New Jersey failed to enact such legislation within this time period but later desired to legalize sports gambling, and accordingly passed the legislation at issue in *Murphy*.

15. *See* Professional and Amateur Sports Protection Act, Pub. L. No. 102–559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–04), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478.

16. *See Murphy*, 138 S. Ct. at 1476. *See also* Polisano, *supra* note 10, at 467.

17. *Murphy*, 138 S. Ct. at 1475. Note, however, that the anti-commandeering doctrine is not violated "when Congress evenhandedly regulates an activity in which both states and private actors engage." *Id.* at 1478.

18. 505 U.S. 144 (1992).

19. Low-Level Radioactive Waste Policy Act, sec. 102, § 5(d)(2)(C), Pub. L. 99–240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. § 2021e).

20. New York v. United States, 505 U.S. at 175. *See also* Polisano, *supra* note 10, at 467–68.

21. *Id.*

22. *Id.* at 176. *See also* Printz v. United States, 521 U.S. 898 (1997) (extending the anti-commandeering doctrine to prevent federal mandates to state and local officials).

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

24. *See supra* note 2 and accompanying text. 28 U.S.C. § 3702(1) (2018) makes it unlawful for "a governmental entity to sponsor, operate, advertise, promote, *license*, or *authorize* by law or compact" sports betting. § 3702(1) (emphasis added).

violated the anti-commandeering doctrine.[25] Although *New York v. United States* dealt with federal a law affirmatively mandating what a state *must do*, the Court held that the distinction between affirmatively mandating state action and precluding state action was "empty."[26] The Court held that "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either case."[27] Similarly, PASPA's anti-licensing provision "suffer[ed] from the same defect as the prohibition of state authorization."[28] The Court held that "[j]ust as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling."[29] Finally, the Court examined whether PASPA's anti-authorization and anti-licensing provisions were severable from the rest of the Act. The Court noted that "[i]n order for the other PASPA provisions to fail, it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.[30]'" The Court found that § 3702(1)-(2) of PASPA "were meant to be deployed in tandem to stop what PASPA aimed to prevent: state legalization of sports gambling."[31] That is, Congress would not have enacted the remainder of § 3702(1) (all of the prohibitions minus the authorization and licensing prohibitions) or § 3702(2) without the anti-authorization and anti-licensing provisions.[32] Therefore, by finding PASPA's anti-authorization and anti-licensing provisions in violation of the anti-commandeering

25. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478, 1481–82 (2018). The Court, citing both *New York v. United States* and *Printz v. United States*, gave three policy reasons behind the anti-commandeering doctrine: (1) "the rule serves as 'one of the Constitution's structural protections of liberty,'" (2) the "rule promotes political accountability," and (3) the rule "prevents Congress from shifting the costs of regulation to the States." *Id.* at 1477.

26. *Id.* at 1478. Petitioners argued that PASPA's anti-authorization clause indirectly required "states to maintain their existing laws against sports gambling without alteration." *Id.* at 1473. On the other hand, Respondents argued that because PASPA's anti-authorization clause did not affirmatively compel state action, and only prohibited states from enacting laws authorizing sports betting, the anti-commandeering doctrine was not violated. *Id.* at 1478.

27. *Id.* at 1478.

28. *Id.* at 1481.

29. *Id.* at 1482.

30. *Id.* (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987)) (alterations in original).

31. *Id.* at 1483.

32. Specifically, the Court held that the prohibitions in § 3702(1), other than the prohibition on authorization and licensing, are pointless if states are allowed to authorize and/or license sports betting. *Id.* at 1482. For example, Congress could not have intended to allow states to *authorize* sports betting, but then prevent states from *operating* endeavors such as sports lotteries. *See id.* If § 3702(2), which regulated private conduct, were a standalone provision the Court held that it would "implement[] a perverse policy that undermines whatever policy is favored by the people of a State." *Id.* at 1483. Because of § 3702(2)'s "pursuant to the law language," *see* 28 U.S.C. § 3702, if a state favored legalized sports betting, federal law would make sports betting illegal; however, if states prohibited sports betting, it would be legal under federal law. *See Murphy*, 138 S. Ct. at 1482.

doctrine, and by finding the remainder of the Act non-severable from those two provisions, the Court in *Murphy* opened the door for states to legalize sports betting.

III. STATES' RESPONSE TO *MURPHY*

As of February 1, 2021, nineteen states regulate state-sponsored sports betting: Arkansas, Colorado, Delaware, Illinois, Indiana, Iowa, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia.[33] New Mexico Native American tribes allow sportsbooks at tribal casinos "under existing tribal gaming compacts."[34] North Carolina passed legislation authorizing sports betting in 2019, with a pending launch expected in 2021.[35] Residents in three additional States—Louisiana,[36] Maryland,[37] and South Dakota[38]—authorized some form of sports betting in 2020 via voter referendum, with launches coming as soon as 2021. Finally, Washington passed legislation in 2020, allowing sports betting to occur only at tribal casinos, but an agreement between the state and tribal representative must be reached prior to launch.[39]

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33. Ryan Butler, *Where Is Sports Betting Legal? Projections for All 50 States*, CHECK ACTION (Last Updated on Feb. 4, 2021), https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections [https://perma.cc/4BCD–372P].

34. *Id.*

35. *Id. See also* 2019 N.C. SESS. LAWS 2019–163.

36. Louisiana residents voted on the sports betting proposition parish by parish, after the Louisiana legislature submitted the proposition to voters. Butler, *supra* note 33. Fifty-five out of 64 parishes approved the proposition. *See* Will Sentell, *Louisiana Parishes Embrace Sports Betting. So When Might it Start?*, THE ADVOCATE (Nov. 4, 2020), https://www.theadvocate.com/baton_rouge/news/politics/article_6fa17fbc–1e3e–11eb–816b–2ba060227739.html [https://perma.cc/96YX-SKQF]. The Louisiana legislature will attempt "to hammer out the parameters of a new form of gambling" during their spring legislative session. *Id.*

37. Residents of Maryland authorized sports betting via statewide ballot measure. Butler, *supra* note 33. The Maryland legislature still has to pass rules and regulations before bets can be placed. *Id. See also* Roy Larking, *Three State Sweep: Maryland, Louisiana and South Dakota Say Yes to Legal Sports Betting*, SPORTS ILLUSTRATED (Nov. 4, 2020), https://www.si.com/gambling/2020/11/04/election–2020-new-legal-sports-betting-states [https://perma.cc/5DAK–98HY].

38. South Dakota residents passed a ballot measure amending the state's Constitution to allow sports betting only in Deadwood, South Dakota and certain tribal casinos. Butler, *supra* note 33. *See also* Larking, *supra* note 37. The South Dakota legislature still needs to pass regulatory measures before bets can be placed. Butler, *supra* note 33.

39. Butler, *supra* note 33.

A. A Survey of Recent States' Legislation Authoirzing Sports Betting

1. Illinois

On June 28, 2019 Illinois Governor J.B. Pritzker signed into law Illinois Senate Bill 690, a widespread gambling expansion bill.[40] Among other gambling expansions, this bill authorized sports betting in Illinois..[41] Any sporting facility with a seating capacity greater than 17,000 persons, after application to the Illinois Gaming Board (hereinafter referred to as the "Board"), may operate, or designate operation via contract, of sports wagering within a five-block radius of that facility.[42] However, no licensee can accept sports wagers for sporting events involving an Illinois collegiate team.[43] In addition, Illinois casinos and horse racing tracks can apply for a master sports wagering license to allow sports wagering in its facility.[44] Online sports betting companies (such as DraftKings and FanDuel) can apply for master sports wagering licenses 540 days (approximately 18 months) "after the first license is issued under this Act."[45] Prior to online sports betting companies being granted a master sports wagering license, online sports bettors must first register at those retail casinos or horse racing tracks granted a master license.[46] Finally, the bill launches a pilot program making applications available for up to 5,000 sports lottery terminals to be placed in lottery retail locations within two years following the effective date of the bill.[47]

The first sports bet in Illinois was placed on March 9, 2020.[48] Due to the coronavirus pandemic, Governor Pritzker issued and renewed an Executive Order suspending the in-person registration requirement for online wagering, which allows individuals to place bets online or through mobile applications without prior in-person registration.[49] As of March 2021,

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40. *Illinois SB690*, TRACKBILL https://trackbill.com/bill/illinois-senate-bill–690-ptell-qualified-school-dist/1664731/ [https://perma.cc/5ZBX-M9LA] (last visited Feb. 10, 2020). *See also* 2019 Ill. Pub. Act 101–0031.

41. *Illinois SB690, supra* note 40. *See also* Joe Barnas, *What You Need to Know About Illinois' Gambling Expansion*, ILLINOIS POLICY (June 13, 2019), https://www.illinoispolicy.org/what-you-need-to-know-about-illinois-gambling-expansion/ [https://perma.cc/4HVV-M6A7].

42. 2019 Ill. Pub. Act 101–0031 § 25–40(b). *See also* Barnas, *supra* note 41.

43. 2019 Ill. Pub. Act 101–0031 § 25–25(d).

44. 2019 Ill. Pub. Act 101–0031 §§ 25–20, 25–30 (horse racing tracks), and 25–35 (casinos). *See also* Barnas, *supra* note 41.

45. 2019 Ill. Pub. Act 101–0031 § 25–45(b). *See also* Barnas, *supra* note 41.

46. 2019 Ill. Pub. Act 101–0031 § 25–35(f).

47. 2019 Ill. Pub. Act 101–0031 § 25–70. *See also* Barnas, *supra* note 41.

48. *Illinois Sports Betting*, LEGAL SPORTS REP., https://www.legalsportsreport.com/illinois/ [https://perma.cc/WZT5-UC94] (last visited Feb. 10, 2021).

49. *Id. See also* Ill. Exec. Order No. 2020–41 (June 4, 2020) (the initial Executive Order suspending the requirement of in-person registration). *See also* Ill. Exec. Order Nos. 2020–44 (June 26,

Illinois has totaled more than $186 million in sports betting revenue, of which the state has collected over $27 million in taxes.[50]

2. Indiana

On May 8, 2019, Indiana House Enrolled Act No. 1015 was signed by Indiana Governor Eric Holcomb, authorizing sports betting in Indiana.[51] The Indiana statute[52] became effective on July 1, 2019 and authorized sports wagering in the state beginning on September 1, 2019.[53] In order to become a sports wagering operator, a business (casino, racetrack, etc.) must apply to the Indiana Gaming Commission for licensure.[54] There is also an avenue for sports wagering operators to offer online sports betting.[55]

The Indiana sports wagering statute also provides various integrity requirements.[56] For example, sports wagering operators must conduct background checks on new hires who will be engaging in sports wagering conduct, and yearly background checks on all existing employees..[57] Operators are also required to "take commercially reasonable methods" to ensure that no bets are placed by persons under age twenty-one, professional athletes, and other persons involved with professional sports teams, or sporting officials, among others.[58] Operators also have a duty to report, among other things, "abnormal betting activity or patterns that may indicate a concern regarding the integrity of a sporting event or events"[59] and "any other conduct that corrupts a betting outcome of a sporting event or events for purposes of financial gain."[60] Finally, a provision within the state's sports wagering statute directs the operator to withhold the amount of delinquent child support from winnings exceeding $600.[61] Indiana also collects a 9.5% sports wagering tax from its operators "on the adjusted gross

2020), 2020–52 (Aug. 21, 2020), 2020–55 (Sept. 18, 2020), 2020–59 (Oct. 16, 2020), 2020–71 (Nov. 13, 2020), 2020–74 (Dec. 11, 2020), 2021–01 (Jan. 8, 2021) (all extending Executive Order 2020–41).

50. *Illinois Sports Betting Revenue Reports*, PLAYILLINOIS.COM, https://www.playillinois.com/revenue/ [https://perma.cc/H659-KFX8] (last visited Mar. 16, 2021).

51. *Indiana HB1015*, TRACKBILL, https://trackbill.com/bill/indiana-house-bill–1015-various-gaming-matters/1614380/ [https://perma.cc/ZEN8-P2E9] (last visited Jan. 10, 2020).

52. IND. CODE § 4–38 (2020).

53. § 4–38–4–1 (2020).

54. §§ 4–38–6–2, 4–38–7–1 (2020).

55. § 4–38–5–12 (2020).

56. *See* § 4–38–9 (2020).

57. § 4–38–9–1(b)(2)(A) (2020). In addition, the operator "may deduct and retain an administrative fee in the amount of the lesser of: (A) three percent (3%) of the amount of delinquent child support withheld under subdivision (2)(A); or (B) one hundred dollars ($100)." § 4–38–9–1(b)(1).

58. § 4–38–9–3 (2020).

59. § 4–38–9–6(3) (2020).

60. § 4–38–9–6(5) (2020).

61. § 4–38–11–1(2020).

receipts received from authorized sports wagering."[62] In 2020, Indiana reported over $7.4 million in sports betting tax.[63]

3. Iowa

Sports betting in Iowa became legal on May 13, 2019 with the enactment of Senate File 617.[64] Similar to Illinois and Indiana, Iowa operators of racetracks and gambling structures, including excursion gambling boats, may offer sports wager after becoming licensed by the state.[65] Online wagering is permitted.[66] Similar to Indiana, Iowa also imposes reporting requirements on operators indicating "abnormal wagering activity or patterns that may indicate a concern about the integrity of an authorized sporting event or events, and any other conduct with the potential to corrupt a wagering outcome of an authorized sporting event for purposes of financial gain."[67] A 6.75% tax is collected by the state "on the sports wagering net receipts received…by a licensed operator from [authorized] sports wagering."[68] As of April 2, 2021, Iowa has generated over $5.4 million in sports betting tax.[69]

4. Michigan

Michigan authorized sports betting on December 20, 2019.[70] Sports betting at retail locations began in March 2020 (shortly before the retail locations closed due to the coronavirus pandemic), and online sports betting launched on January 22, 2021.[71] The state's casinos must apply for a sports betting operator license before taking sports wagers.[72] Operators may also

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62. § 4–38–10–1 (2020).
63. Ind. Gaming Comm'n, 2020 ANN. REP. TO GOVERNOR ERIC HOLCOMB 10, https://www.in.gov/igc/files/FY2020-Annual.pdf [https://perma.cc/3TVH-PMXX] (last visited Feb. 9, 2021).
64. IOWA CODE § 99F.3 (2021).
65. § 99F.7A.1 (2021).
66. § 99F.7A.3 (2021).
67. § 99F.12.2.B (2021).
68. § 99F.11.4.A.
69. *Iowa Sports Betting Revenue Reports*, PLAYIA.COM https://www.playia.com/revenue/ [https://perma.cc/L67D-CFPT] (last visited Apr. 2, 2021).
70. *See* MICH. COMP. LAWS § 432.
71. Adam Candee, *Michigan Sports Betting Launch: Everything We Know Today*, LEGAL SPORTS REP. (Jan. 22, 2021), https://www.legalsportsreport.com/47463/michigan-sports-betting-launch-info/ [https://perma.cc/36JS-Z4TF].
72. § 432.406(1).

establish sports wagering via the internet.[73] Sports wagering within the state is taxed at a rate of 8.4%.[74]

The recent sports betting legislation surveyed above provides high-level insight into the similarities and differences seen in sports betting legislation. Typically (at least prior to the coronavirus pandemic) states first license defined retail locations, before secondarily launching online sports betting. States take a defined percentage of their sports betting handle, but these percentages differ from state to state, and states may differ in whether they tax net or gross receipts. Finally, states may or may not provide mechanisms aimed at ensuring the integrity of the sports being bet on. Often not included on the face of a state statute authorizing sports betting, however, are the ethical considerations involved in its passage. That is the subject of the next four sections.

II. ETHICAL CONSIDERATIONS OF GAMBLING, IN GENERAL

In 2018, gambling in the United States generated over $160 billion in gross revenues.[75] More than $83 billion was generated from commercial and tribal casinos alone.[76] Lottery revenues accounted for $72 billion, charitable games for over $2 billion, and online gambling for over $300 million.[77] *Legal* sports bookmaking generated over $430 million.[78] This amount was an increase of approximately $182 million from 2017,[79] one year prior to the *Murphy* decision. In fact, in the sixth months immediately following *Murphy*, the handful of states that quickly enacted legislation authorizing sports betting (New Jersey, Delaware, West Virginia, etc.[80]) generated close to $130 million in revenue.[81] With the number of states authorizing sports betting on the rise, it is estimated that an additional $40 billion of gambling revenue can be generated per year, helping total gambling *revenue* in the United States to surpass $200 billion per year.[82] In total the United States gambling industry is estimated to be worth over $260 billion.[83]

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73. § 432.404.
74. § 432.406(1).
75. *Ultimate USA Gambling Facts & Revenue*, ONLINE U.S. CASINOS, https://www.onlineunitedstatescasinos.com/usa-gambling-facts/ [https://perma.cc/366C-WT3G] (last visited Feb. 9, 2021).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *See* Butler, *supra* notes 33.
81. *Ultimate USA Gambling Facts & Revenue*, *supra* note 75.
82. *Id.*
83. *Id.*

With gambling being so prevalent and controversial, it is not surprising that the activity has garnered much contemporary ethical commentary. In an essay titled "The Ethics of Gambling," John A. Hobson defined gambling as "the determination of the ownership of property by appeal to chance."[84] Hobson explained that "[t]he rational basis of the acquisition of property is the 'natural' relation of effort to satisfaction."[85] However, viewing gambling as a vice, Hobson concluded:

> [g]ambling involves the denial of all system in the appointment of property: it plunges the mind in a world of anarchy where things come upon one, and pass from one miraculously. It does not so manifestly sin against the canons of justice as do other bad modes of transfer, theft, fraud, sweating, for every one is said to have an equal chance; but it inflicts a graver damage on the intellect. Based as it is on an organi[z]ed rejection of all reason as a factor . . . . The essence of gambling consists in an abandonment of reason, an inhibition of the factors of human control.[86]

In a similarly titled essay written just two years after Hobson's, Frank N. Freeman highlights three features of gambling: "the one-sided gain, the arbitrariness and the chance."[87] As to the first feature, Freeman posited that gambling "causes a loosening of social ties. It sets each man's hand against his brother and thus is of the very essence of immoral action."[88] Exploring arbitrariness, Freeman said that "the connection between the prize and the wager is not a natural condition of social life, but is arbitrarily fixed . . . ."[89] In other words, there is generally no rational relationship between the act of gambling itself and that which is gambled on. Describing chance, Freeman said that "[w]hen the likelihood that one party to the wager will win becomes so great as to amount to a practical certainty, the transaction from his point of view loses the character of gambling."[90] Further analyzing these three features of gambling, Freeman reached a similar ethical conclusion to Hobson:

> gambling has been found to destroy the solidarity of social life and to make of men anti-social individuals, because, first, it is founded on anti-social feelings and aims, namely, the desire for gain at the

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84. John A. Hobson, *The Ethics of Gambling*, 15 INT'L J. ETHICS 135, 135 (1905).
85. *Id.* at 136.
86. *Id.* at 138.
87. Frank N. Freeman, *The Ethics of Gambling.*, 18 INT'L J. ETHICS 76, 80 (1907).
88. *Id.* at 79.
89. *Id.*
90. *Id.* at 80.

> expense of another; second, it involves exchange of property on a false basis, rendering the condition of cooperative life less secure; and third, it entails great disorganization of mind and character with its consequent social evils.[91]

Ethical commentary on gambling, then, seems aimed at describing the activity as a vice. Despite this commentary, however, the research at the beginning of this section suggests that gambling in the United States has become commonplace and accepted, with the gambling industry worth approximately $261 billion.[92] Hence, a social tension emerges: despite gambling being generally described as an ethical vice, the activity has arguably gained considerable acceptance in the United States. This tension creates another ethical consideration: to what extent can a democratic government ethically *prohibit* gambling, or certain subsets thereof,[93] despite its populace's seeming acceptance of the activity?[94]

Economist Richard McGowan provided some insight into this consideration. McGowan observed that research on the effects of gambling is usually divided between economic and psychological points of view.[95] Examining gambling through more of a public policy lens, McGowan said that "the controversy which public policy makers face involves a conflict between those who maintain that the goal of public policy should be to maintain the 'societal good' versus those who advocate the supremacy of the 'rights of the individual.'"[96] He said that proponents of the institutionalization of gambling argue that gamblers will find a way to gamble whether or not it is legal, so states should capitalize economically and put gambling proceeds to socially beneficial uses.[97] This view is based on the ethics of tolerance: "[t]olerance entails that no one has to sacrifice their basic freedoms in order to achieve some goal of public welfare."[98] On the contrary, those opposed to the institutionalization of gambling argue

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91. *Id.* at 83.

92. *See Ultimate USA Gambling Facts & Revenue*, *supra* note 75. For sports gambling in particular, see Polisano, *supra* note 10, at 483 ("nearly two-thirds of Americans believe that it is not immoral to gamble on sports.") (citing Lisa Cannon Green, *Is Sports Gambling Moral? You Bet, Americans Say*, LIFEWAY RES. (Jan. 22, 2016), http://lifewayresearch.com/2016/01/22/is-sports-gambling-moral-you-bet-americans-say/).

93. PASPA prohibited the subset of *sports* gambling.

94. Of course, many forms of gambling are legal in the United States. This question is not intended to ask and/or answer *why* certain forms of gambling are legal, but rather *could* a democratic government, at either the state or federal level, prohibit gambling, or a subset of gambling, if they had the desire to do so.

95. Richard McGowan, *The Ethics of Gambling Research: An Agenda for Mature Audiences*, 13(4) J. GAMBLING STUD. 279, 279 (1997).

96. *Id.* at 280–81.

97. *Id.* at 281.

98. *Id.* at 283.

"that society cannot permit any activity which exploits the addiction of some population segment even if the rest of society might derive benefit."[99] This latter idea is based on the ethics of sacrifice: "[w]hen sacrifice is used as a moral concept to advance the merits of a particular public policy issue, public policy makers must be able to persuade the public that it must give up some benefit or "right" to achieve a noble goal or end."[100] Much of McGowan's discussion on the ethics of tolerance and sacrifice can be traced back to philosophical theories of liberalism and paternalism.[101] A discussion of those two ethical theories follows within the context of exploring each's tolerance, or lack thereof, of state prohibited gambling.

III. STATE PROHIBITED GAMBLING ANALYZED UNDER THEORIES OF PATERNALISM AND INDIVIDUAL LIBERTY

John Stuart Mill, in his famous essay *On Liberty*, recognized the tension between public policy concerns and protecting individual freedoms. In the first sentence of his introductory remarks, Mill stated that the subject of his essay is "Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual."[102] In the very next sentence, Mill says that the tension between social liberty and governmental authority presents "[a] question seldom stated, and hardly ever discussed, in general terms, but which profoundly influences the practical controversies of the age by its latent presence, and is likely soon to make itself recogni[z]ed as the vital question of the future."[103] In an attempt to reconcile this tension, Mill introduced what has become known as the Harm Principle:

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civili[z]ed

99. *Id.* at 281.

100. *Id.*

101. McGowan concluded that "[t]he overall effect of this difference in ethical perspective has been research that tends to overestimate both the costs and benefits of gambling." *Id.* at 285. He said that "[a]nti-gambling forces are more than willing to sacrifice a person's right to gamble to ensure that no person is sacrificed to the addiction of gambling, while pro-gambling advocates will not tolerate any imposition on the right to gamble especially when gambling can be shown to have economic benefits." *Id.*

102. J.S. Mill, *On Liberty*, in J.S. MILL'S ON LIBERTY IN FOCUS 23, 23 (John Gray & G.W. Smith eds., 1991).

103. *Id.*

> community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[104]

Succinctly put, Mill's Harm Principle "refuses limitations on individual liberties *unless* such limitations reduce 'harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.'"[105]

In applying his Harm Principle, Mill also suggested that the information an individual possesses, and the certainty of the harm, are also relevant to his calculus. Mill's "bridge example" illustrates this point:

> [i]f either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore . . . he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.[106]

In the first scenario, because the individual does not have all of the relevant information to make an informed decision, and because harm was rather certain, intervention is appropriate. In the latter scenario, however, Mill does not favor intervention because the harm is not certain, and the individual himself can judge his own action.[107]

Mill's Harm Principle is generally thought to be liberalistic, or anti-paternalistic.[108] Paternalism is defined as "the power or authority one person or institution exercises over another to confer benefits or prevent harm for the latter regardless of the latter's informed consent."[109] Mill's Harm Principle rejects Paternalism because under the Harm Principle, an

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104. *Id.* at 30.

105. Eunseong Oh, *Mill on Paternalism*, 2016 N.Y.U. J. POL. INQUIRY 41, 41. (emphasis in original) (citation omitted).

106. Mill, *supra* note 102, at 110.

107. For further discussion of Mill's "bridge example," see Oh, *supra* note 105, at 45–46.

108. *See id.* Oh acknowledges that "some commentators have described *On liberty* as lenient to paternalism, generating irreconcilable inconsistency." *Id.* Oh himself proceeds "to reconcile the seemingly contradictory principles of liberalism (defined as the belief that individual free will is inherently valuable and deserves protection from unjustified restrictions) and paternalism." *Id.* This discussion, while interesting, is beyond the scope of this paper.

109. Barbara Hands, *Paternalism and the Law*, PHIL. NOW, 2009, https://philosophynow.org/issues/71/Paternalism_and_the_Law (quoting Hugo Adam Bedau, *Paternalism*, in THE OXFORD COMPANION TO PHIL. 684, 684 (Ted Honderich ed., 2d. ed. 2005).

institution cannot exercise authority over an individual (by limiting individual freedom) to confer benefits or prevent harm to that individual.[110] The only time an institution is allowed to interfere with an individual's liberty is when that individual harms others.[111] Mill's Harm Principle more closely adheres to the ethical theory of liberalism, which is the antithesis to paternalism.[112] Liberalism is "the belief that individual free will is inherently valuable and deserves protection from unjustified restrictions."[113] At the heart of Mill's belief is also his Utilitarian ideology: "Mill is looking for the best possible outcome ['the greatest good for the greatest number'], and he finds no instances where a paternalistic action provides this."[114]

Another justification Mill gave for his Harm Principle concerns personal autonomy.[115] Personal autonomy, Mill believed, promoted the development of human faculties, by requiring individuals to "use their physical and mental abilities."[116] Mill believed that developing human faculties (i.e. freely and repeatedly using individual physical and mental abilities) was the best "way to achieve human excellence."[117] Mill posited, "[h]e who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties."[118] Therefore, "paternalism is incompatible with human excellence. Any paternalistic argument justifying constraint on individual liberty would rob individuals of the opportunity to exercise their individuality and autonomy, both of which are indispensable to the deliberative process and the perfection of their faculties."[119]

Mill's Harm Principle also distinguishes actions which are self-regarding and actions which are not. For actions which are not wholly self-regarding, Mill supports governmental intervention if said intervention is better for society in general.[120] One reason for this needed intervention is that actions

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110. Oh, *supra* note 105, at 41.

111. *Id.*

112. *See, e.g.*, Paul Burrows, *Patronising Paternalism*, 45 OXFORD ECON. PAPERS 542, 542 (1993). ("[P]aternalism is the antithesis of freedom of choice . . . .").

113. Oh, *supra* note 105, at 41. For a similar definition of liberalism, see Raphael Cohen-Almagor, *Between Autonomy and State Regulation: J.S. Mill's Elastic Paternalism*, 87 ROYAL INST. PHIL. 557, 557 ("Liberalism holds that autonomous individuals who are capable of acting rationally and deliberately, of being self-governed and self-controlled rather than subordinated to external forces and inspection, are entitled equally to a respectful treatment").

114. Hands, *supra* note 109 (alteration in original).

115. *See* Oh, *supra* note 105, at 42.

116. *Id.*

117. *Id.*

118. Mill, *supra* note 102, at 75. *See also* Oh, *supra* note 105, at 42.

119. Oh, *supra* note 105, at 43.

120. *Id.* at 45–46.

which are not wholly self-regarding can negatively affect other people.[121] When an individual's seemingly self-regarded action prevents an individual from fulfilling his social duties and begins to negatively affect other individuals, intervention is acceptable because the actor committed a social offense.[122] Mill held:

> [i]n like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offence. No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.[123]

The analysis becomes difficult, however, because self-regarding actions are hard to distinguish from non-self-regarding actions.[124] Almost every action an individual undertakes affects another person in some respect.[125] It is clear, however, that for some of these seemingly self-regarding actions that prevent individuals from honoring their societal duties, Mill blamed the individual and not the activity.[126] Mill provided an example:

> [i]f, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance.[127]

Applying these principles to gambling, most traditional forms of gambling are purely self-regarding activities that only affect the individual gamblers. If true, these traditional forms of gambling would fail Mill's

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121. Oh seems to suggest that this proves a consistency between Mill's beliefs and paternalism because contrary to an absolute anti-paternalistic ideology, situations where self-regarding actions cause an individual to neglect their duties to others, or to society as a whole, regulation by the majority may be permitted. *See id.* at 47. It is not clear, however, if Mill's belief is an exception to his anti-paternalistic views or whether the self-regarding act, because of its negative impact on others, fails the Harm Principle. If the latter were true, such situations would not be exceptions to Mill's anti-paternalistic views.

122. *Id.* at 47.

123. Mill, *supra* note 102, at 96. *See also* Oh, *supra* note 105, at 47.

124. Oh, *supra* note 105, at 46.

125. *Id.*

126. *Id.*

127. Mill, *supra* note 102, at 75.

Harm Principle, and liberalism more generally, which would not permit a democratic government from prohibiting these activities. Paternalism, on the other hand, would permit a prohibition on gambling as a means of preventing harm to the gamblers themselves. This analysis becomes more difficult, however, due to the potential of gambling to affect individuals other than the gambler. A father, for example, may become addicted to casino gambling and spend a majority of his weekly paycheck at the casino, to the detriment of his family. If the father's gambling severely affects his ability to provide for his family, he may be committing a social offense according to Mill. On Mill's view, such a scenario may permit intervention, but Mill would blame the gambler and not the act of gambling. In fact, while discussing self-regarding acts within the context of his Harm Principle, Mill directly discussed gambling.[128] He recognized gambling's potential to be an activity that negatively affects individuals other than the gamblers themselves.[129] When considering whether one should be allowed to keep a public gambling house (i.e. a casino), Mill said, "[this] case is one of those which lie on the exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs."[130] Mill, however, seemed to be more concerned with the prospect of punishing the owner and operator of the gambling house.[131] He concluded, "I will not venture to decide whether they are sufficient to justify the moral anomaly of punishing the accessary, when the principal is (and must be) allowed to go free; . . . the gambling-house keeper, but not the gambler."[132] One commentator noted that

> Mill's paternalism accords himself and the State the right and competence to decide what is evil. . . . The formula tries to juggle between State responsibility, personal freedom, and not conferring legitimacy on a practice that might waste one's resources at the expense of one's family, acknowledging that one's autonomy is not complete when it comes to gambling as addiction may come to play.[133]

128. Mill, *supra* note 102, at 113–14.
129. Cohen-Almagor, *supra* note 113, at 579.
130. Mill, *supra* note 102, at 113.
131. *Id.* at 113–14.
132. *Id.*
133. Cohen-Almagor, *supra* note 113, at 579–80. Cohen-Almagor had the following to say about Mill:

> [H]e sometimes favoured a degree of weak, or it may be preferable to call it soft paternalism, but on some matters, such as unripe marriage and irresponsible divorce, he did not shrink from strong (or hard) paternalism. Thus, I suggest that Mill's paternalism may be best described as elastic. Mill endorsed soft paternalism when he exempted children and barbarians from his

To summarize, it appears that, generally, Mill's liberalistic ideals would not permit a democratic government to prohibit an individual's gambling, as long as the individual knows the risks of his actions. After all, an individual's "own good, either physical or moral, is not a sufficient warrant" to allow societal intervention.[134] This inquiry, however, becomes more problematic when gambling habits begin to affect individuals other than the gambler himself. Direct harm to other individuals surrounding the gambler would appear to satisfy Mill's Harm principle, allowing societal structures to intervene. However, Mill does not give a clear answer to this problem. He notes both the State's and individual's interest. Perhaps finding a middle ground, Mill suggested taxation as a means of discouraging stimulants the State disapproved of, saying, "[t]axation, therefore, of stimulants, up to the point which produces the largest amount of revenue (supposing that the State needs all the revenue which it yields) is not only admissible, but to be approved of."[135] Sports gambling, on the other hand, deserves special attention under Mill's Harm Principle due to its potential to also affect the independent sporting events being bet on.

IV. WHAT MAKES SPORTS GAMBLING DIFFERENT THAN OTHER FORMS OF GAMBLING?

Despite the growing acceptance of gambling in the United States, are there characteristics unique to sports gambling that alter the ethical considerations when deciding whether to authorize or prohibit this subset of gambling?

Sports gambling does not appear to be any more or less self-regarding than other forms of gambling. That is, moderate wagering is likely to only affect the individual bettor, whereas reckless wagering may affect other individuals, such as the bettor's family. However, sports betting is unique from other forms of gambling in that individuals place bets on independent sporting spectacles. Professional sports leagues, such as the National Football League, National Basketball Association, and Major League Baseball are multi-billion-dollar, self-regulated industries. Thousands of professional athletes make careers out of the sports they play. Therefore, the integrity of these sporting events is an added dimension to the authorization

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> Liberty Principle and also when he allowed stopping a person from crossing an unstable bridge when we suspect that that person is oblivious to the risk.59 But if the person, after being warned, choose nevertheless to cross the bridge, then we need to respect her decision. In the spirit of liberalism, Mill supported regulation rather than coercion or outright prohibition.

Id. at 574.

134. Mill, *supra* note 102, at 30.

135. *Id.* at 115.

of sports betting.[136] In its original support for PASPA, the Senate Judiciary Committee's report "argued that the threat of expanding sports wagering is 'undermin[ing] public confidence in the character of professional and amateur sports' and 'promot[ing] gambling among our Nation's young people.'"[137] Widespread authorization of sports betting may also provide opportunity for those within professional sports—such as referees or athletes[138]—to place implicit wagers. On the other hand, the increased regulation of sports betting necessitated by widespread authorization may make it easier to find and punish individuals participating in match-fixing.[139] Stakes are also high at the collegiate level, where many student athletes receive scholarships for their sport participation. According to law professor Marc Edelman, "the main reasons for not allowing individuals to bet on amateur sporting events are to protect the privacy of amateur athletes and to insulate these athletes from gamblers, based on the athletes' greater financial incentive to accept bribes."[140]

The question becomes, then, to what extent paternalism and liberalism would tolerate sports gambling. First, it is unlikely that a strict paternalistic institution would tolerate sports gambling. Paternalism allows an institution to prohibit an activity in order to confer a benefit on an individual or to prevent harm.[141] Sports gambling not only has the potential to harm the individual bettor and his family, but it also has the potential to harm the integrity of the sports being bet on.[142] The analysis becomes more difficult under a liberalistic model. A strict theory of liberalism would likely tolerate sports gambling, as considerations for an individual's free will would trump thoughts of prohibition. Mill's Harm Principle, however, may tolerate governmental intervention because of the characteristics just described—that is, sports gambling is not wholly self-regarding and has the potential to disrupt the sports being gambled on. Mill's Harm principle, remember, tolerates intervention when there is potential for harm to persons other than

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136. Polisano, *supra* note 10, at 481–82.

137. *Id*. at 482 (citing S. REP. NO. 102–248, at 4 (1992)).

138. *See supra* note 11 and accompanying text.

139. *See id.* (concluding that "[i]n countries that permit sports gambling, match fixing 'scandals [are] more readily exposed and violators' are more easily punished due to increased regulation" (citation omitted)).

140. Edelman, *supra* note 11, at 332 (citing Adam Kilgore, *For Sports Leagues, Legalized Sports Betting Offers New Risks, and Massive Rewards*, WASH. POST (May 14, 2018), https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4–5790–11 c8–858f–1 2becb4d6067_story.html?utm term=.62adl a703bbd (quoting Florida State University sports law professor Ryan Rodenberg for the proposition that "[c]ollege sports is the one realm where corrupters can influence athletes, because they're not paid market rate")).

141. *See* Hands, *supra* note 109.

142. *See supra* note 11 and accompanying text.

the actor himself.[143] However, Mill would likely not support an outright prohibition of sports gambling. Rather, he would likely support heavy regulation and taxation.[144]

Of course, democratic governments consider more than just ethics when deciding whether to pass legislation.[145] Often, democratic governments pass legislation after determining that the social benefits outweigh the social costs and/or ethical concerns.[146] If concerns exist after authorization, regulation and taxation can help quell these concerns.

This Note contends that through consistent regulation and integrity requirements, transparent taxation, and certain social safeguards, the ethical and social concerns surrounding sports gambling can be reconciled with a state's authorization of it.

V. RECONCILING THE ETHICAL CONCERNS SURROUNDING SPORTS GAMBLING

As funding from the federal government has fluctuated,[147] and with states and local governments reluctant to increase individual income, sales, and property taxes, states and local governments have necessarily turned to various other taxes to raise revenue.[148] Sin taxes[149] on previously unauthorized activities, such as sports betting, provide one option for a new

143. *See* Oh, *supra* note 105, at 41.

144. Mill, *supra* note 102, at 115.

145. *See, e.g.*, Karine Nyborg and Inger Spangen, *Cost-Benefit Analysis and the Democratic Ideal*, STAT. NOR., no. 205, Nov. 1997, at 3 ("In a [cost-benefit analysis], all costs and benefits are valued in monetary terms, and net benefits of the various policy alternatives are calculated. However, although [cost-benefit analysis] may indicate the efficiency aspect of projects, most economists would agree that it is not suitable for evaluating the political and ethical aspects.").

146. *Id.*

147. *State and Local Finance Initiative*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues [https://perma.cc/G8ZP-UCJE] (last visited Feb. 11, 2021).

148. LOUIS JACOBSON, TAXING DECISIONS: A FEW STATES ARE DIPPING THEIR TOES INTO NEW REVENUE STREAMS, NCSL 20 (2012), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2012/SL–0712-Fiscal.pdf?ver=2012–07–12–111118–390.

149. Sin taxes are flat taxes on each item of a socially harmful product sold. Kimberly Amadeo, *Sin Taxes, Their Pros and Cons, and Whether They Work: If Wine is Taxed, Why isn't Soda?*, THE BALANCE (May 23, 2019), https://www.thebalance.com/sin-tax-definition-examples–4157476 [https://perma.cc/N336–9MQ4]. Supporters argue that sin taxes discourage the unhealthy behavior taxed and help pay for some of society's increased costs for authorizing the behavior. *Id.* Some research, however, suggests that the financial benefits of sin taxes are better in the short term, and are not ideal for long term budget commitments. *See Are Sin Taxes Healthy for State Budgets? Taxes on Vices are Tempting but Unreliable Source of Revenue*, PEW (July 19, 2018), https://www.pewtrusts.org/en/research-and-analysis/reports/2018/07/19/are-sin-taxes-healthy-for-state-budgets [https://perma.cc/5W9B–6Q3F]

revenue stream.[150] As legislation authorizing sports betting becomes more and more creative, states are realizing that there are ways to profit off sports betting while also accounting for the possibility of increased individual gambling and integrity concerns of professional sports leagues. As one commentator noted,

> some of the more important questions for reasonable legislative debate include the following: (a) how to legally define the term "sports gambling;" (b) how to determine whether to allow gambling on amateur sports; (c) whether to allow for online sports betting; (d) whether to allow for multi-jurisdictional gambling compacts; (e) how to share sports-gambling revenues between states and operators; (f) whether to share sports-gambling revenues with U.S. commercial sports leagues; and (g) how to minimize the risk of participant gambling addiction and loss of financial independence.[151]

A. Indiana Integrity Model

Indiana's legislation authorizing sports betting is an example of balancing the concerns of the state and the integrity of the sports being wagered on and which provides model legislation for states that are considering to authorize sports betting. Background checks for new and existing employees,[152] commercially reasonable methods to prevent underage or "insider" betting,[153] mandatory cooperation with investigations conducted by sports leagues and/or law enforcement,[154] and mandatory reporting of suspicious wagering[155] are all methods aimed at upholding the integrity of the events being wagered. When combined with strong taxes and specific social safeguards at the state or local level, these integrity requirements help ensure that the benefits of sports betting outweigh the potential harm.

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150. *See, e.g.*, *Sin Tax Revenues by State*, GOVERNING THE FUTURE OF STATES AND LOCALITIES, https://www.governing.com/gov-data/finance/state-sin-tax-collections-revenues.html [https://perma.cc/LTH9-XTF3] (last visited Feb. 11, 2021) ("State sin tax collections exceeded $32 billion in fiscal year 2014, representing roughly 3.8 percent of total tax revenues."). *See also* Polisano, *supra* note 10, at 475 (noting that potential tax revenues from sports betting could raise significant revenue for states and help states finance sports-related projects, such as building sports stadiums).

151. Edelman, *supra* note 11, at 330.

152. IND. CODE § 4–38–9–1.

153. § 4–38–9–3.

154. § 4–38–9–5.

155. § 4–38–9–6.

B. Taxes and Their Allocation

In order to financially benefit from the authorization of sports betting, states need to tax both the individual operators on all revenues and individual bettors on all winnings. The tax on bettor winnings, if taxed at the time of payout, could act as a "sin" tax, a minor deterrent to the activity. Whatever the rate taxed at the state level,[156] the state needs to share its tax revenue with the local governments whose physical locations attract the sports wagering. Moreover, states need to be transparent in their spending and allocation of these funds.[157] Too many times, a state creates a new tax revenue or increases a current revenue only to frustrate citizens who do not see any tangible benefit coming from the increased tax.[158] This is especially important for the authorization of ethically or socially controversial activities because if citizens can see the social benefits of the authorization, they may be more willing to accept it as socially desirable. Targeted taxation and allocation, therefore, is another tool that states can use to ensure that the social benefits of sports gambling outweigh its ethical and social concerns.

C. Integrity Fees to Sports Leagues

Another taxing option available to those states authorizing sports betting is to tax wagering operators at a set amount and to disperse the collected money directly to the professional sporting leagues whose sports are being gambled on. This taxing and distribution structure is known as an integrity fee.[159] Integrity fees would send a considerable amount of money directly

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156. States take different approaches to their tax rates on sports betting. Iowa taxes net receipts at a rate of 6.75 percent, while Pennsylvania taxes daily gross sports wagering revenues at a rate of 34%. IOWA CODE § 99F.11.4 (2019); 4 PA. CONS. STAT. § 13C62.

157. The Iowa statute authorizing sports betting provides a good example of transparent allocation. Each fiscal year, a percent, or fraction of a percent, of the adjusted gross receipts is to be deposited in the state's county endowment fund, to the department of cultural affairs, to the community development division of the economic development authority for tourism purposes, and to the rebuild Iowa infrastructure fund. *See* IOWA CODE § 99F.11.3 (2019).

158. *See, e.g.*, ADAM SCHUSTER, ET AL., ILL. POL'Y INST., WASTE WATCH: NEARLY $100M OF WASTE IN ILLINOIS STATE AND LOCAL GOVERNMENT (2018), https://files.illinoispolicy.org/wp-content/uploads/2018/10/Waste-Watch-finale–2.pdf [https://perma.cc/N53U-EKYZ].

159. *Sports Betting Integrity Fee*, LEGAL SPORTS REP., https://www.legalsportsreport.com/integrity-fee/ [https://perma.cc/3X57–72CS] (last visited Feb. 11, 2021). Indiana's House of Representatives, for example, introduced a sports gambling bill in 2018, which would impose an integrity fee on sports betting operators. The bill read, in pertinent part, "A sports wagering operator shall remit to a sports governing body that has provided notice to the commission under section 2 of this chapter an integrity fee of one percent (1%) of the amount wagered on the sports governing body's sporting events. The sports wagering operator shall remit integrity fees to the sports governing body at least once per calendar quarter." Dustin Gouker, *New Version of Indiana Sports Betting Bill Includes Hefty 'Integrity Fee' Paid to Sports Leagues*, LEGAL SPORTS REP. (Jan. 8, 2019), https://www.legalsportsreport.com/17400/indiana-sports-betting-integrity-fee/

to the professional sports leagues because the total amount wagered by bettors, as opposed to merely the revenues, is taxed.[160] A mere 1% integrity fee could send around 20% of an operator's *revenues* to the sports leagues.[161] One argument in favor of integrity fees concerns the increased costs that sports leagues will incur due to monitoring integrity protocols.[162] On the other hand, it has been argued that "irrespective of whether states legalize sports gambling, commercial sports leagues have a strong and independent incentive to prevent players and owners from gambling on their sports to safeguard outcome uncertainty."[163] The American Gaming Association argues that integrity fees would take considerable funding away from state and local governments and would put considerable pressure on operators to turn massive profits.[164] Because states have been increasingly unwilling to include integrity fees in legislation authorizing sports betting, sports leagues have lowered their "asking integrity fee price" from 1% to 0.25%.[165]

States should strive for a middle ground when considering integrity fees. Instead of taxing a small percentage of an operator's overall handle, the sports leagues should receive a slightly increased percent of the operator's *revenues*. Professional sports leagues (who, as noted above, have an independent incentive to uphold the integrity of their sports) would profit from sports betting, and state and local governments would still have a large revenue pool to tax for their own purposes. Another problem, best left for another discussion, is ensuring that sports leagues appropriately use their integrity fees, and what this structure might look like.

D. Online Wagering

There are many arguments against allowing online sports betting, including concerns that the online market would be difficult to regulate and track; the ease of online use, which could foster addictive behavior; and the potential for underage wagers.[166] There are safeguards, however, that can be deployed to regulate these concerns. For example, Michigan commands its

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[https://perma.cc/L3CE-ZNNL] (quoting Ind. HB 1325 (2018)). This language was absent from the bill that Indiana passed in 2019 authorizing sports betting.

160. Gouker, *supra* note 159.

161. *Integrity Fees — What Are They and Why Are They So Controversial?*, SPORTSHANDLE, https://sportshandle.com/integrity-fees/ [https://perma.cc/3K5A-CND9] (last visited Apr. 2, 2021).

162. Edelman, *supra* note 11, at 336. *See also Integrity Fees — What Are They and Why Are They So Controversial?*, *supra* note 161.

163. Edelman, *supra* note 11, at 336–37.

164. Gouker, *supra* note 159.

165. *Integrity Fees — What Are They and Why Are They So Controversial?*, *supra* note 161.

166. Edelman, *supra* note 11, at 333.

operators to maintain mechanisms "designed to reasonably verify that an authorized participant is 21 years of age or older."[167] Possible alternative mechanisms could include setting up an online wagering account in person at the location offering the online wagering, or if an online-only site, sending verified photos of government issued identification.

E. Social Safeguards

States should also consider various social safeguards to offset the potential negative social effects that could arise from an authorization of sports betting. Indiana, for example, allows a portion of a bettor's winnings to be withheld to pay back delinquent child support.[168] Some states also dedicate a portion of their tax revenue or license fees collected from sports wagering operators to curbing gambling addiction.[169] It has also been suggested "to cap the amount of money that any gambling operator (or perhaps all sports-gambling operators in the aggregate) may collect from any sports gambler over a monthly period."[170] Enforcement problems could arise, however, if bettors need to set up individual accounts with each operator they wager with and if bettors frequently cross state lines to place bets in numerous states. Still, with modern technology states and sports betting operators likely could find a secure way to transmit the necessary information to enforce wagering caps or other similar safeguards.[171] These safeguards could "minimize the likelihood of sports gamblers becoming wards of the state . . . ."[172]

Social and ethical concerns surrounding sport betting include potential harm to the individual bettor and the individuals who rely on that bettor. States have an interest, as well, because the broke sports gambler, and his family, risk becoming reliant on the state for support. Sports betting is also unique in that it has the potential to undermine the integrity of the sports being bet on. These social and ethical considerations may compel a

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167. MICH. COMP. LAWS 149 (2019) § 432.407(7)(c).

168. IND. CODE § 4–38–11–1(2020).

169. *See, e.g.*, IND. CODE § 4–38–10–3(2020) (3.33% of sports betting tax revenue dedicated to an addiction services fund and 25% of that amount must be allocated to education, prevention, and treatment of compulsive gambling); N.J. STAT. ANN. § 5:12A–16 (West) (a portion of the fee paid for operating license is appropriated to the Department of Health to educate, prevent, and treat compulsive gambling).

170. Edelman, *supra* note 11, at 337.

171. *See* Polisano, *supra* note 10, at 482 (arguing that "legalizing sports gambling would actually have a positive effect on the integrity of sports" because "[m]odern technological safeguards, which could be utilized if sports gambling was legalized and properly regulated, could help to monitor unusual betting activities and identify people with gambling problems")

172. Edelman, *supra* note 11, at 337.

paternalistic democratic government to prohibit sport gambling. However, the safeguards discussed in this section provide states an opportunity to reject a paternalistic prohibition on sports gambling and to reconcile the authorization of sports betting with that activity's social and ethical considerations. Targeting taxation and allocation ensures that the states and communities that authorize sports betting will benefit the most from the increased revenue that the activity should provide. Integrity safeguards, such as those deployed by Indiana, and integrity fees distributed to professional sports leagues will help states and those sports leagues coordinate against potential integrity concerns. Finally, social safeguards, such as withholding gambling winnings to satisfy delinquent child support, help protect the individual gambler and the people that depend on that individual.

CONCLUSION

The authorization of sports gambling presents to state legislatures a special challenge. Legislators not only have to balance the inevitable tension between social policy and individual freedoms, which by itself raises paternalistic versus liberalistic ethical considerations, but legislators also have to account for the unique characteristics of sports betting, which certainly adds to the ethical consideration. In the face of pragmatic concerns, however, these ethical concerns can be reconciled. Through consistent regulation, transparent taxation, integrity requirements, and social safeguards, states can pass legislation authorizing sports betting while also accounting for the social concerns surrounding the activity and the potential integrity questions it raises.