

THE EVOLUTION OF DATA IN SPORTS BETTING AND ITS LEGAL RAMIFICATIONS ON THE PRIVACY AND PROTECTIONS OF COLLEGE ATHLETES

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ABSTRACT

Have you ever placed a sports bet before? Did you win... *or* did you lose? Did it come down to the final seconds... *or* did you regret your decision before the game even reached halftime? At times, betting on a sports team can seem like a sure-fire win. Unfortunately, it can be nearly impossible to truly know a result before it happens, especially in the sports industry, where a simple bad bounce can alter the final score, effectively causing millions of dollars to change hands. But what if there was a way to know something about the game that others don't?

Now, I'm not implying that a real-life Marty McFly walks amongst us. Instead, I want to take you back to October 29, 2020. In two days, the No. 2 ranked Clemson Tigers were set to take on the Boston College Eagles. At this time, placing a bet on the underdog, Boston College, to win the game could have been disregarded as a waste of money. However, pandemonium quickly struck the college football world as it was announced that Clemson's star-QB and projected first-overall pick in the 2021 NFL Draft, Trevor Lawrence, tested positive for COVID-19. In just a matter of minutes, Boston College's chances of pulling off an upset changed, and the sports betting lines adjusted accordingly. A bet on Boston College to win would now result in a lower expected return. That same person who placed the bet *before* Trevor Lawrence's positive test though, might now be heralded for their extreme foresight, albeit lucky.

Unfortunately, Boston College squandered a surprising halftime lead, thus ruining the day for any bettor pulling for the Eagles. However, this doesn't mean these types of events are uncommon within sports. Something that once seemed so drastic has now turned into an almost every-night occurrence. Professional and collegiate sports leagues have attempted to play through the pandemic, while at the same time learning of positive tests of their players at random. When a player tests positive, he or she sits out, often for extended periods. And when a player sits out, the betting line changes. These instances aren't simply limited to a pandemic, though. Much like the stock market, betting odds on sporting events change rapidly, sometimes by the second, effectively allowing individuals the chance to capitalize on this invaluable information. But what is it that drives these sports betting decisions? What is it that

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can be such a determinative factor in a team's chance of winning or losing a game? The answer is *data*.

If you were to ask a professional gambler, or even someone reasonably familiar with sports betting, they'll say that you bet the numbers, not the teams.¹ But what happens when a new subset of data changes the playing field? Are athletes protected in the ways we previously thought? Or is their data subject to exploitation in an industry just starting to take stride?

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I. INTRODUCTION: A NEW ISSUE FACING ONE OF THE MOST POPULAR INDUSTRIES IN AMERICA

Roughly two years ago, in February of 2019, the formation of a new professional football league was set to sweep the nation. Known as the Alliance of American Football (“AAF”), the league sought to bring a quality football product during a time of year when die-hard football fans still craved the game they loved.² Pressed to find

¹ Josh Applebaum, *Sports Betting 101: Sharp Bettors Bet with Data, Not on Teams They Like*, VSiN (Mar. 26, 2020, 12:01 AM), <https://www.vsin.com/sports-betting-101-sharp-bettors-bet-with-data-not-on-teams-they-like/> (describing the difference between the betting public, or casual bettors, who typically bet for fun, based on gut instinct, bias, favoritism, or emotional attachment, and professional bettors, known as “sharps,” who bet based on analytics and hard data).

² See Ben Kercheval, *AAF 2019: How the New Alliance of American Football Stands out in a Growing Pro Football Landscape*, CBS SPORTS (Feb. 3, 2019), <https://www.cbssports.com/aaf/news/aaf-2019-how-the-new-alliance-of-american-football-stands-out-in-an-ever-growing-pro-football-landscape/> (scheduling a kickoff

new, creative ways to draw in viewers, the AAF looked to combine the growing developments of technology and data with the immense popularity and expansion of sports gambling in America.³ In an innovative move, the AAF rolled out a mobile application that would allow its viewers to both watch and bet on a game using the same screen.⁴ Even though in-game wagering had been commonplace in sports betting for years, the AAF's expansion of this idea sparked intensive legal conversations.⁵

While a football league revolving around the concept of sports betting seemingly made perfect sense, the AAF had a controversial plan to outfit players with wearable tracking devices, with the data from these devices being utilized for the general public to bet on.⁶ This level of personalized data betting was new to the sports betting industry. Could a spike in the quarterback's heart rate really increase his odds of throwing an interception? Could you even bet on the top speed of the starting wide receiver? These propositions may seem like entertaining wagers for the average American, but they pose serious questions to the privacy and protection of athletes whose data is being exploited.⁷

after the NFL season, the AAF wasn't looking to make it a markedly different product, but actually wanted to design the league in a similar fashion to the NFL).

³ See Brent Schrottenboer, *Pro Football League AAF is Using Technology That May Revolutionize Pro Sports and Gambling*, USA TODAY (Feb. 16, 2019), <https://www.usatoday.com/story/sports/nfl/2019/02/14/aaf-pro-football-league-built-sports-gambling-data-technology/2870023002/> (partnering with investors such as Silicon Valley venture capitalists and MGM Resorts International allowed the league to develop the innovative technology).

⁴ *Id.* The app would allow gamblers the ability to bet on almost everything, with a variety of options, throughout the entirety of the football game. This consisted of bets such as how a team might end its offensive possession; in a punt, field goal, or touchdown.

⁵ Representatives from the four major sports leagues talked about the future of player tracking and biometric data at a recent Sports Lawyers Association Conference in Phoenix in May 2019. See John Holden, *The Major Issues Behind Biometric Data and Its Potential In Legal Sports Betting*, LEGAL SPORTS REPORT (June 5, 2019), <https://www.legalsportsreport.com/32915/biometric-data-legal-sports-betting/>.

⁶ See Darren Rovell, *Alliance of American Football Will Have Enhanced In-Game Betting*, ESPN (Sept. 10, 2018), https://www.espn.com/chalk/story/_/id/24632798/alliance-american-football-enhanced-live-game-betting.

⁷ Ultimately, the Alliance of American Football league collapsed just weeks into the season due to monetary issues. However, just one year later, the XFL returned to TV after failed attempts in 2001. Like the AAF, the XFL has emphasized sports betting from the start by partnering with gambling companies, launching a mobile betting app, and even displaying sports betting lines directly underneath the score line on the TV broadcast. Conor Orr, *The Curious Rise and Spectacular Crash of the Alliance of American Football*, Sports Illustrated (May 1, 2019), <https://www.si.com/nfl/2019/05/01/alliance-american-football-aaf-collapse-charlie-ebersol-tom-dundon>; see also C. Jackson Cowart, *How the XFL Is Going All-In on*

Sports gambling has been trending as a popular discussion topic for a number of years. But as with nearly every major industry, it comes with a plethora of questions. Part II.A will discuss the recent legal developments of sports betting in America, and Part II.B will explore the evolving use of data in sports, a byproduct of wearable technology. While it may initially appear that these topics are independent of one another, in reality, they are intertwined as contributing factors to a much more distinct, and relatively unfamiliar, problem: how to protect the data of college athletes in a billion-dollar sports betting industry built upon the very collection of data itself. Within the more detailed analysis of this Note, Part III.A will explore the ways in which sports betting exploits data. Part III.B will discuss how the athletes' data, specifically biometric data, is protected. Part III.C will explain the different reactions to sports betting between both college and professional sports, and how college athletes may be at a disadvantage when it comes to their representation. Part III.D will set the scene for where we currently stand regarding these topics today. Finally, the Note will conclude by showing that a uniform, federal system for sports betting in America will best suit collegiate athletes as we head into the future.

II. BACKGROUND: SETTING THE SCENE

A. *The Legal History and Recent Developments of Sports Betting in America*

For nearly the past century, gambling on sports was widely (and publicly) frowned upon by both college and professional sports leagues.⁸ It was believed that betting on games “convey[ed] the message that sports are more about money than personal achievement and sportsmanship.”⁹ In 1992, Congress passed the Professional and Amateur Sports Protection Act (“PASPA”) in an effort to prohibit sports gambling under state law.¹⁰ Sponsored by then-New Jersey Governor Bill Bradley,¹¹ both the

Sports Betting, theScore, <https://www.thescore.com/xfl/news/1944747> (last visited Dec. 28, 2020).

⁸ See Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 26–29 (2016).

⁹ Marc Dib, *A Game of Skill or Chance? Why Texas Should Legalize Daily Fantasy Sports*, 51 TEX. TECH. L. REV. 361, 369 (2019).

¹⁰ Alexander J. Hall, *Place Your Bets: Tennessee’s Sports Gaming Act Begins July 1*, TENN. BAR J., July 2019, at 14, 15; see also 28 U.S.C. § 3702 (declaring that “[i]t 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”).

¹¹ Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 287 (2011). The bill was popularly referred to as the “Bradley Act” because Bill Bradley, a previous college and professional star basketball player, maintained that the law was needed to safeguard the integrity of sports. Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors*

National Collegiate Athlete Association (the “NCAA”) and all professional sports leagues widely supported this law.¹² However, PASPA didn’t exactly stop sports gambling in America.¹³ In fact, with the turn of the century and into the mid-2010s, it was clear that the imposed law was incapable of slowing down the offshore and illegal gambling market within the United States.¹⁴ As the sports betting industry began to explode, and as citizens became much more progressive, the states’ views began to change on this issue.¹⁵

Sparked by a lucrative potential for increased revenue,¹⁶ New Jersey looked to pave the way for a legalized sports betting market. Unfortunately, the state was

Sports Betting, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html>.

¹² See S. REP. NO. 102-248, at 8 (1991), as reprinted in 1992 U.S.C.C.A.N. 3553, 3559; *Prohibited 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., 21–31, 227–28 (1991) [hereinafter *PASPA Hearings*] (statement of Paul Tagliabue, Commissioner, National Football League); *PASPA Hearings*, *supra*, at 37–41 (statement of Francis T. Vincent, Jr., Commissioner of Baseball); *PASPA Hearings*, *supra*, at 43–47 (statement of David J. Stern, Commissioner of the National Basketball Association); *PASPA Hearings*, *supra*, at 59–60 (statement of Gil Stein, General Counsel, National Hockey League on behalf of John Ziegler, President, National Hockey League); *PASPA Hearings*, *supra*, at 227–28 (statement of Richard D. Schultz, Executive Director, National Collegiate Athletic Association); see generally ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES 5, 198–99 (1963) (discussing the most infamous story in baseball history, in which professional gamblers are said to have paid members of the Chicago White Sox to throw the 1919 World Series).

¹³ Fielkow et al., *supra* note 8, at 47 (highlighting that in 2015 alone, between \$148-\$500 billion worth of illegal wagers were placed on sporting events in the United States).

¹⁴ See Hall, *supra* note 10, at 15.

¹⁵ See generally Robert Porter, *Regulated Sports Betting: Ohio's Chance to Take A Bet on Itself*, 67 CLEV. ST. L. REV. 267, 268 (2019); see also Gillian Spear, *Think Sports Gambling Isn't Big Money? Wanna Bet?*, NBC NEWS (July 13, 2013), <https://www.nbcnews.com/news/other/think-sports-gambling-isnt-big-money-wanna-bet-f6C10634316> (stating that “one in 10 Americans play March Madness brackets” and “[t]hirty-three million Americans participate in fantasy football”); Hall, *supra* note 10, at 15.

¹⁶ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1469–70 (2018) (explaining how Nevada was the only remaining state venue for legal gambling in casinos, and as sports gambling became immensely popular, New Jersey hoped to revitalize what was “once the most fashionable resort of the Atlantic Coast” through the legalization of sports betting).

initially met with resistance from the courts.¹⁷ However, in 2014, rather than *enacting* affirmative betting legislation, New Jersey instead attempted to *repeal* its own state laws criminalizing sports gambling.¹⁸ In effect, this would legalize the activity without expressly saying so.¹⁹ Following more opposition from the professional leagues and NCAA, New Jersey's gambling law was once again defeated in the district court, and the Third Circuit affirmed the decision.²⁰ However, the Supreme Court agreed to hear the case, and eventually overturned the lower courts in what would become known as the landmark sports betting case of *Murphy v. National Collegiate Athletic Association*.²¹

While factors such as sports and money originally influenced New Jersey's legislation, the Supreme Court's decision focused on something different: the Constitution. The Supreme Court accepted the case to carefully consider the constitutionality of PASPA's provision prohibiting states from authorizing sports gambling.²² In a 6-3 decision, the Court held that PASPA violated the Tenth Amendment's anticommandeering doctrine, which reserves all enumerated powers not delegated by Congress to the States.²³ PASPA was understood to be a direct command to the States, which is exactly what the anticommandeering doctrine disallows.²⁴ The *Murphy* court ultimately overruled PASPA, thus reversing the Circuit Court's decision and essentially clearing the way for each individual state to follow in New Jersey's footsteps.²⁵ The floodgates had therefore officially opened, and states could legalize sports betting.²⁶

¹⁷ Hall, *supra* note 10, at 15 ("In 2012, the New Jersey Legislature enacted a law that legalized sports wagering in Atlantic City. The NCAA . . . and [the professional sports leagues] responded with a lawsuit to enjoin the legislation for violating PASPA. The district court sided with the leagues, the Third Circuit affirmed, and the Supreme Court denied New Jersey's petition for writ of certiorari.")

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Murphy*, 138 S. Ct. at 1481.

²² *Id.* at 1473.

²³ *Id.* at 1481.

²⁴ *Id.* at 1478 ("That provision unequivocally dictates what a state legislature may and may not do.").

²⁵ *Id.* at 1485.

²⁶ While other states have embraced legalized sports betting since the Supreme Court's decision, New Jersey has been at the forefront, taking in more than \$2.9 billion in sports bets, resulting in nearly \$200 million in revenue for multiple sportsbooks in just 12 months of operation. Nick Corasaniti, *Move Over, Nevada: New Jersey Is the Sports Betting Capital of the Country*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/nyregion/nj-sports-betting.html>.

After the Supreme Court's decision in *Murphy*, the sentiment of the general public was that sports betting would become readily available nearly everywhere.²⁷ However, this proved to be a common misconception. Although the Supreme Court struck down PASPA as unconstitutional, the decision failed to simply legalize sports gambling at a federal level.²⁸ The Court's holding stated that "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own."²⁹ Effectively, while *allowing* Congress the opportunity to govern sports gambling on a federal level, the Supreme Court left the decision to each individual state, ensuring that any proposed legislation would not be preempted by PASPA.³⁰ Sports gambling was no longer regulated on a federal level, but with the Supreme Court's decision, the question ultimately became a state issue.

Although New Jersey unofficially led the initial charge,³¹ we have yet to see a complete legalization of sports gambling across the country today.³² Some states were quick to respond, while others were reluctant to enact legislation.³³ However, many states have slowly but surely begun introducing and enacting their own laws that would allow for legalized sports gambling within each respective state.³⁴ Although the

²⁷ Tucker Davison, *Merging Sports Gambling and Technology: What's Really Going to Happen?*, 22 SMU SCI. & TECH. L. REV. 165, 170 (2019).

²⁸ See *Murphy*, 138 S. Ct. at 1484–85.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Corasaniti, *supra* note 26.

³² See William H. Williams, *On the Clock, Best Bet to Draft Cyberdefensive Linemen: Federal Regulation of Sports Betting from A Cybersecurity Perspective*, 13 BROOK. J. CORP. FIN. & COM. L. 539, 541 (2019).

³³ As of February 2021, twenty-two (22) total states plus Washington D.C. have legalized sports betting. Two (2) are recently legalized, with no bets having taken place yet (North Carolina and Washington), eleven (11) states have full mobile betting (Colorado, Illinois, Indiana, Iowa, Michigan, Nevada, New Jersey, Pennsylvania, Tennessee, Virginia, and West Virginia), five (5) states (Mississippi, Montana, New Hampshire, Oregon, Rhode Island) and Washington D.C. have partial mobile betting, and four (4) states only contain physical sportsbooks (Arkansas, Delaware, New Mexico, and New York). Furthermore, three (3) states are awaiting further action by legislature and are likely to be approved in 2021, two (2) states have action possible for 2021, two (2) more have tribal action possible, and ten (10) states are under consideration by legislature for 2021 & 2022. Finally, four (4) states have tribal action possible for 2023 and beyond, four (4) states have no movement in the legislature, and three (3) states are under consideration for 2023 or beyond but considered as longshots. Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Feb. 12, 2021), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

³⁴ *Id.*

full impact of a legalized sports betting industry is hard to predict,³⁵ states have realized the potential revenue that could be brought in as an effort to capture dollars being wagered through illegal channels or at casinos in neighboring states.³⁶ However, this has created an inconsistent system that varies in degree from state to state. Within this current framework, the sports betting laws have become mainly centered around revenue for the states, with little emphasis on the looming question of data protection and privacy for the athletes who drive the industry.

B. The Use of Data in Sports and the Evolution of Wearable Technology

As the popularity of sports gambling continues to grow, and as betting becomes more accessible to the public, the proliferation of data usage will only expand. When discussing the direct relationship between athletes and data, it is important to first understand that there are multiple categories and definitions of “data.” Historically, statistical data has been used within college and professional sports as the primary way of measuring athlete performance and comparing teams and players.³⁷ In addition to statistical data, teams now both analyze and store non-public information such as medical records, game plans, internal communications, individual performance metrics, and many other forms of analytic data.³⁸ Today, professional and collegiate

³⁵ *But see* John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 385 (2019) (analyzing that on a larger scale, market analysts envision a scenario where “more than \$300 billion is wagered annually and legally in the United States, which would rank sports betting as the 15th-largest industry in the country” and account for roughly 2 percent of the country's gross domestic product).

³⁶ *See* Hall, *supra* note 10, at 16 (“Between August and December 2018, [the eight states to legally offer in-state sports gambling] recorded nearly \$4 billion in sports wagers and more than \$300 million in gaming revenues.”); *see also* Corasaniti, *supra* note 26 (“Bettors wagered more in New Jersey than in any other state in the country during May [2019], edging past Nevada and the famed Las Vegas sportsbooks by \$1.5 million.”).

³⁷ *See* Williams, *supra* note 32 at 542–43; 545 (leading this analytical approach was the Oakland Athletics, who “propelled a new view of statistical methods and sports strategy into the minds of front office executives” eventually leading to the success and release of *Moneyball*, which highlighted a new way to analyze player data in Major League Baseball).

³⁸ Williams, *supra* note 32, at 543. Over the past few years, new systems have been implemented that allow teams to track and record nearly every event that transpires on the field or court in much more precise detail than ever before. Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH. & LEE L. REV. 1567, 1577 (2017). The immense amounts of data produced by these modern tracking systems yield new insights that represent potentially significant competitive advantages for the teams that are best able to develop proprietary methods for analyzing the new information recovered (whether during a game or even during practices) and incorporate it into their decision-making processes. *Id.* *See generally* Zach McCann, *Player Tracking Transforming NBA Analytics*, ESPN (May 18, 2012), https://www.espn.com/blog/playbook/tech/post/_id/492/492 (showcasing how

teams across all sports gather and analyze tremendous volumes of data in a sophisticated effort to gain a competitive edge over opponents.³⁹ But with the rapid growth and increasing advances in technology, the use of data has evolved as additional categories have now come into play.⁴⁰

Teams across both the college and professional sports industry have recently begun realizing benefits of a different category: biometric data. While athlete biometric data (commonly referred to as “ABD”) is not a new concept to athletes, “the current application and implementation of [ABD] is cutting edge.”⁴¹ In recent years, advances in technology have led to a growing market of wearable smart devices that can collect data on nearly all aspects of an athlete’s life.⁴² Popularly known as “wearables,” these devices “can help manage training, prevent injuries, and even modify athletes’ behavior by providing objective feedback.”⁴³ Ranging from wearable monitors to clothing and equipment with embedded sensors, the devices are used by professional teams, colleges and universities, and other sports and athletic institutions, *as well as the companies that provide the wearables*, to collect massive amounts of data such as an athlete’s heart rate, breathing, strain, or fatigue.⁴⁴ This biometric data is comprised of unique biological and behavioral characteristics that are used to identify a specific individual, both on and off the field.⁴⁵ Unfortunately, though, this form of data has the

advanced statistics help NBA teams to track players for better utilization of plays and sets).

³⁹ Williams, *supra* note 32, at 542–43; *see also* Grow & Grow, *supra* note 38, at 1575 (“[S]tatistically inclined fans created a variety of new metrics to better evaluate the performance of baseball players, tools that have subsequently been incorporated by professional teams’ in-house statisticians.”).

⁴⁰ Williams, *supra* note 32, at 542.

⁴¹ Williams, *supra* note 32, at 546; *see also* Katrina Karkazis & Jennifer R. Fishman, *Tracking U.S. Professional Athletes: The Ethics of Biometric Technologies*, 17 AM. J. BIOETHICS 45, 46 (2017); *see also* Gilbert Smolenski, *When the Collection of Biometric and Performance Data on College Athletes Goes Too Far*, 54 WAKE FOREST L. REV. 279, 280 n.6 (2019) (providing that “[t]eams are also exploring the potential of these technologies for longer term applications, such as assessing the career longevity of current players and potential draft picks” (quoting Katrina Karkazis & Jennifer R. Fishman, *Tracking U.S. Professional Athletes: The Ethics of Biometric Technologies*, 17 AM. J. BIOETHICS 45, 46 (2017))).

⁴² Williams, *supra* note 32, at 546.

⁴³ Smolenski, *supra* note 41, at 280.

⁴⁴ Mary Costigan et. al., *As Wearable Technology Booms, Sports and Athletic Organizations at All Levels Face Privacy Concerns*, JD SUPRA (Apr. 5, 2019), <https://www.jdsupra.com/legalnews/as-wearable-technology-booms-sports-and-97565/>.

⁴⁵ Kristy Gale, *The Sports Industry’s New Power Play: Athlete Biometric Data Domination. Who Owns It and What May Be Done with It?*, 6 ARIZ. ST. SPORTS & ENT. L.J. 7, 11 (2016) [hereinafter Gale, *The Sports Industry’s New Power Play*]; *see also* Williams, *supra* note 32, at 547 (describing how “biometric data is typically collected ‘to monitor a player’s health, wellness, and performance; establish baselines,

potential to reveal more sensitive personal information, relating to an athlete's identity, location, or health status, which cannot be obtained just by closely observing the individual.⁴⁶

One of the leading companies in wearable devices, WHOOP, realized a significant rise in publicity during the coronavirus pandemic.⁴⁷ In June 2020, through the use of his WHOOP device, one PGA Tour golfer noticed a minor increase in his respiratory rate overnight, thus providing a key indicator that something might be wrong with his body while competing in a tournament.⁴⁸ The next day, the golfer tested positive for COVID-19, forcing him to withdraw from the event and isolate for ten days.⁴⁹ For athletes, this is just one example of the unique data points that the wearable devices can provide. Furthermore, when the NBA decided to continue the remainder of their 2020 season and playoffs, the league looked to utilize wearable data trackers to ensure safety within their makeshift bubble⁵⁰ during the coronavirus pandemic.⁵¹ Through a

perform diagnostics, understand player load, educate coaches and players on the effects of training on players; and to design appropriate training and recovery regimens' to prevent, monitor, and rehabilitate injury").

⁴⁶ Costigan, *supra* note 44.

⁴⁷ Darren Rovell (@darrenrovell), TWITTER (June 28, 2020, 11:27 PM), <https://twitter.com/darrenrovell/status/1277443584258715648>.

⁴⁸ *Id.*; see also Daniel Rapaport, *PGA Tour Players, Caddies, and Essential Staff to Receive WHOOP Straps in Attempt to Detect Signs of Covid-19*, GOLF DIGEST, <https://www.golfdigest.com/story/pga-tour-players-covid-19-whoop> (last visited Oct. 28, 2020) (explaining that the PGA Tour distributed nearly 1,000 devices, which come in the form of a bracelet or bicep band that monitors the wearer's heart rate, strain, sleep, and recovery pattern, along with the accompanying memberships for data recording).

⁴⁹ Rapaport, *supra* note 48.

⁵⁰ After a stoppage to the NBA season in March 2020, the NBA designed an extensive return-to-play plan in which 22 of the 30 teams would resume the 2019-2020 season at Disney World in Orlando, Florida. With the coronavirus pandemic ongoing, the league essentially isolated players, coaches, media members, and essential personnel, applying all necessary precautions to provide for a safe conclusion to the season. Applauded by those around the sports world for its incredible success, it became widely referred to as "the Bubble." Colin Ward-Henninger & Jack Maloney, *NBA Disney World Rules: Details of How the Bubble Will Work with League Set to Resume Play in Orlando*, CBS SPORTS (July 30, 2020, 3:50 PM), <https://www.cbssports.com/nba/news/nba-disney-world-rules-details-of-how-the-bubble-will-work-with-league-set-to-resume-play-in-orlando/>.

⁵¹ Jeff Zillgitt, *Some NBA Players Skeptical of Wearable Devices to be Used Inside Disney World Bubble*, USA TODAY (June 19, 2020, 2:31 PM), <https://www.usatoday.com/story/sports/nba/2020/06/19/nba-tech-wearables-used-for-health-not-tracking-data-at-disney-complex/3223065001/>.

partnership with Oura, the NBA provided Oura Rings⁵² and health management services to all players, team, and league officials who voluntarily participated.⁵³

This idea of tracking biometric data through wearables is nothing new to college or professional athletes, but it has realized an incredible technological rise within sports in just the last few years, and predictably, it has led to even greater questions regarding the ownership and privacy of ABD.⁵⁴ As sports betting has highlighted however, the use of data, and more specifically, biometric data, isn't simply limited to the players, teams, and leagues themselves. In fact, various companies have established themselves as leaders within the professional sports industry, partnering with the leagues, teams, and even players to gather information on biometric data via trackers built into game equipment or worn by the athletes outside of the physical sport.⁵⁵ Through the recent *Murphy* decision and popularity of American sports gambling, combined with the advancing technology of wearable devices, it is presumed that this proliferation of data usage will become even more highly prioritized for the institutions that offer sports betting, as well as any individuals looking to gain a gambling advantage.⁵⁶ In an industry worth billions of dollars, the ability to access data or information inaccessible to—or simply before—others, can become exponentially profitable.⁵⁷

⁵² The Oura Rings, simply worn on a finger at all times, would monitor real time temperature of all participants within the bubble to detect possible symptoms of the coronavirus. Ben Golliver, *A Farewell to the NBA Bubble After Three Grueling and Exhilarating Months*, WASH. POST (Oct. 10, 2020, 12:21 PM), <https://www.washingtonpost.com/sports/2020/10/10/nba-bubble-farewell/>.

⁵³ Oura (@ouraring), TWITTER (June 24, 2020, 10:45 AM), <https://twitter.com/ouraring/status/1275802258400333824>.

⁵⁴ Costigan, *supra* note 44.

⁵⁵ “Companies such as Whoop, Zebra, and Catapult have established themselves as early leaders in the industry . . . Although the NBA has not approved the use of biometric data trackers during games, other technologies have been gathering in-game information on players for years – and with no guardrails on its use.” Cameron Miller, *Surveying Biometric Data Privacy, Ownership, and Usage in American Sports*, UNIV. DEN. SPORTS & ENT. L.J. BLOG (Apr. 11, 2018), <https://duselj.wordpress.com/2018/04/11/surveying-biometric-data-privacy-ownership-and-usage-in-american-sports/>. This despite the NBA being one of the most progressive leagues. Many teams and athletes still utilize the wearables during practices and training sessions, but it is subject to what has been agreed upon by each representative players’ union.

⁵⁶ See Williams, *supra* note 32, at 543–44.

⁵⁷ See generally Craig Newman, *Cybercrime Meets Insider Trading in Sports*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/business/dealbook/sports-betting-cybercrime.html>.

III. ANALYZING THE ISSUE: HOW TO PROTECT COLLEGE ATHLETES' DATA

A. *The Exploitation of Data Through Sports Betting*

While there are countless benefits involved with the multi-billion-dollar sports betting industry, there is an increased potential for abuse as well. In fact, it is naive to believe that the accessibility of data and promotion of gambling will not be used in a way to exploit the athletes that create the market.⁵⁸ Data has always and will always be available for sports gambling purposes. Sports betting institutions use intricate systems and predictive algorithms as a way of generating “odds” and “lines” that are used for betting on each respective sporting event.⁵⁹ A betting line is a form of wagering whereby a sportsbook, typically operating inside of a casino, sets gambling odds to determine the favorite or underdog teams in a sporting match.⁶⁰ This creates a margin (line) between the two teams, where there are only two outcomes possible, thus setting the parameters for wagering on the game.⁶¹ With the help of industry experts, decades of data, numbers, and trends are pored over as part of the odds-making process.⁶² But through the progressive nature of the leagues and their attempt for monetization, the evolution of data has given rise to a new host of legal issues across the sports betting industry that was never an issue with statistical or informational data.⁶³ An explanation stems from the *form* of data being utilized by the betting institutions. As technology has progressed, the sportsbooks now utilize machine learning as a way of predicting the most likely result for the next pass, shot, score, and play, effectively producing the most efficient sports betting line to wager on.⁶⁴ Therefore, a simple injury on the field could have a profound effect on the outcome of the next play. So, while sportsbooks have previously used public information such as statistics, play results, or medical reports, access to athlete biometric data would become a vital element in the odds-making process.

The treatment of ABD isn't just important because of the public's interest in the information as entertainment, but also because the general public has the potential to

⁵⁸ See generally Matthew A. Melone, *New Jersey Beat the Spread: Murphy v. National Collegiate Athletic Association and the Demise of PASPA Allows for States to Experiment in Regulating the Rapidly Evolving Sports Gambling Industry*, 80 U. PITT. L. REV. 315, 362 (2018).

⁵⁹ *How Do Bookmakers Generate Sports Odds?*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/guides/betting-101/how-bookmakers-generate-odds/> (last updated Nov. 12, 2020).

⁶⁰ *Betting Lines Explained*, ONLINE GAMBLING, <https://www.onlinegambling.com/sports/betting-lines/> (last visited Feb. 19, 2021) (detailing the application forms of sports betting to the various professional sports leagues).

⁶¹ *Id.*

⁶² See *How Do Bookmakers Generate Sports Odds?*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/guides/betting-101/how-bookmakers-generate-odds/> (last updated Nov. 12, 2020).

⁶³ *Id.*

⁶⁴ *Id.*

use ABD to generate personal income from fantasy sports or sports wagering winnings.⁶⁵ The *Murphy* decision, along with subsequent state legalization, has given fans and gamblers easier accessibility to a much wider array of bets that are available to be wagered on each game.⁶⁶ However, the distinct, personalized nature of ABD places it in a separate category of data, creating issues of privacy and protection. With an increase of live, in-game “prop bets,”⁶⁷ it is crucial for these institutions to have the most up-to-date information about the athletes and teams being wagered on, which is why data is so important. But in the absence of case law addressing ABD, combined with an increasing popularity and legality of sports betting, athletes, and more specifically, college student-athletes, face intense questions regarding the protection of their own data.

However, sportsbooks aren’t the only ones utilizing available data. Many gamblers have created their own schemes, similar to the algorithms used by accredited institutions, as a way to game the system and “beat the bookies.”⁶⁸ In a lucrative industry not entirely run by luck, the accessibility of data is where its exploitation comes into play. ABD is problematic because of its unique ability to measure data points of an athlete that may not be visible to the human eye. By gaining access to this information, a gambler could realistically use it in ways abusive to athletes. With personal information in the hands of so many outsiders, and with uncertainty over the athletes’ ownership and protection,⁶⁹ it poses a dangerous threat to the athletes who generate the data. Is there anything to protect an athlete from his college roommate selling information about the athlete’s sprained ankle? What happens when a third-party data company is subject to a security breach and the athlete’s information becomes public?⁷⁰ These questions are just two from a never-ending list of potential areas of manipulation for athletes.

⁶⁵ See Gale, *supra* note 45, at 29.

⁶⁶ Andrew Beaton, *How Sports Leagues Are Gearing up for the Future of Betting*, WALL ST. J. (May 14, 2018), <https://www.wsj.com/articles/how-sports-leagues-are-gearing-up-for-the-future-of-betting-1526330495>.

⁶⁷ See Hall *supra* note 10, at 17 (defined as bets on individual performance such as the number of yards a player will have in a given game, whether or not a specific player will score a touchdown, or who will win the Heisman Trophy).

⁶⁸ See generally David Sumpter, *How I Used Maths to Beat the Bookies*, ECONOMIST (June 8, 2016), <https://www.economist.com/1843/2016/06/08/how-i-used-maths-to-beat-the-bookies>; see generally JOE PETA, TRADING BASES (2013).

⁶⁹ See Part III.B, *infra*.

⁷⁰ See Williams, *supra* note 32, at 548 (“Data breaches and hacks have become troublingly pervasive and continue to increase in prevalence. Seemingly every day there is another announcement of a major hack with criminals escaping with millions of sensitive records . . . In 2016, the Milwaukee Bucks were victims of a phishing scam resulting in the release of tax information, including Social Security numbers and total compensation packages, of all its employees and players . . . [A] second incident was an athletic trainer for the Washington Redskins had his laptop stolen from his car in 2017. The computer possessed medical records of players and prospective players from the NFL combine. The Redskins had password protected computers but failed to encrypt their hardware. After this incident, all ‘teams have been directed to

B. How the Athletes' Data is Protected

Currently, there is no shortage of federal and state regulations regarding the privacy and protection of data on a broader scale. In fact, many of these laws vary greatly depending on which *type* of data is involved.⁷¹ There are generally few questions or issues regarding the ownership of statistical and licensed, in-game data.⁷² Naturally, as games are played, the events taking place and results that occur are held to be factual data.⁷³ Thus, because of its availability, this data is not restricted to any one owner.⁷⁴ In fact, the Eighth Circuit found that it would be “strange law” to limit a First Amendment right to use information that is already available to everyone else in the public domain.⁷⁵ On the other hand, medical data has continuously been invaluable to nearly all stakeholders involved. These stakeholders consist of the professional leagues, colleges, governing bodies, athletes, and of course, the betting public. There will always be a strong interest in obtaining personal health information for reasons of fair competition, safety, economic incentives, and public perception, among others.⁷⁶ But what makes medical information so vital to the betting industry is its inaccessibility before being made public and the impact that it can have on the outcome of a game. When a star player gets hurt, that team’s chances of winning will likely decrease significantly. But in such a competitive industry, athletes often choose to play through their pain or injuries. Therefore, because medical data is at times non-public information, access to this data can prove extremely profitable within the sports betting industry.

re-confirm that they have reviewed their internal data protection and privacy policies and that . . . every person with access to medical information has reviewed and received training on the policies regarding privacy and security of that information.”).

⁷¹ See Gale, *supra* note 45, at 9.

⁷² See James Glantz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> (addressing that teams generally own the data involving what happens on the field, or will have rights with the respective league to license in-game playing data with a network provider).

⁷³ Brett Smiley, *The War over Sports Betting Data: Lies, Half-Truths and Statistics: Part 1*, SPORTSHANDLE (July 17, 2019), <https://sportshandle.com/sports-betting-data-war-analysis-part-one/>.

⁷⁴ *Id.*

⁷⁵ *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 823; see also Smiley (explaining how the Supreme Court’s denial of certiorari let a decision stand that secured strong First Amendment protection for information available in the public domain, even where such information was used for commercial, for-profit purposes such as that with fantasy baseball).

⁷⁶ See Michael K. McChrystal, *No Hiding the Ball: Medical Privacy and Pro Sports*, 25 MARQ. SPORTS L. REV. 163,164 (2014).

Professional sports teams are required to list weekly, and sometimes daily, injury reports detailing the injury statuses of their respective players.⁷⁷ This allows sports betting industries, as well as the general public, to adjust their plans accordingly. However, while there are several news outlets, like *USA Today*, that collect and report on college injury information, we have yet to see a consistent approach in the way of uniform NCAA injury reports.⁷⁸ The Big Ten Conference advocated for a modified version of the NFL's weekly injury report across all of College Football, but was ultimately shut down by the NCAA Board of Governors, who explained that there are "significant concerns about the purpose, parameters, enforcement, and effectiveness of a player availability reporting model."⁷⁹ Take for example the University of Oklahoma, whose coach, Lincoln Riley, said that the University would not be releasing football COVID testing data during the fall 2020 season because of "competitive advantage."⁸⁰ In fact, Oklahoma "decided to start treating these things like injuries when it comes to public disclosure."⁸¹ Some people believe that this creates a market for inside information about injuries, or even positive COVID tests during a pandemic, others can't imagine medical information being leaked from a college university; but the discussion isn't so simple.

Currently, the medical data and information of college student-athletes is protected under a federal regulation known as the Health Information Portability and Accountability Act ("HIPAA"). HIPAA was originally implemented to standardize the electronic management and sharing of individuals' medical information as a way of curbing data abuses.⁸² Notably, HIPAA "requires extreme confidentiality of most medical information."⁸³ It was carried out by the Department of Health and Human Services in an effort to shield an individual's Protected Health Information ("PHI")

⁷⁷ See *NBA Injury Report: 2020-21 Season*, NBA, <https://official.nba.com/nba-injury-report-2020-21-season/> (last visited Feb. 19, 2021); see also 2017 Personnel (Injury) Report Policy, NFL, <https://operations.nfl.com/media/2683/2017-nfl-injury-report-policy.pdf> (last visited Feb. 19, 2021).

⁷⁸ John Holden, *Why Are There No NCAA Injury Reports in the Age of Legal Sports Betting?*, LEGAL SPORTS REP. (Apr. 14, 2019), <https://www.legalsportsreport.com/31209/ncaa-injury-reports-legal-sports-betting/>.

⁷⁹ *Board of Governors Reaffirms Sports Wagering Rules, Discusses Player Availability Reporting*, NCAA (Aug. 7, 2019, 4:41 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-reaffirms-sports-wagering-rules-discusses-player-availability-reporting>.

⁸⁰ Jason Kersey (@jasonkersey), TWITTER (Sep. 8, 2020, 1:15 PM), <https://twitter.com/jasonkersey/status/1303381363391893512>.

⁸¹ *Id.*

⁸² Smolenski, *supra* note 41, at 289.

⁸³ James Blake Hike, *An Athlete's Right to Privacy Regarding Sport-Related Injuries: HIPAA and the Creation of the Mysterious Injury*, 6 IND. HEALTH L. REV. 47, 50 (2009) (quoting Susan K. Menge, *Should Players Have to Pass to Play?: A Legal Analysis of Implementing Genetic Testing in the National Basketball Association*, 17 MARQ. SPORTS L. REV. 459, 468 (2007)).

from unauthorized disclosures to third parties.⁸⁴ Within the sports industry, though, HIPAA has emphasized the constant exposure between athletes and trainers, and the relationship to the media.⁸⁵

Naturally, it would seem that HIPAA is the answer to these forms of medically related issues in college athletics, and in a sense, it is. However, college athletes already waive significant privacy rights in association with their participation in intercollegiate athletics and could even be expected to waive limited rights for the release of certain medical information.⁸⁶ Even further, as the sports industry has demonstrated in recent years, medical data simply isn't what it used to be characterized as. The advanced developments of data through wearable devices has left various college institutions across the country feeling as if they are operating in a gray area when it comes to the interpretation of HIPAA and biometric information.⁸⁷ Currently, only some forms of athlete biometric data are protected under the federal framework of HIPAA, and only "when collected by health care providers."⁸⁸ Otherwise, federal statutes are generally absent in regulating this collection of ABD.⁸⁹ With no legal precedent to go off of, some schools follow the rules just to be on the safe side.⁹⁰ But on the other hand, most have assumed that biometric data is not covered by HIPAA.⁹¹

As a result of this uncertainty, the data collected on student-athletes may be circulated unknowingly with a variety of entities, such as Nike or other companies that have contracted with the NCAA or its member schools.⁹² One of the leading experts on ABD, Kristy Gale,⁹³ believes that ABD should be subject to stricter privacy laws as a form of personal health information for athletes.⁹⁴ In 2016, Gale predicted that it

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Holden, *supra* note 5.

⁸⁷ Kenny Berkowitz, *A Private Matter: HIPAA and Your Athletic Program, TRAINING & CONDITIONING* (Jan. 29, 2015), <https://training-conditioning.com/article/a-private-matter/>.

⁸⁸ This would include team doctors, and sometimes team trainers, but not medical-type information collected during practices (heart rate, force exerted, etc.). Williams, *supra* note 32, at 547.

⁸⁹ See Berkowitz, *supra* note 87, (discussing the possibility of the Family Educational Rights and Privacy Act (FERPA) possibly covering ABD).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Smolenski, *supra* note 41, at 281.

⁹³ Gale, a publisher of two of the most authoritative legal articles on the subject of athlete biometric data, is described as a sports technology law pioneer and entrepreneur dedicated to helping athletes, entertainers, and consumers protect their biometric data. KRISTY GALE, <https://www.kristygale.com/> (last visited Nov. 14, 2020).

⁹⁴ Gale, *The Sports Industry's New Power Play*, *supra* note 45, at 9. Gale explains that one of the first things that needs to be done is to define what we are talking about

would be foreseeable for player tracking data to make its way into fantasy sports and betting information, which has already proven to be the case.⁹⁵ However, as Gale has even further advocated, if we establish ABD as intangible property, instead of mere facts, statistics, or medical data, the ownership of the ABD would inherently belong to the athlete.⁹⁶ This classification would provide a step in the right direction for solutions to many of the data protection and ownership questions posed by the potential exploitation in the sports betting industry. But for now, unfortunately, there is just too much uncertainty, and little being done on both a national level and by the NCAA to provide student-athletes with clarity concerning the use of their biometric data. At the same time, though, while college athletes lack protections for their ABD, some solutions are masked by the inherent discrepancies between college and professional sports.

C. The NCAA Versus the Professional Sports Leagues

1. Two Opposite Responses to the Legalization of Sports Betting

Encapsulated by the ever-changing landscape brought on by the *Murphy* decision, the NCAA has become an important component in the resulting legislation of states across the country. But while we seem to be heading to a point at which every state has a form of legalized sports gambling, the NCAA has been slow to not only accept, but also to adjust to the movement.⁹⁷ In recent years, the NCAA has, at nearly every opportunity, expressed its adamant opposition to sports betting.⁹⁸ In fact, the NCAA's website at one point explicitly stated that not only was it against illegal betting, but that the NCAA "opposes all forms of *legal*... sports wagering" as well.⁹⁹ However,

with regards to athlete biometric data that can consistently be used by the sports industry, legislatures, and the courts. *Id.* at 10–11. She previously proposed the following definition for ABD: "[a] measurable and distinguishable physical characteristic or personal behavioral trait used to recognize one's identity, including, but not limited to name, nicknames, likeness, signatures, pictures, activities, statistics, playing and performance records, achievements, indicia, data, and other information identifying a particular athlete." *Id.* at 11 (quoting Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337, 376 (2016).

⁹⁵ *Id.* at 9.

⁹⁶ *Id.*

⁹⁷ See Dustin Gouker, *NCAA Head: Sports Betting Is 'Going to Threaten the Integrity of College Sports in Many Ways,'* LEGAL SPORTS REP. (Jan. 25, 2019), <https://www.legalsportsreport.com/28038/ncaa-says-sports-betting-will-threaten-integrity/>.

⁹⁸ See *id.*; Ben Nuckols, *NCAA Can't Keep Tournament Games Away from Legal Gambling*, ASSOCIATED PRESS (Mar. 19, 2019), <https://apnews.com/article/66e15b3a43ef49619c57467cecd0b8c>.

⁹⁹ While the NCAA has softened its language around sports betting after *Murphy*, it continues to prohibit the practice, stating that it undermines the integrity of sports

for an entity that once maintained a longtime ban on hosting championships in cities or states where sports wagers were legal, it won't be able to deny reality for much longer.¹⁰⁰ Over the past year, the NCAA's Board of Governors has met to preliminarily consider new gambling policies and approaches in an attempt to figure out how to acknowledge the spread of legalized betting.¹⁰¹ As a reflection of just how fast developments are taking place within this industry, the University of Colorado signed a five-year deal in September 2020 with PointsBet to serve as an official sports betting partner of the University.¹⁰² As the first ever partnership between an athletic department and a sports betting operator, this looks to be a major step in dismantling college sports' decades-long aversion to gambling.¹⁰³

On the other hand, professional sports leagues have embraced this change much more proactively, and were even preparing for it before the *Murphy* decision, both behind the scenes and publicly.¹⁰⁴ The leagues quickly discovered that a legalized sports betting market could be a way to engage with fans or even increase viewership. The leagues have believed that a legalized system would actually bring greater transparency and integrity, while also creating vast business opportunities.¹⁰⁵ More importantly though, the professional leagues realized the potential for a massive increase in revenue. These partnerships have evolved in recent years to bring a direct connection between fans and gambling. Not only are there a variety of sportsbooks now offering services to ordinary gamblers, but the operators are also beginning to partner with teams to bring gambling right into the arenas themselves.¹⁰⁶

and threatens the well-being of student athletes. *Sports Wagering*, NCAA, <https://www.ncaa.org/enforcement/sports-wagering> (last visited Dec. 29, 2020).

¹⁰⁰ Met with the possibility that the NCAA will run out of options for hosting tournament games if the rest of the country continues to legalize gambling, Joni Comstock, the NCAA's senior vice president for championships, stated that "we're going to have to work in the environment that we have." Nuckols, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² Eben Novy-Williams, *University of Colorado Signs Pointsbet to Official Sponsorship Deal*, SPORTICO (Sept. 8, 2020, 11:30 AM), <https://www.sportico.com/business/sports-betting/2020/colorado-pointsbet-first-1234611672/>.

¹⁰³ *Id.*

¹⁰⁴ Fielkow et al., *supra* note 8, at 48. While previous owner David Stern had opposed legalized sports betting during most of his 30 years as NBA commissioner, his successor, Adam Silver, made his support of legalized sports betting clear, explaining that it would bring greater transparency and integrity, while also creating vast business opportunities for the league. Beaton, *supra* note 66. Furthermore, the NHL placed a new franchise in Las Vegas, while the NFL has been in advanced talks to move the Raiders to Las Vegas as well. *Id.*

¹⁰⁵ See Beaton, *supra* note 66; see also Fielkow et al., *supra* note 8, at 47.

¹⁰⁶ Julian Rogers, *How Legal Sports Betting Is Slowly Infiltrating Stadiums and Arenas*, PLAYUSA, <https://www.playusa.com/sports-betting-stadiums-arenas/> (last updated Feb. 19, 2020).

2. The Commercialization of Sports Betting Data

Viewed as one of the more progressive American sports leagues, the NBA was the first league to strike a deal with a sports betting casino. In late July 2018, just a few months after the Supreme Court's historic decision in *Murphy*, the NBA announced a partnership with MGM Resorts to become the "first official gaming partner" of the NBA.¹⁰⁷ Other leagues ultimately followed suit and have begun partnering with not only casinos, but other sports betting-based companies as well, in an effort to financially capitalize on the opportunity.¹⁰⁸ These deals go much further than simple partnerships, however. Central to many of these partnerships is the buying, selling, and sharing of athlete and team data. As the governing bodies of the athletes, the leagues have controlling rights for so many valuable data points that the casinos look to use when establishing their bets.¹⁰⁹ Casinos and third-party data companies have long been preparing for the future of sports betting in America, an industry that has the capacity to expand with the accessibility and development of biometric data.¹¹⁰ When these industries all intertwine, such as with wearable devices, it becomes a fight to gain access to and ownership over the information, leading to many of these partnerships in which data is being sold. Through all of its opposition to legalized sports betting though, even the NCAA was aware of the importance that data plays in the sports industry. The NCAA partnered with Genius Sports, a U.K.-based technology firm, as part of a ten-year data and technology deal that saw the NCAA

¹⁰⁷ Daniel Roberts, *NBA Holds All the Cards in Sports Betting Deal with MGM*, YAHOO FIN. (Aug. 1, 2018), <https://finance.yahoo.com/news/nba-holds-cards-sports-betting-deal-mgm-182333795.html>. In a deal worth \$25 million over three years, MGM was granted a non-exclusive right to use official NBA and WNBA data and branding, in which MGM therefore had a right to the licensing of the NBA's intellectual property, and more specifically, real-time data feed. *Id.*

¹⁰⁸ Marketing deals have been rampant throughout all of professional sports, including deals between the New York Jets and 888 Casino, as well as Caesars Entertainment and the New Jersey Devils. Furthermore, the Devils even agreed to include a second sports betting lounge inside the team's arena, where fans will be able to make bets through the respective sportsbook's app within the lounges. In Las Vegas, Caesars Entertainment signed a 15-year agreement that made it an initial founding partner of the forthcoming, state-of-the-art home of the Las Vegas Raiders that is expected to be finished in time for the 2020 season. Juan Carlos Blanco, *Flurry of Gambling Partnerships Are Enhancing the In-Stadium Sports Experience*, THELINE (Dec. 2, 2018), <https://www.thelines.com/gambling-partnerships-stadium-experience/>.

¹⁰⁹ Khristopher J. Brooks, *The New Game in Town for Pro Sports Leagues: Selling Stats*, CBSNEWS (Jan. 8, 2020, 5:07 PM), <https://www.cbsnews.com/news/nba-nfl-sports-nascar-leagues-selling-stats-to-gambling-companies/>.

¹¹⁰ Charean Williams, *MGM to Acquire AAF's Gambling App for \$125,000*, NBC SPORTS (June 27, 2019), <https://profootballtalk.nbcsports.com/2019/06/27/mgm-to-acquire-aafs-gambling-app-for-125000/>.

commercializing its data in much the same way as the professional leagues.¹¹¹ Genius Sports will assist the NCAA with development, promotional, and technical support of the data software, as well as serving as the NCAA's exclusive agent to license real-time official data from championship events to media platforms and other companies.¹¹² Though it has no direct impact on a legalized betting market for now, it shows the NCAA's understanding of data within its own collegiate system.

Meanwhile, as biometric data becomes more prominent for betting purposes, legitimate concerns as to its commercialization have arisen at some of the most prestigious and popular colleges. In 2016, the University of Michigan signed an apparel contract with Nike worth more than \$170 million, stretching fifteen years and presenting Michigan with several opportunities, including brand new uniforms across each sport.¹¹³ But while Michigan's contract with Nike may seem remarkable on its face, and in most ways, it is, what makes it so concerning is the lack of protection for the athletes that the deal involves. Within the contract is a little-known clause that could allow Nike to "harvest" personal data from Michigan athletes through the use of wearable technology like heart-rate monitors, GPS trackers, and other devices that log large amounts of biometric activity.¹¹⁴ Not only would data points such as speed, distance, or heart rate be collected, but the contract also appeared "to allow for more comprehensive data collection than is typical and grants Nike broad rights 'to utilize' that information."¹¹⁵ Fortunately, the biometric data that comes from these wearable devices is primarily beneficial. Many of these data points from the trackers are used to protect athletes against future injury and optimize performance to extend the duration of their careers.¹¹⁶ However, in the National Football League, teams are

¹¹¹ Jen Booton, *NCAA Turns to Genius Sports as SCOTUS Legalizes Sports Betting*, SPORTTECHIE (May 14, 2018), <https://www.sporttechie.com/ncaa-turns-to-genius-sports-as-scotus-legalizes-sports-betting/>.

¹¹² *Id.*

¹¹³ *Michigan, Nike Reach Deal for up to Nearly \$174 Million*, SPORTS ILLUSTRATED (Apr. 26, 2016), <https://www.si.com/college-football/2016/04/26/michigan-wolverines-nike-deal-contract>. The contract would also allow UM students the opportunity to participate in internships at Nike's headquarters in Eugene, Oregon that were not previously available to the student-athletes. *Id.*

¹¹⁴ Marc Tracy, *With Wearable Tech Deals, New Player Data Is up for Grabs*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/11/sports/ncaafotball/wearable-technology-nike-privacy-college-football.html> (worrying some experts are more worried about the broad latitude of the contract, potentially allowing for and leaving the door open to tracking many other attributes, like temperature and sweat production).

¹¹⁵ *But see id.* (clarifying how a Nike spokesman did state that while the company has not yet begun collecting data under its college contracts, they will "continue to use athlete science to inform footwear and apparel advancements for performance and safety," adding, "[w]e take athlete data, privacy, and security seriously").

¹¹⁶ Angela Ruggiero, *With Great Athlete Data Comes Great Responsibility*, SPORTS BUS. J. (Jan. 21, 2019),

eligible to use chip data from the wearable devices during contract negotiations.¹¹⁷ Unless specifically granted by the individual teams, the players do not even have full access to the information.¹¹⁸ An athlete could hypothetically lose out on a future contract, earn less money, or even be cut by a team because of data supplied by the wearable devices that the team mandates for players to use. It was no secret that college sports teams utilize many of the same biometric device trackers as professional athletes.¹¹⁹ The issue is that in just the last five years, the technology surrounding these devices has increased dramatically.¹²⁰ With a trend that will most likely expand at a pace much faster than the law, it begs the question of how college athletes are protected.¹²¹ While these amateur athletes are asked to sign a multitude of waivers giving up their rights to the data, such as what was done in Michigan's contract with Nike, it can become difficult for the student-athletes to understand what is being done with all of this data. The reason this becomes such a distinct issue though, is because of the stark differences between collegiate athletes and their professional counterparts.

3. What Makes the Leagues Different

When discussing data ownership, there is a reason collegiate student-athletes are so distinctly handicapped when compared to professionals. And the primary explanation lies within the most basic difference between college and professional athletes: compensation. While paid for their services, professional athletes are thus entitled to unionize, meaning they can (and do) negotiate their own collective bargaining agreements ("CBA") with their respective league.¹²² This permits professional athletes to have a voice when negotiating various rights or stipulations with their governing league, such as distribution of money, health benefits, disciplinary rules, and endless other issues that arise in professional sports.¹²³ In fact, the more specific issues involving biometric data, such as ownership, privacy, uses, and data breach scenarios are primary discussion points within the current or upcoming negotiations of each league's CBA.¹²⁴ This has helped to nullify unforeseen

<https://www.sportsbusinessdaily.com/Journal/Issues/2019/01/21/Opinion/Ruggiero.aspx>.

¹¹⁷ Costigan et al., *supra* note 44.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Brian Socolow & Ieuan Jolly, *Game-Changing Wearable Devices That Collect Athlete Data Raise Data Ownership Issues*, WORLD SPORTS ADV., July 2017, at 15.

¹²¹ *See id.* (“[C]ompelling sports organizations to grapple with the sensitive ownership, intellectual property, privacy and security issues involved in collecting and using an enormous amount of athletes’ personal data.”).

¹²² *See* Miller, *supra* note 55 (providing various examples of negotiating points and different measures enacted in the collective bargaining agreements of professional athletes).

¹²³ *Id.*

¹²⁴ *Id.* Following the approval of arm sleeves monitoring elbow data and a device measuring cardiovascular functions, MLB approved the use of a product that measures

issues that may arise with the partnerships between the professional sports leagues and sports betting casinos. Many athletes are okay with their biometric data being utilized by training staff to monitor injuries or plan training regimens. But when it comes to potential abuses or unforeseen circumstances involving this data, the athletes have an ability to disallow its analysis for reasons of contract negotiations, simply by making it a point of discussion or negotiating point in their next CBA.¹²⁵

Alternatively, while professional athletes have the ability to bargain for their individual data protections, the NCAA does not have its own players' union to negotiate on the athletes' behalf.¹²⁶ There is but one single independent voice for college athletes across the nation, the National College Players Association.¹²⁷ While looking to provide a voice for the athletes across college sports, it has become nearly unfeasible to expect the group to administer or negotiate on behalf of each athlete collectively when it comes to independent university partnerships. This sets collegiate athletics amongst the NCAA on a much different level compared to professional sports leagues. Unlike in professional sports, where the athletes are represented by groups such as the National Basketball Players Association in the NBA or National Football League Players Association in the NFL, collegiate athletes, who don't have a union, have little—if any—voice in the policies that govern their biometric data.¹²⁸ Because the NCAA maintains that its student-athletes are amateurs, they are not considered employees of their universities,¹²⁹ and are therefore unable to unionize at their

recovery, strain, and sleep, allowing its use in games during the 2017 season. *Id.* The Major League Baseball CBA states that “Wearable Data shall be treated as highly confidential at all times,” but fails to describe specific privacy safeguards. *Id.*

¹²⁵ See Adam Candee, *Key Questions Raised by Reported MGM-AAF Sports Betting Deal*, LEGAL SPORTS REP. (Sept. 10, 2018), <https://www.legalsportsreport.com/23963/mgm-aaf-sports-betting-deal/>; Costigan et al., *supra* note 44 (further explaining that Major League Baseball and the Players Association added Attachment 56 to the 2017-2021 Collective Bargaining Agreement to address some of the concerns with wearable technology; however, many of these questions and concerns are unique to each professional sport, and thus will differ depending on the sport's respective collective bargaining agreement).

¹²⁶ See Miller, *supra* note 55.

¹²⁷ The NCPA is a nonprofit advocacy group, launched by UCLA football players in 2001, with a mission to provide the means for college athletes to voice their concerns and change NCAA rules. *About NCPA*, NAT'L COLL. PLAYERS ASS'N., <https://www.ncpanow.org/about#:~:text=The%20National%20College%20Players%20Association,first%20press%20conference%20on%20Jan> (last visited Dec. 30, 2020).

¹²⁸ Miller, *supra* note 55. Concern over data usage from wearable technology is just as pertinent with college athletes. College football players, for example, may use mouth guards with built-in sensors measuring football hits. *Id.*

¹²⁹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1057 (9th Cir. 2015).

respective schools.¹³⁰ Consequently, in such a rapidly expanding industry, the athletes are at the mercy of their schools, conferences, and the NCAA as a whole. These disadvantages for college athletes (as compared to professionals) naturally highlight the privileges that come with “making it to the next level.” But when the personal data of young athletes has such a great potential for manipulation, combined with a rapidly growing, hotbed industry, the disadvantages of data use without bargaining power should ultimately be questioned.

D. Where We Now Stand

1. A Statewide System

When the Supreme Court decided *Murphy*, it left nearly all stakeholders without a standard, unified approach. However, some states realized that a legalized system would pose significant risks for college athletes and decided to address the issue by altering their own sports betting legislation. States such as Oregon and New Jersey do not allow bets on any in-state collegiate teams or events.¹³¹ Others, such as Tennessee, have decided to disallow bets on the individual performance of any college athlete.¹³²

¹³⁰ In 2015, the National Labor Relations Board determined that it did not have jurisdiction over state-run colleges and universities, effectively overruling an Administrative Law Judge decision granting Northwestern football players the ability to unionize. Tom Farrey, *Northwestern Players Denied Request to Form First Union for Athletes*, ESPN (Aug. 17, 2015), https://www.espn.com/college-football/story/_/id/13455477/nlrbsays-northwestern-players-cannot-unionize. Though the Board declined to decide whether the Northwestern football players were “employees” as defined in the National Labor Relations Act, it determined that even if they were, the Board would still decline to exercise jurisdiction over the case. 362 N.L.R.B. 1350, 1352 (2015). However, the Board also stated that it would consider hearing cases from student-athletes at other private universities, or even Northwestern if circumstances changed in the future. *Id.* at 1355; accord Farrey, *supra*. While a full analysis may be outside of the scope of this Note, it is still important to observe that compensating the athletes for their own image and likeness is perhaps one of the biggest issues facing collegiate athletes today. While it may seem like they are two separate, distinct topics, the decision to pay college athletes could have large implications on how their data is protected, as well as the overall framework of college sports. If paid, college athletes may no longer be characterized as amateurs, potentially leading to unionization. If this were the case, the collegiate athletes would have the ability to negotiate for better protections on the usage of their data. However, these events are all speculative, and again, outside of the scope of this Note.

¹³¹ Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Oct. 19, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

¹³² Hall, *supra* note 10, at 17. Better known as ‘prop bets’, “[t]he Tennessee Sports Gaming Act explicitly prohibits bets on [i]ndividual actions, events, statistics, occurrences, or nonoccurrences to be determined during a collegiate sporting event.” *Id.* (internal quotation marks omitted). For an illustration of how some states have simply chosen to impose relatively high taxes on sports gambling, see Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Gambling*,

This paints only a small picture of the environment though. Many state laws fail to provide restrictions on betting involving college athletes or sports, and thus have a full college sports betting capacity and allow bets on colleges outside of the state.¹³³ After *Murphy*, states are free to enact the legislation as they see fit.¹³⁴ The problem with a state by state framework, though, is that many states have since pushed to keep the federal government out of sports betting because they do not want to lose the revenue it generates.¹³⁵ Sports betting legislation often overlooks the questions of data privacy and protection for the athletes involved by instead focusing on money or integrity. Thus, the industry has become that of a money game, with little thought put into the athletes that are supplying the entertainment and money.

2. The Call for a Federal System?

Various members of professional sports leagues and the NCAA have advocated for a federal system of betting. The leagues prefer a federal standard in which the interests of *all* stakeholders are brought into account, not just the casinos offering sports betting options.¹³⁶ A standard, federally regulated sports betting market would allow leagues, schools, and casinos to address many of the widely publicized issues that come with sports gambling. Sports betting has always imposed integrity issues within sports,¹³⁷ but by establishing national standards across different platforms, the leagues hope to provide greater protections for their athletes.¹³⁸ The NCAA's fear has been that these uncompensated college students will be more susceptible than professional athletes to accept payment for influencing a game's outcome, or

CNBC (July 10, 2019), <https://www.cnn.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html>. A 34 percent tax was charged by Pennsylvania on operators' revenue, plus a 2 percent tax that goes for local grants to counties, as well as a one-time fee of \$10 million. *Id.*

¹³³ Rodenberg, *supra* note 131.

¹³⁴ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018).

¹³⁵ James Glantz, *States Are Pushing to Keep Federal Regulation out of Sports Gambling*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/sports/sports-gambling-regulation.html> (describing how this push has been brought on by the casinos who would prefer not to pay an “integrity fee” to the professional sports leagues, stating, “[t]he so-called ‘integrity fee’ would increase the costs of legal sports betting, siphon much-needed tax revenues away from state coffers and increase state regulatory burdens”).

¹³⁶ *Id.* (touching on how the professional sports leagues prefer a federal system because it would allow for new measures that would protect against things like match fixing and improper wagering); *see also* sources cited *supra* note 12.

¹³⁷ *See* sources cited *supra* note 12.

¹³⁸ Because of the risks to the integrity of sporting events, the professional sports leagues, which have always favored a restriction to sports betting, prefer core standards that would “include protections for consumers, and for the league’s content and intellectual property, as well as assurances that fans receive reliable data and that law enforcement is able to pursue bad actors – presumably those who attempt to fix games.” Glantz, *supra* note 135 (internal quotation marks omitted).

disclosing confidential information.¹³⁹ However, nearly everyone within the sports betting industry supports integrity, not just the NCAA or professional sports leagues.¹⁴⁰ Many incidents throughout the history of sports, both at the collegiate and professional level, have led to this increased reliance on integrity.¹⁴¹ As a result of sports betting's legalization though, the NCAA has chosen to ramp up its educational efforts for not only student-athletes, but even referees as well.¹⁴² Along with sending educational materials to respective colleges, the NCAA has devoted numerous resources to making sure that its athletes are not giving in to the added pressures that come with gambling addiction and match-fixing.¹⁴³ In October 2018, the NCAA Board of Governors established an Ad Hoc Committee on Sports Wagering in an effort to evaluate whether relevant NCAA rules need to change, how best to educate athletics departments and student-athletes about compliance and problem gambling, and how to ensure integrity of competitions as the market expands.¹⁴⁴ Integrity has been, and remains, the number one priority for the NCAA.

However, these athletes are reminded of integrity within competition nearly every time they prepare to compete. Hoping to refrain from being the next Pete Rose,¹⁴⁵ athletes generally understand any consequences that might come with betting within their own sport.¹⁴⁶ Protections on this front *should* be expected. Unfortunately, as

¹³⁹ Andrew Maykuth, *What Are the Odds? Colleges Fear Sports Betting Will Lead to Cheating*, PHILA. INQUIRER (September 14, 2018), <https://www.inquirer.com/philly/business/college-sports-betting-ncaa-laws-pennsylvania-new-jersey-20180914.html>.

¹⁴⁰ *Id.* (discussing how legal sportsbooks in Nevada have always had the greatest incentive in protecting integrity and spotting any irregularities, primarily because their money – and their gaming licenses – are on the line).

¹⁴¹ See sources cited *supra* note 12; see also Sean Isabella, *Sports Betting: Gambling Could Put Athletes at Risk*, TRIBUNE-STAR (July 5, 2018), https://www.tribstar.com/news/local_news/sports-betting-gambling-could-put-athletes-at-risk/article_4a4f1a0b-c3a5-581c-a196-eba84945bc59.html.

¹⁴² David Purdum, *NCAA Pushing for Federal Sport Betting Legislation*, ESPN (Sept. 10, 2019), https://www.espn.com/chalk/story/_/id/27586235/ncaa-pushing-federal-sport-betting-legislation.

¹⁴³ Brian Burnsed, *Doubling Down*, NCAA, <http://www.ncaa.org/static/champion/doubling-down/> (last visited Nov. 2, 2020).

¹⁴⁴ *Id.*

¹⁴⁵ As punishment for betting on Major League Baseball games as a manager for the Cincinnati Reds, Pete Rose accepted a settlement on August 23, 1989 that included a lifetime ban from the game of baseball. Though he maintains he always bet on his team to win, Rose cannot work in Major League Baseball and, despite his stellar playing career, he is not eligible for the Hall of Fame. See *Pete Rose Gets Booted from Baseball*, HISTORY, <https://www.history.com/this-day-in-history/pete-rose-gets-booted-from-baseball> (last updated Aug. 20, 2019).

¹⁴⁶ See NAT'L COLL. ATHLETIC ASS'N, NCAA 2020–21 DIVISION I MANUAL, 44–45 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> (prohibiting

recent years have shown, sports betting poses questions that expand well beyond the issue of integrity. While integrity certainly plays an important, central role, the rapidly expanding use of data within the betting industry has created much more complexity in ways the NCAA isn't as well prepared for. With the rapid advancement of technology and the development of biometric data tracking, it is important for the NCAA to get out in front of issues beyond just integrity in sports betting.

3. The NCAA's (Failed?) Response

With such frequent adoption of state sports betting laws, the NCAA has become pressed for time in attempting to address the many pertinent issues associated with sports betting.¹⁴⁷ The issue with the NCAA isn't that they will forever refuse to be on board with gambling. In fact, even while maintaining a strong opposition to a legalized gambling market, the NCAA hasn't completely turned its back to the changing landscape. NCAA President Mark Emmert has even stated that the NCAA would support strong federal standards, or even a federal model.¹⁴⁸ But where the issue lies with the NCAA is that their slow responses have had escalating effects on their athletes.

Questions about athletes' data ownership and privacy existed well before the legalization of gambling. And, as was stated previously, there are already gray areas when it comes to the protection of biometric data. While it may be a niche topic, these issues involving ABD for college athletes need to be addressed before the problem gets out of hand. However, the NCAA's failure to adapt to changing landscapes demonstrates a detrimental lack of leadership that puts the athletes at risk. In many of the pressing issues presented to the NCAA, including medical injury reports, the image and likeness debate, and even transferring athletes, the NCAA seems to have a reactionary stance. To understand, look no further than the NCAA's lack of response amidst the coronavirus pandemic. At a time of crisis in which colleges looked to the NCAA for a response, there was no concrete guidance. Many people have criticized the NCAA's lack of leadership, and one conference official was even quoted as saying "college athletics is the only multibillion-dollar business in the world with no leadership structure or decision-making apparatus, and it's been catastrophically

participation in intercollegiate competition for duration of a suspension related to sports wagering).

¹⁴⁷ Burnsed, *supra* note 143.

¹⁴⁸ Isabella, *supra* note 141. However, a more common sentiment amongst collegiate officials might contradict this view. The University of Pittsburgh athletic director asked members of the Senate Judiciary Committee to prohibit betting on collegiate sports during a hearing in July in Washington D.C. David Purdum, *Pittsburgh Athletic Director Heather Lyke Tells Senate That ACC Schools Unanimously Oppose Gambling on Collegiate Sports*, ESPN (July 22, 2020), https://www.espn.com/college-football/story/_/id/29519389/pittsburgh-athletics-director-heather-lyke-tells-senate-acc-schools-unanimously-oppose-gambling-collegiate-sports. The Pittsburgh AD testified that Presidents of Atlantic Coast Conference schools unanimously oppose gambling on collegiate sports over concerns for the well-being of the student body, the athletes, and potential threats to the integrity of competitions. *Id.*

exposed.”¹⁴⁹ This lack of organization was no more apparent than with what occurred during the 2020 fall sports season, or more particularly, with football.¹⁵⁰ Initially, conferences were forced to make their own decisions, with no leadership or guidance coming from the main governing body.¹⁵¹ Even when the NCAA did speak on the COVID-19 crisis, it simply put out guidelines, not requirements. It was an easy way out for them to leave the decisions up to the schools themselves. But this is exactly where the problem lies. Although another pandemic is unlikely, this example demonstrates the NCAA’s inability to effect universal changes and responses throughout the organization. There is too much uncertainty and things are changing too quickly in this age of college sports. The rapid developments in technology and with wearable devices are only going to cause more problems in the coming years, which is exactly why student athletes need to be heard. The collegiate athletes deserve a voice similar to what is seen with the professional sports unions and player’s associations.

IV. CONCLUSION: ADDRESSING THESE ISSUES FOR COLLEGIATE ATHLETES TODAY

Whether done legally or illegally, sports betting will pose challenges and questions for nearly every party involved. However, when compared to their counterparts, collegiate athletes seem to face these hardships to a much greater extreme for many reasons. While no system will address all of these issues, a federal standard would provide the closest answers to these problems. A federal system would allow the national government to better control and address the issues of data protection and privacy for collegiate student-athletes. Allowing independent legislation that varies from state to state disrupts an industry that is so heavily nationalized. While the *Murphy* decision may have allowed for each individual state to make their own decision on the subject, Congress still has the power to standardize the system. In doing so, college athletes could have their voices heard without needing to completely overhaul a system in which they are currently defined as amateurs. Technology and data have been developing so rapidly in recent years that it is important for Congress to get out in front of these questions before becoming *too* reactionary. In any event, it is important to not only understand how rapidly the sports betting industry is evolving, but to recognize the convergence of wearable technology and the effects on college student athletes in order to provide for necessary protections.

¹⁴⁹ Jon Solomon (@jonsolomonaspen), TWITTER (Aug. 10, 2020, 9:42 AM), <https://twitter.com/JonSolomonAspen/status/1292818541507485700>.

¹⁵⁰ Dennis Dodd, *Power Five, NCAA Are Now Officially Adversaries, and a Breakaway May Only Be a Matter of Time*, CBS SPORTS (Aug. 3, 2020, 11:08 AM), <https://www.cbssports.com/college-football/news/power-five-ncaa-are-now-officially-adversaries-and-a-breakaway-may-only-be-a-matter-of-time/>

¹⁵¹ As a result, Conferences such as the Big 10 and Pac 12 decided to shut down their fall sports season, only to go back on the decision less than a month later and reinstate the fall football season. Reese Oxner, *Big Ten Reverses Decision, Will Start Football Season in October*, NPR (Sept. 16, 2020, 12:31 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/16/913522262/big-ten-reverses-decision-will-start-football-season-in-october>. This was likely a result of not only immense outside pressure, but also the fact that the three other Power Five conferences had decided to continue playing a fall football season.

Furthermore, the NCAA as a governing body has a responsibility to its athletes to address these issues as well. The formation of an athlete group or players association would provide athletes the voice that they so desperately need. However, those familiar with college sports may have been able to notice a growing trend that began to spark over the past year or so, amidst both the coronavirus pandemic and social protests.¹⁵² In a day and age where social media has allowed college student-athletes to reach millions of Americans nearly simultaneously, the athletes have begun to speak out. While this trend will undoubtedly have certain effects on the landscape of college sports, one thing that it has certainly done is given its athletes a voice. These athletes are realizing that while they may simply be students, they will not be pawns in a multi-billion-dollar industry. Whether it be safety during practice, the refusal to play a game, or even the influence to re-think the cancelation of an entire season,¹⁵³ this generation of college athletes will be one to bring about change in a variety of ways. At a time in which there is uncertainty surrounding their industry, combined with a lack of leadership from those who govern them, the student-athletes themselves may provide the best answer for addressing these issues.

¹⁵² See J. Brady McCollough, *UCLA Football Players Demand Protection from Injustices amid Pandemic Return*, L.A. TIMES (June 19, 2020, 12:36 PM), <https://www.latimes.com/sports/ucla/story/2020-06-19/ucla-football-players-demand-protections-amid-pandemic-return>; see also Adam Rittenberg, *Ohio State Had to Fight for Its Season From Beginning to End*, ESPN (Jan. 12, 2021), https://www.espn.com/college-football/story/_/id/30692786/ohio-state-had-fight-season-beginning-end.

¹⁵³ See sources cited *supra* note 152.