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Fraud on Any Market

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Fraud on Any Market

GREGORY DAY*, JOHN T. HOLDEN** & BRIAN M. MILLS***

Claims of securities fraud had historically failed because investors seldom rely on false or misleading statements when transacting securities. To bolster confidence in securities markets, the U.S. Supreme Court adopted a doctrine called “fraud-on-the-market” so that duped investors can show detrimental reliance without ever encountering the fraudulent statements. The doctrine assumes that a stock’s price reflects all material information, meaning that an investor who bought tainted stock has constructively relied on the fraud.

Fraud-on-the-market is not only unavailable in other markets but is also embattled within securities law. The doctrine has endured volleys of criticisms about whether markets actually absorb information, leading critics to believe that the Supreme Court would eliminate it in 2014. The Court did not. In light of persistent questions about whether the doctrine reflects reality or has outlived its purpose, our empirical research tests fraud-on-the-market’s viability by investigating sports gambling: we find that the doctrine provides a sound remedy for investors in any market.

The sports wagering market operates like others in which defrauded individuals have historically failed to support their fraud claims due to a lack of reliance. We show that securities and gambling markets suffer from many of the same frailties. Chief among them is that both investors and bettors place money in markets where they lack information about deception, cheating, and fraud. And like investors rely on prices affected by fraud, gamblers reference wagering information based on the playing field: if deception enables a team to fare better or worse, this skews the betting lines on which gamblers rely. The difference between these markets, though, is that investors enjoy a body of securities law to condemn fraud.

We first argue that fraud-on-the-market would benefit most types of investable markets like sports gambling and support the doctrine in the securities context. Despite criticisms of the doctrine, our analysis shows that fraud creates the presumption of distorted prices. Second, the money wagered via sports betting and daily fantasy sports (DFS) would generate damages such that leagues would better maintain a competitive environment, boosting sports integrity akin to how securities regulations provide market protections. Also, our argument recognizes the inequity of denying sports bettors and DFS users a remedy. Whereas the leagues had traditionally benefited from gambling indirectly, today, the NFL, NHL, MLB, and NBA have partnered with DFS and other gambling industry companies. Since the leagues now benefit directly from gambling, and lucratively so, they should owe their fans a truly competitive landscape.

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INTRODUCTION

Claims of securities fraud had historically failed because investors seldom rely on false or misleading statements when transacting securities.¹ To bolster confidence in securities markets, the Supreme Court embraced a doctrine known as “fraud-on-the-market” to address how fraud distorts market prices.² It rests on the theory that a stock’s price reflects material information about the underlying firm, indicating that one who buys tainted stock *has constructively relied on the fraud*.³ A price distorted

1. See Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 157–58 (2009) (explaining the difficulty of reliance in securities litigation).

2. *Grossman v. Waste Mgmt., Inc.*, 589 F. Supp. 395, 403 (N.D. Ill. 1984) (explaining that securities regulations and fraud-on-the-market are meant to “instill confidence in the securities markets”).

3. *Peil v. Speiser*, 806 F.2d 1154, 1160 (3d Cir. 1986) (“The fraud on the market theory

by fraud may thus cause investors to misjudge the likelihood of making money, which justifies allowing them to support a fraud claim without ever knowing of the misstatements.

Fraud-on-the-market is not only unavailable in other markets, but it is embattled in securities litigation. The doctrine has endured volleys of criticism about whether markets actually absorb information.⁴ Observers had even believed that the Supreme Court intended to eliminate it in 2014—the Court did not.⁵ While the doctrine remains good law, questions persist about whether it reflects reality or has outlived its purpose.⁶ Our empirical research examines fraud-on-the-market by investigating sports gambling markets: we find that the doctrine provides a sound remedy for investors in *any* market.

Rather than a trivial industry, estimates suggest people wager up to \$3 trillion on sports annually.⁷ The amount legally wagered on sports in the United States has tripled since the Supreme Court enabled states to legalize sports wagering in 2018.⁸ Propelling sports gambling even further is the rise of daily fantasy sports (DFS), which entails a gambling platform based off fantasy sport's template—remarkably, *fifty-seven million* people wagered over \$350 million via DFS in 2016 alone.⁹ This burgeoning market has inspired the NFL, NBA, MLB, and NHL to partner with DFS companies such as DraftKings and FanDuel.¹⁰ Reports in 2021 have even found that the NHL bought equity stakes in sportsbooks, raising questions about how deeply the leagues are leveraged in the sports wagering industry.¹¹ In Europe, seventeen out

is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. The misstatements may affect the price of the stock, and thus defraud purchasers who rely on the price as an indication of the stock's value." (citation omitted)).

4. See *infra* Section III.C.3 (discussing the criticisms of fraud-on-the-market).

5. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (refusing to overrule *Basic*); see also Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37, 38–39 (2015) (discussing the anticipation over whether the Supreme Court would terminate the fraud-on-the-market doctrine).

6. See, e.g., Charles W. Murdock, *Halliburton, Basic, and Fraud on the Market: The Need for a New Paradigm*, 60 VILL. L. REV. 203, 208 (2015) (discussing the need to replace fraud-on-the-market).

7. Samantha Beckett, *Global Sports Betting Market Worth \$3 Trillion*, CASINO.ORG (Apr. 20, 2015, 5:03 AM), <https://www.casino.org/news/global-sports-betting-market-worth-3-trillion/> [https://perma.cc/CH3Z-NQB6].

8. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018) (holding that the states may enact statutes permitting sports wagering).

9. Chris Grove, *3 Reasons Why the Feds Should Approve the Merger of Draftkings and Fanduel*, LEGAL SPORTS REP. (June 16, 2017), <https://www.legalsportsreport.com/14418/approve-draftkings-fanduel-merger/> [https://perma.cc/BF5L-S3WH].

10. See *infra* Section II.B.

11. Matthew Waters, *NHL Deepens Legal Sportsbook Ties with PointsBet Equity Stake*, LEGAL SPORTS REP. (Feb. 9, 2021), <https://www.legalsportsreport.com/48115/nhl-pointsbet-equity-stake/> [https://perma.cc/WHH7-TX23].

of twenty teams in the English Premier League have partnered with a betting brand¹² while ten of twenty teams adorn a gambling company's logo on their jerseys.¹³ In the United States, the sports gambling market equates to the eighth largest stock exchange in the world.¹⁴

Despite the economic stakes, cheating is prevalent in sports.¹⁵ For example, the Houston Astros cheated in 2017 when they won the World Series: team executives used illicit means of decoding and transmitting their opponents' signs so that batters knew whether the opposing pitcher intended to throw a fastball or curveball.¹⁶ Scandals in the NFL include Deflategate, Spygate, and Bountygate.¹⁷ In fact, an NBA

12. David Camilleri, *The Evolution of Premier League Betting Sponsorship*, PUNTERS PAGE, <https://www.thepunterspage.com/evolution-premier-league-betting-sponsorship/> [https://perma.cc/C42Y-EVMZ].

13. Rob Davies, *Half of Premier League Clubs to Have Gambling Sponsors for 2019-20 Season*, GUARDIAN (July 19, 2019, 12:52 PM), <https://www.theguardian.com/football/2019/jul/19/half-of-premier-league-clubs-to-have-gambling-sponsors-for-201920> [https://perma.cc/EZ4C-WQA2]; see also Charlie Walker, *Premier League and EFL Clubs Will Lose £110million in Sponsorship if Betting Companies Are Banned from Advertising on Shirts in a Government Review of Gambling Launched on Tuesday*, MAILONLINE (Dec. 8, 2020, 7:22 PM), <https://www.dailymail.co.uk/sport/sportsnews/article-9029921/Premier-League-Championship-clubs-lose-110-million-betting-companies-banned-shirts.html> [https://perma.cc/4W9R-VUEA].

14. Since the sports gambling market is estimated to fall within the \$3 trillion–\$4 trillion range, it would likely fall somewhere between the sixth and ninth largest stock exchange. See Aran Ali, *The World's 10 Largest Stock Markets*, VISUAL CAPITALIST (Oct. 29, 2020), <https://www.visualcapitalist.com/the-worlds-10-largest-stock-markets/> [https://perma.cc/BBX7-CSS5].

15. We use the term “cheating” broadly. For purposes of this Article, this term includes deceptions that may not violate written rules but violate the spirit of the rules. For instance, the use of performance-enhancing drugs during the 1990s, though largely illegal, was not against MLB rules; however, there is a strong argument to be made that the use of these substances violated the spirit of the league's rules.

16. Indeed, there is some debate about whether the Astros violated a specific rule that existed at the time. While there may not have been a rule in the MLB rule book against stealing signs, MLB issued a directive in 2001 that prohibited the use of electronic devices or binoculars in the dugout. See David Schoenfeld, *Everything You Need to Know About Sign-Stealing*, ESPN (Sept. 5, 2017), https://www.espn.com/blog/sweetspot/post/_id/82491/everything-you-need-to-know-about-sign-stealing [https://perma.cc/W596-DMCK]. The irony of the Astros' cheating scandal was that it relied on monitors that had been installed by MLB in 2014 as part of what was meant to be an integrity-enhancing feature—video replay. See Tom Verducci, *Why MLB Issued Historic Punishment to Astros for Sign Stealing*, SPORTS ILLUSTRATED (Jan. 13, 2020), <https://www.si.com/mlb/2020/01/13/houston-astros-cheating-punishment> [https://perma.cc/VZN7-LV3N].

17. Jason Gay, *Deflategate's Endless Hissing Contest*, WALL ST. J. (Apr. 25, 2016, 6:35 PM), [https://www.wsj.com/articles/deflategates-endless-hissing-contest-1461623705?](https://www.wsj.com/articles/deflategates-endless-hissing-contest-1461623705?mg=prod/com-wsj) <https://perma.cc/QWW3-NBYS>]; Carl Bialik & Jason Fry, *'Spygate' Between Pats, Jets Is Really a Family Quarrel*, WALL ST. J. (Sept. 12, 2007, 12:01 PM), <https://www.wsj.com/articles/SB118960478308725115> [https://perma.cc/6QGC-XYQD]; Lynn Zinser, *Bountygate: A Circular, Confusing History*, N.Y. TIMES: THE FIFTH DOWN (Oct. 10, 2012, 3:10 PM), <https://fifthdown.blogs.nytimes.com/2012/10/10/bountygate-a-circular-confusing-history/> [https://perma.cc/MXH6-SHWL]; The Times-Picayune, *Full NFL*

referee sold inside information to gamblers between 2005 and 2007 and even may have fixed games.¹⁸ In 2006, the Italian soccer league stripped powerhouse Juventus of two titles and relegated them for colluding with the league's referees.¹⁹

But akin to how claims of securities fraud had traditionally failed, fans and gamblers can rarely *if ever* redress cheating since they lack reliance.²⁰ For example, the Southern District of New York rejected a lawsuit in 2020 by users of DraftKings who alleged fraud against MLB after betting on games tainted by the Astros' cheating affair.²¹ It ruled that the plaintiffs failed to show reliance on any statements by MLB about the fairness of its games even though MLB has profited from the gamblers' wagers via its partnership with DraftKings—MLB had even owned a stake in DraftKings.²² A public policy explaining why courts have long deprived gamblers of remedies against leagues is the belief that wagering would cause gamblers to fix games.²³

Without the threat of liability, critics assert that leagues are more concerned about guarding their images than identifying cheating or meaningfully punishing teams and players. When *journalists* unearthed the Astros' cheating scandal, MLB stripped the Astros of draft choices and \$5 million even though the value of winning a World Series far exceeds that amount.²⁴ The players who executed the scheme received no punishment.²⁵ When an NBA referee conspired with gamblers, the scheme was uncovered by an FBI investigation into organized crime rather than the NBA's

Statement into 'Bounty' Program Run by New Orleans Saints, NOLA.COM (Mar. 3, 2012, 1:46 AM), https://www.nola.com/sports/saints/article_8742fc0b-72a7-5a8d-998d-b425ffee06df.html [https://perma.cc/8MUZ-Q32N].

18. Norman Chad, *Tim Donaghy Fixed NBA Games Under David Stern's Watch. They Are Both to Blame*, WASH. POST (Mar. 3, 2019), https://www.washingtonpost.com/sports/tim-donaghy-fixed-nba-games-under-david-sterns-watch-they-are-both-to-blame/2019/03/03/e217dce0-3d3e-11e9-a06c-3ec8ed509d15_story.html [https://perma.cc/DS4C-YWCC].

19. Shamoon Hafez, *Calciopoli: The Scandal that Rocked Italy and Left Juventus in Serie B*, BBC SPORT (Oct. 5, 2019), <https://www.bbc.com/sport/football/49910626> [https://perma.cc/S8PL-7XDM] (explaining the Calciopoli scandal).

20. Murdock, *supra* note 6, at 237.

21. Olson v. Major League Baseball, 447 F. Supp. 3d 159, 173 (S.D.N.Y. 2020).

22. *Id.* at 167 (“[T]his only reinforces the conclusion that what is known to the plaintiff, his own reliance, must be alleged with particularity. But here, the complaint does not even allege that the plaintiffs ‘saw, read, or otherwise noticed’ any of the few actionable misrepresentations noted above, and thus completely fails to meet this standard.”).

23. See Harry Lyles, Jr., *The Supreme Court's Sports Gambling Decision Won't Ruin Sports Because Any Damage is Already Done*, SBNATION (May 15, 2018, 8:30 AM), <https://www.sbnation.com/2018/5/15/17352742/sports-betting-supreme-court-experience> [https://perma.cc/2A84-R88N] (noting that match fixing was one of the fears associated with increased legalized sports betting).

24. See Maury Brown, *Astros Sign-Stealing Scandal Aftermath: Luhnow and Hinch Fired, Loss of Draft Picks, \$5M Fine*, FORBES (Jan. 13, 2020, 2:51 PM), <https://www.forbes.com/sites/maurybrown/2020/01/13/luhnow-hinch-suspended-loss-of-draft-picks-5m-fine-for-astros-sign-stealing-scandal/?sh=5c7ab426730a> [https://perma.cc/9SXZ-NK8P] (detailing the punishments).

25. *Id.* (noting that no players were penalized among the sanctions).

efforts.²⁶ In football, the strategy of preserving the NFL's brand is known as "protecting the shield."²⁷

If gamblers could plead fraud-on-the-market, we argue that it would counterintuitively *enhance* sports integrity and recognize that the same injuries affecting securities plague other investable markets. This is because both securities fraud and sports cheating create an identical problem where misinformation distorts prices. With securities, misstatements cause a person to misperceive the odds of an investment paying off—e.g., the investor expects the stock's value to appreciate above the price at which it was bought.²⁸ Just like how investors are defrauded when misstatements induce them to buy securities at inflated prices, gamblers operating under false information will misperceive a match's true odds to their detriment. But whereas fraud-on-the-market enables investors to show reliance on a security's price, gamblers cannot invoke this doctrine even though an overperforming team aided by cheating would perhaps skew betting lines.²⁹ If fraud-on-the-market reflects how fraud or cheating distorts prices—a source of great contention—then the doctrine should enable gamblers and other types of investors to show reliance on market prices.

We test the validity of fraud-on-the-market as a whole by showing how private information alters prices in betting markets akin to securities fraud. During the 2015 MLB season, critical aspects of the ball changed, which MLB denied.³⁰ We find that the new balls took flight in a materially different way than old ones—specifically, drag was reduced—affecting the nature of scoring. Our empirical analysis demonstrates that MLB's misleading statements about whether anything about the baseballs had changed dramatically altered the odds of winning certain bets around

26. Scott Eden, *From the Archives: How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (July 9, 2020), https://www.espn.com/nba/story/_id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games [https://perma.cc/NA53-3QY8]; Jack Delaney, *Reports Confirm Former Ref Tim Donaghy Fixed Games*, BASKETBALL FOREVER (Feb. 19, 2019), <https://basketballforever.com/2019/02/19/disgraced-nba-referee-tim-donaghy-admitted-he-would-fail-polygraph-if-asked-if-he-fixed-nba-games> [https://perma.cc/WJG4-Y94U].

27. Hua Hsu, *Sword and Shield*, GRANTLAND (Dec. 26, 2013), <https://grantland.com/features/the-nfl-very-bad-year/> [https://perma.cc/J3HH-Q6FL] (noting the origins of "protecting the shield").

28. Murdock, *supra* note 6, at 209.

29. Cf. *Basic Inc. v. Levinson*, 485 U.S. 224, 241–42 (1988) (explaining fraud-on-the-market); Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 970 (2019) (providing the law and theory of fraud-on-the-market). Historically, there may have been an argument that because of sports betting's illegality, there should not have been a remedy for sports bettors. Times have changed, however, with more than twenty states having legalized sports betting, and more than thirty-five having explored using sports betting as a means to fill budget holes. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 932–33 (2020) (describing the historical treatment of sports gambling in the United States).

30. Jake Kaplan, *Rob Manfred 'Absolutely Certain' Baseballs Fall Within Specifications*, CHRON (July 11, 2017), <https://www.chron.com/sports/astros/article/Rob-Manfred-certain-baseballs-not-juiced-11280991.php> [https://perma.cc/4JJS-YQWP].

the 2015 All-Star Game: a wagering strategy that would have previously won reversed into a losing one.³¹ Just like with securities fraud, misinformation distorted market prices in ways harming gamblers. By implication, gamblers assessed the odds of games based on market prices without accounting for the destabilizing effects of duplicitous conduct. Recalling the doubts over whether securities fraud can actually be expected to alter prices, our research supports this presumption in the securities context as well as in other investable markets.

In short, we argue that embracing fraud-on-the-market across the sea of investable markets, like sports gambling, would achieve the doctrine's very purpose: it would increase integrity and remedy meritorious injuries. Despite criticisms that fraud-on-the-market fails to reflect reality, our analysis shows that fraud does in fact create the presumption of distorted prices on which people like gamblers and investors rely. Second, the money wagered via sports betting would generate sizeable damages after an episode of cheating, which would force leagues to offer a competitive environment, or at least proactively police misconduct. This would boost sports' integrity to the degree that securities regulation has helped to create confidence in stock markets. Our argument also recognizes the inequity of denying bettors and DFS users a remedy.³² Whereas the leagues had traditionally benefited from gambling indirectly, today, the NFL, NHL, MLB, and NBA have partnered with those companies themselves as well as brokers of gambling data.³³ Since the leagues benefit directly from gambling, and lucratively so, they should owe their fans a competitive landscape.

This Article proceeds in four parts. Part I briefly details the rich history of cheating in sports. It traces not only instances where teams and players impaired the competitive landscape, but also where gamblers sought to manipulate results for personal enrichment. Part II's analysis of case law reviews the obstacles encountered by fans, gamblers, and spectators when they seek a remedy for cheating. In nearly every instance, courts have dismissed lawsuits against teams and leagues, insulating them from legal liability. Part III argues that cheating creates the precise harms

31. See *infra* Section III.D.

32. As Professor Christine Hurt noted in 2006, "the stereotype of an investor as a gambler seems particularly well deserved." Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 373 (2006). Professor Hurt argues that while some investors do research about securities purchases, some do not, and instead act on a "feeling." *Id.* Despite similarities in the realities of investing and gambling, the two activities are treated differently. *Id.* at 373–74. Hurt advocated for revisions to the regulatory model that would no longer use antiquated terms as the basis for different forms of regulation but would instead use the level of speculation in an activity to determine its regulatory structure. *Id.* at 375–76. On a continuum of entertainment to utility, Hurt categorizes sports betting alongside trading in individual stocks. *Id.* at 378.

33. Both leagues and teams have formed partnerships with a variety of DFS and gambling operators. See *US Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting-deals/> [<https://perma.cc/E6FS-RQCR>] (listing league and team sports betting partnerships); see also *DFS Partnership / Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/dfs-sponsorship-tracker/> [<https://perma.cc/8VEC-KBYQ>] (listing league and team DFS partnerships).

remedied by securities law. Now that the leagues have partnered with, and profit from, FanDuel, DraftKings, and the DFS industry altogether, gamblers are akin to investors in public firms who rely on the market prices set based on an ostensibly fair landscape. The last Section in this Part discusses the implications of our findings, explaining other investable markets such as art and cryptocurrencies that could likely benefit from embracing the fraud-on-the-market theory.

I. A SHORT REVIEW OF CHEATING'S LONG HISTORY

Cheating in sports occurs for a myriad of reasons. Just as the reward of personal accomplishment motivates players to cheat, the same incentives drive teams and executives who can similarly profit from winning. If this was not enough, gamblers have long been associated with threatening the integrity of competition by inducing players to throw matches. The result is a rich history of cheating that spans essentially all sports.

A. A Brief History of Cheating

The chief source of cheating in sports has historically stemmed from gambling. Most famously, eight members of the heavily favored Chicago White Sox were accused of throwing the 1919 World Series at the urging of organized crime figure Arnold Rothstein.³⁴ One of the "Black Sox" players testified that he was jealous of the money paid to members of the Chicago Cubs for throwing the previous year's World Series.³⁵ This scandal decimated baseball, produced eight lifetime suspensions (including "Shoeless" Joe Jackson),³⁶ and resulted in the edict posted in every MLB clubhouse that players may not gamble on baseball.³⁷

Executives in other leagues have expressed the same anxieties about gambling.³⁸ Such concern was far from unfounded. The FBI alleged in 2007 that former NBA

34. See John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455 (2015) (noting that Rothstein allegedly bribed eight members of the Chicago White Sox and that the players were eventually put on trial for charges, including conspiring to defraud the public).

35. Holden & Edelman, *supra* note 29, at 913.

36. Holden & Rodenberg, *supra* note 34, at 455. Baseball's first commissioner was Judge Kenesaw Mountain Landis, who began his appointment by famously stating:

Regardless of the verdict of juries, no player who throws a ballgame, no player that undertakes or promises to throw a ballgame, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.

Id.

37. *Rule 21; Misconduct*, MAJOR LEAGUE BASEBALL, http://content.mlb.com/documents/8/2/2/296982822/Major_League_Rule_21.pdf ("(g) RULE TO BE KEPT POSTED. A printed copy in English and Spanish of this Rule 21 shall be kept posted in each clubhouse.").

38. Brett Smiley, *Where Major Sports Leagues Stand on Gambling Legislation in the U.S.*, SPORTSHANDLE (Aug. 19, 2017), <https://sportshandle.com/gambling-legislation-laws-united-states-leagues-commissioners/> [<https://perma.cc/96JJ-Y4C5>].

referee Tim Donaghy fed offshore gamblers information about which teams were likely to win, including games that he was officiating.³⁹ In the NFL, the league suspended two stars—Paul Hornung of the Green Bay Packers and Alex Karras of the Detroit Lions—for betting on football games and associating with “known hoodlums.”⁴⁰

Compared to professional athletes, gamblers can more easily induce amateur athletes who have more to gain (e.g., the value of a bribe next to their zero-dollar salaries) and less to lose (e.g., a professional athlete risks millions of dollars whereas amateur athletes play for minimal pay).⁴¹ For instance, a common scheme in college sports involves “point shaving,” which can be easy to accomplish and hard to detect.⁴² A player who shaves points may alter wagering outcomes without affecting the game’s result, helping the scheme to fly under the radar. In basketball, one must only miss enough shots to win by a certain margin, less than the point-spread.⁴³ An abridged list of point shaving scandals includes basketball teams from Boston College,⁴⁴ Tulane University,⁴⁵ and Arizona State University.⁴⁶

Point shaving has even been found in college football. In 2007, players for the University of Toledo were indicted for conspiring with gamblers.⁴⁷ During the 2005

39. See Eden, *supra* note 26.

40. Larry Schwartz, *Hornung, Karras Suspended for Betting on NFL*, ESPN (Nov. 19, 2003), <http://www.espn.com/classic/s/moment010417hornung-karras-betting.html> [https://perma.cc/WKC2-6FZF]. Then-NFL commissioner, Pete Rozelle, describing the incident, said: “No bribes, no game-fixing or point-shaving. The only evidence uncovered in this investigation, which included 52 interviews with players on eight teams, was the bets by the players penalized. All of these bets were on their own teams to win or on other NFL games.” See Tex Maule, *SI Vault: Players Are Not Just People: The NFL Suspends Its ‘Golden Boy,’* SPORTS ILLUSTRATED (May 12, 2015), <https://www.si.com/nfl/2015/05/12/si-vault-paul-hornung-alex-karras-pete-rozelle> [https://perma.cc/2422-NE9S].

41. See Justin Wolfers, *Point Shaving: Corruption in NCAA Basketball*, 96 AM. ECON. REV. 279 (2006), (analyzing point shaving in college basketball). Wolfers’s findings about the prevalence of point shaving in college basketball have been the subject of critique, however, these critiques are largely beyond the scope of this Article. See Richard Borghesi, Rodney Paul & Andy Weinbach, *Totals Markets as Evidence Against Widespread Point Shaving*, 4 J. PREDICTION MKTS. 15, 18–21 (2010) (finding that the prevalence of point shaving in college basketball is likely not widespread).

42. Wolfers, *supra* note 41.

43. *Id.*

44. David Purdum, *‘The Worst Fix Ever,’* ESPN (Oct. 3, 2014), https://www.espn.com/espn/chalk/story/_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal [https://perma.cc/N2Y6-C5SA] (detailing the 1978–79 scandal).

45. Frances Frank Marcus, *8 Indicted in Tulane Scandal; School to Give Up Basketball*, N.Y. TIMES (Apr. 5, 1985), <https://www.nytimes.com/1985/04/05/sports/8-indicted-in-tulane-scandal-school-to-give-up-basketball.html> [https://perma.cc/76SC-4PQC].

46. Stevin (Hedake) Smith, *Confessions of a Point Shaver Former Arizona State Star Hedake Smith Reveals How He and His Accomplices Fixed Basketball Games*, SPORTS ILLUSTRATED (Nov. 9, 1998), <https://vault.si.com/vault/1998/11/09/confessions-of-a-point-shaver-former-arizona-state-star-hedake-smith-reveals-how-he-and-his-accomplices-fixed-basketball-games>.

47. Mike Fish, *Six Ex-Players Charged with Conspiracy*, ESPN (May 6, 2009),

GMAC Bowl, running back Quinton Broussard admitted that he intentionally fumbled the ball in exchange for \$500.⁴⁸

Perhaps the most easily manipulatable events involve individual sports. Due to the lack of collective action issues—as gamblers must only compromise one player—few sports have seen as much match-fixing as boxing.⁴⁹ Allegations include a 2019 event in which Floyd Mayweather Jr.’s opponent seemed to throw the match.⁵⁰ At the 2016 Olympics, officials dismissed referees and judges following evidence of fraud.⁵¹ Then in 2021, Barstool Sports promoted a fight, took bets on that fight, and then watched as one of the boxers, Jose Canseco, allegedly “took a dive.”⁵²

While gambling’s entanglement with boxing is well publicized, it is lesser known that sports such as tennis have experienced similar scandals. Not only have tennis players received lifetime bans in the past two years,⁵³ but the BBC also found potential match-fixing among the top fifty players,⁵⁴ even compromising Wimbledon competitors.⁵⁵ Tipping off investigators, Russian and Italian gamblers bet suspiciously large sums on Martin Vassallo Arguello in his contest against Nikolay Davydenko.⁵⁶ The gamblers favored Arguello *during the match* even as he was being dominated by Davydenko who was known as the superior player.⁵⁷ When

<https://www.espn.com/college-sports/news/story?id=4146980> [https://perma.cc/7QD2-A7GL].

48. Nicholas Piotrowicz, *Former UT Players Sentenced for Point-Shaving*, TOLEDO BLADE (Apr. 1, 2015, 12:53 PM), <https://www.toledoblade.com/local/courts/2015/04/01/UT-players-sentenced-for-point-shaving/stories/20150401066> [https://perma.cc/4LZT-SVNY].

49. Dimitar Ivanov, *Are Boxing Matches Fixed? Why Yes and Why No*, SHORTBOXING, <https://shortboxing.com/are-boxing-matches-fixed-why-yes-and-why-no/> [https://perma.cc/S9UN-VZD4].

50. Fernando Quiles Jr., *Chael Sonnen Says Tenshin Nasukawa ‘Did the Job’ for Floyd Mayweather*, MMA NEWS (Jan. 3, 2019), <https://www.mmanews.com/chael-sonnen-nasukawa-job-mayweather/> [https://perma.cc/AZ5G-CGFL].

51. Ken Belson & Scott Blumenthal, *Dismissal of Rio Boxing Judges Robed in Secrecy*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/sports/olympics/boxing-judges-dismissal-robed-in-secrecy.html> [https://perma.cc/665P-JFNM]; Sean Ingle, *Judges ‘Used Signals’ to Fix Olympic Boxing Bouts, McLaren Report Finds*, GUARDIAN (Sept. 30, 2021, 2:14 PM), <https://www.theguardian.com/sport/2021/sep/30/judges-signals-fix-olympic-boxing-bouts-mclaren-report> [https://perma.cc/P52K-K29X].

52. Matt Schoch, *Barstool Sports Fight Under Investigation After Jose Canseco ‘Took a Dive’*, PLAYMICHIGAN.COM (Mar. 25, 2021), <https://www.playmichigan.com/barstool-sportsbook-controversy-jose-canseco/> [https://perma.cc/Z3DA-LKHX].

53. Youssef Hossam Receives Lifetime Ban for Match-Fixing, REUTERS (May 4, 2020, 11:30 PM), <https://www.reuters.com/article/us-tennis-tennis-hossam-ban/youssef-hossam-receives-lifetime-ban-for-match-fixing-idUSKBN22H07U> [https://perma.cc/3BJJ-AQ8Q].

54. Simon Cox, *Tennis Match Fixing: Evidence of Suspected Match-Fixing Revealed*, BBC SPORT (Jan. 18, 2016), <https://www.bbc.com/sport/tennis/35319202> [https://perma.cc/P7MY-TT99].

55. *Id.*

56. Simon Cox, *The Tennis Files: Have Top Players Been Paid to Lose?*, BBC NEWS (Jan. 18, 2016), <https://www.bbc.com/news/magazine-35325473> [https://perma.cc/5EJH-C55J].

57. *Id.*

Davydenko forfeited in the second set upon claiming a sprained ankle, the gamblers appeared prophetic.⁵⁸

Although gambling may drive a bulk of cheating, players and teams have also broken the rules for the simple motivation of winning. For instance, a trilogy of “gate” scandals like Bountygate,⁵⁹ Spygate,⁶⁰ and Deflategate have overwhelmed the NFL.⁶¹ The first was a secret bounty program in which coaches of the New Orleans Saints rewarded players for injuring opposing players.⁶² Although the operation ended in 2011, the Saints won the Super Bowl in 2010 during (and perhaps due in part to) Bountygate.⁶³ The New England Patriots used brain, as opposed to brawn, by first videotaping their opponents’ hand signals in the Spygate scandal and then, a few years later, using balls inflated below league rules to appease then-quarterback Tom Brady.⁶⁴ After winning the AFC Championship game with deflated balls, the Patriots advanced to win their next game: the 2014 Super Bowl. The Patriots were again in the public’s eye upon the Spygate 2.0 scandal where the team, once again, allegedly videotaped opponents.⁶⁵

Like in the NFL, technology has famously aided cheating in other sports, such as baseball—e.g., the Astros’ championship in 2017 discussed in the Introduction. One year later, the Red Sox won the World Series while also stealing signs via video.⁶⁶

58. *Id.*

59. Jesse Reed, *Reviewing the Complete Timeline of NFL, Saints Bountygate Scandal*, BLEACHER REP. (Dec. 11, 2012), <https://bleacherreport.com/articles/1441646-reviewing-the-complete-timeline-of-nfl-saints-bountygate-scandal> [<https://perma.cc/GQM5-NHE3>].

60. Scott Davis, *Bombshell ESPN Report Says Patriots’ ‘Spygate’ Scandal Was Way Worse Than People Realized*, BUS. INSIDER (Sept. 8, 2015, 10:58 AM), <https://www.businessinsider.com/espn-report-patriots-spygate-scandal-2015-9> [<https://perma.cc/QJM4-G62X>].

61. Joe Nocera, *True Scandal of Deflategate Lies in the N.F.L.’s Behavior*, N.Y. TIMES (Jan. 22, 2016), <https://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html> [<https://perma.cc/YKU3-RH4L>].

62. Reed, *supra* note 59.

63. Ed Werder & Darren Rovell, *Lowered Suspensions for 2 Players*, ESPN (Oct. 9, 2012), https://www.espn.com/nfl/story/_id/8483685/roger-goodell-upholds-suspensions-jonathan-vilma-smith [<https://perma.cc/88CP-YDVJ>]; Derek Estes, *New Orleans Saints’ Super Bowl Victory Forever Tarnished by Bountygate*, BLEACHER REP. (Mar. 2, 2012), <https://bleacherreport.com/articles/1089270-new-orleans-saints-super-bowl-victory-forever-tarnished-by-bountygate> [<https://perma.cc/9Y7J-U75C>].

64. John Branch, *The Deflategate Scientists Unlock Their Lab*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/25/sports/football/deflategate-new-england-patriots-nfl-science.html> [<https://perma.cc/3PLJ-PH6C>]; Mo Brewington, *Detailing the Events That Made Up Patriots’ Spygate Scandal*, EAGLESWIRE: USA TODAY (Jan. 26, 2018, 12:05 AM), <https://theeagleswire.usatoday.com/2018/01/26/spygate-was-an-inside-job/> [<https://perma.cc/3EWA-TT9G>].

65. Ben Volin, *NFL Nearing End to Investigation into Patriots’ Videotaping Incident from December*, BOS. GLOBE (Feb. 26, 2020, 10:30 AM), <https://www.bostonglobe.com/sports/patriots/2020/02/26/nfl-nearing-end-investigation-into-patriots-videotaping-incident-from-december/NeoyPAAezSSFgf5oqEL4OJ/story.html> [<https://perma.cc/DG7B-QBCZ>].

66. Chris Chavez, *Report: Red Sox Illegally Used Reply Room to Steal Signs in 2018*, SPORTS ILLUSTRATED (Jan. 7, 2020), <https://www.si.com/mlb/2020/01/07/boston-red-sox-sign-stealing-allegations-video-replay-room-2018-investigation> [<https://perma.cc/L4AX->

MLB punished the Red Sox by stripping them of a draft pick and banning the operator of their video replay system for one year.⁶⁷ The manager, Alex Cora, was also suspended, but his punishment derived from the Astros' cheating scandal where he had previously worked.⁶⁸

Outside of the United States, cheating in soccer has marred the German Bundesliga,⁶⁹ Italian Serie A (twice), and others.⁷⁰ In the *Calciopoli* scandal, teams colluded with the organization of Italian referees to place certain referees where Juventus, AC Milan, and Lazio benefitted.⁷¹ Although Juventus was relegated in 2006 as punishment, it not only returned to Serie A the next year but also won the division four years later—as well as the next nine championships.⁷² French, Greek, Turkish, and Brazilian clubs have perpetrated similar schemes.⁷³ Whereas gambling motivated the Turkish affair in 2011 resulting in the arrests and convictions of players and team executives⁷⁴—the Greek scandal implicated one of Europe's premier teams,

X6E5].

67. David K. Li, *Red Sox Stripped of Draft Pick over 2018 Sign-Stealing Scandal*, NBC NEWS (Apr. 22, 2020, 5:33 PM), <https://www.nbcnews.com/news/us-news/red-sox-stripped-draft-pick-over-2018-sign-stealing-scandal-n1189881> [https://perma.cc/CE7L-6H4J]; Asher Klein & Raul Martinez, *MLB Releases Report on Red Sox Sign-Stealing Probe, Docks Team a 2020 Draft Pick*, NBC 10 Bos. (Apr. 22, 2020, 5:44 PM), <https://www.nbcboston.com/news/sports/red-sox-sign-stealing-investigation-report/2112107/> [https://perma.cc/V48P-SBUV].

68. *Id.*

69. Axel Falk, *How the Biggest Match-Fixing Scandal in Bundesliga History Changed the German Game Forever*, THESE FOOTBALL TIMES (Apr. 4, 2018), <https://thesefootballtimes.co/2018/04/20/how-the-biggest-match-fixing-scandal-in-bundesliga-history-changed-the-german-game-forever/> [https://perma.cc/EX6E-P8C4].

70. Conor Dowley, *A Decade After Italy's Match-Fixing Scandal, Serie A Is Worse than It Was Before*, SBNATION (July 15, 2016, 11:54 AM), <https://www.sbnation.com/soccer/2016/7/15/12197194/calciopoli-scandal-anniversary-juventus-milan-fiorentina-napoli> [https://perma.cc/3YWB-HZDG].

71. See Hafez, *supra* note 19.

72. *Juventus Clinch Eighth Serie A Title in a Row*, REUTERS (Apr. 20, 2019, 2:06 PM), <https://uk.reuters.com/article/uk-soccer-italy-spa-juv-report/juventus-clinch-eighth-serie-a-title-in-a-row-idUKKCN1RW0JU?edition-redirect=uk> [https://perma.cc/MRU2-SEEB]; Can Erözden, *Juventus Owns Italy, Winning 9 Straight Titles in Row*, AA (July 29, 2020), <https://www.aa.com.tr/en/sports/juventus-owns-italy-winning-9-straight-league-titles-in-row/1925836> [https://perma.cc/4UWX-5AGT].

73. See, e.g., *7 of the Most Infamous Match Fixing Scandals That Shook World Football*, 90 MIN (May 28, 2019), <https://www.90min.com/posts/6378318-7-of-the-most-infamous-match-fixing-scandals-that-shook-world-football> [https://perma.cc/8K9J-BBGS]; Brian Homewood, *Brazilian Referee Admits that He Fixed Matches*, GUARDIAN (Sept. 29, 2005, 9:10 PM), <https://www.theguardian.com/football/2005/sep/30/newstory.sport7> [https://perma.cc/3XEU-VZ7H].

74. Brian Homewood, *Brazilian Referee Admits that He Fixed Matches*, BBC (Sep. 29, 2005, 9:10 PM), <https://www.theguardian.com/football/2005/sep/30/newstory.sport7> [https://perma.cc/Z39P-E6VL]; *Turkey: Fenerbahce Boss Remanded on Match-Fix Charge*, BBC NEWS (July 10, 2011), <https://www.bbc.com/news/world-europe-14100659> [https://perma.cc/5UKJ-AC5G].

Olympiakos F.C., which engaged in “blackmailing and fraud” meant to “absolutely control Greek football’s fate.”⁷⁵

Along this line, cheating stems from national pride. At the 2012 Olympics, boxer Satoshi Shimizu knocked down Magomed Abdulhamidov five times in one round—which should have resulted in Shimizu’s victory—but instead of counting, the referee commanded Abdulhamidov to rise.⁷⁶ When the round ended, the judges declared that the pummeled Abdulhamidov had won in an especially cynical instance of match-fixing.⁷⁷ A report found that the World Series of Boxing received a \$9 million wire to deliver two Olympic gold medals to Abdulhamidov’s home country of Azerbaijan.⁷⁸ Similarly, during the 2002 Olympics, Russian organized crime figure Alimzhan Tokhtahounov allegedly orchestrated a deal with French and Russian officials in figure skating that induced the French judge to award winning scores to the Russian team in pairs figure skating.⁷⁹ The Russian judge returned the favor with a gold medal to the French pair in ice dancing.⁸⁰ Given this long history of cheating, deception, and match fixing, the next Section explains why this is actually the expected state of affairs.

B. The Impetus to Cheat

The leagues lack incentives to catch and expose cheating. Scholars describe it as a catch-22 since leagues derive profit from intrigue—the NFL’s revenue combined with its teams exceeded \$14 billion in 2018—based on the perception that anything may happen within a fair landscape.⁸¹ Beyond the direct revenue earned from ticket sales and television, leagues encounter incentives to ignore cheating in order to guard

75. Graham Wood, *Farcical Ending to Koriopolis Scandal*, AGONA SPORT (Jan. 20, 2019), <https://www.agonasport.com/agonasport-allnews/farcial-ending-to-koriopolis-scandal> [<https://perma.cc/XRA8-63Y9>].

76. Kelefa Sanneh, *Fixing the Olympics? Azerbaijan’s Boxing Scandal*, NEW YORKER (Aug. 2, 2012), <https://www.newyorker.com/sports/sporting-scene/fixing-the-olympics-azerbaijans-boxing-scandal> [<https://perma.cc/E9XF-ZGFR>].

77. *Id.*

78. *Id.*

79. Holden & Rodenberg, *supra* note 34, at 459–60.

80. See Oliver Burkeman, ‘Russian Mafia Kingpin’ Accused of Fixing Olympic Skating Result, GUARDIAN (July 31, 2002, 8:57 PM), <https://www.theguardian.com/world/2002/aug/01/russia.sport> [<https://perma.cc/JP89-NPDB>]. The 2002 figure skating scandal would mark the first time that Olympic officials gave duplicate gold medals, awarding the Canadian pair a gold medal after French judge, Marie Reine Le Gougne, acknowledged the arrangement. Ironically, a Canadian pair lost out on a medal in the ice dancing competition, finishing fourth after the Russian judge placed the French pair first. *Id.*

81. See Glenn Knowles, Keith Sherony & Mike Hauptert, *The Demand for Major League Baseball: A Test of the Uncertainty of Outcome Hypothesis*, 36 AM. ECONOMIST 72 (1992); see also E. Woodrow Eckard, *The Uncertainty-of-Outcome Hypothesis and the Industrial Organization of Sports Leagues: Evidence from U.S. College Football*, 18 J. SPORTS ECON. 298, 299 (2017) (explaining that the uncertainty of outcome hypothesis argues that sports fans “value contests with uncertain outcomes,” and thus prefer that leagues be competitive as opposed to dominated by a single team); Holden & Rodenberg, *supra* note 34, at 461 (“The commercial viability of sport is at least somewhat dependent on the uncertainty of outcome.”).

their ancillary industries worth billions of dollars, including video games, trading cards, and apparel.⁸² By effect, the parties who often unearth scandals are Nevada sportsbooks, inspiring observers to question whether leagues endeavor to protect their games' integrity or whether they hope to protect the *appearance* of integrity.⁸³

Further, a league may actually have good reason to manipulate games in favor of certain players or teams. Consider disgraced referee Tim Donaghy who provided support for a longstanding rumor that the NBA employs certain referees to manipulate important games.⁸⁴ A well-known allegation is Game 6 of the 2002 series between the Los Angeles Lakers and Sacramento Kings in which the NBA's "fixer," referee Dick Bavetta, helped to extend the series to seven games after awarding the Lakers twenty-seven free throws in the fourth quarter alone based on dubious foul calls.⁸⁵ The quality of the game's officiating attracted the FBI's attention.⁸⁶

Perhaps no event better highlights the leagues' misaligned incentives than the 1998 MLB season.⁸⁷ After baseball's popularity waned due to the players' strike in 1994, it received a jolt of excitement from the home run explosion⁸⁸—though rumors

82. See Terry Lefton, *NFL: Another Record Year for Merchandise*, N.Y. BUS. J. (Feb. 15, 2018, 2:48 PM), <https://www.bizjournals.com/newyork/news/2018/02/15/nfl-another-record-year-for-merchandise.html> [<https://perma.cc/J8NZ-5QUQ>] (noting that even in a year where the NFL saw injuries shorten the season for several star players, various merchandisers saw record years in terms of sales); Christina Gough, *Total Revenue of All National Football League Teams from 2001 to 2020*, STATISTA (Sep. 8, 2021), <https://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/> [<https://perma.cc/9TJL-H7YJ>]; TJ Mathewson, *TV is Biggest Driver in Global Sport League Revenue*, GLOB. SPORT MATTERS (Mar. 7, 2019), <https://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue/> [<https://perma.cc/C3KN-2PF7>] (describing the revenues of various professional leagues).

83. See *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H.R. Comm. on the Judiciary*, 115th Cong., 5–6 (2018) (testimony of Becky Harris, Chairwoman of the Nevada Gaming Control Board) <https://docs.house.gov/meetings/JU/JU08/20180927/108721/HHRG-115-JU08-Wstate-HarrisB-20180927.pdf> [<https://perma.cc/JCP2-NJ3K>] (noting that Las Vegas sportsbooks and consultants identified suspicious betting involving both Toledo football and basketball games and at Arizona State University).

84. John Marzulli, *Ex-referee Tim Donaghy Blows Whistle on NBA Dirty Secrets*, N.Y. DAILY NEWS (June 11, 2008, 11:31 AM), <https://www.nydailynews.com/sports/basketball/ex-referee-tim-donaghy-blows-whistle-nba-dirty-secrets-article-1.293192> [<https://perma.cc/R53D-8G89>].

85. See Greg Cote, *Disgraced NBA Ref Opens Up About Game-Fixing Scandal*, GUAM DAILY POST (Oct. 30, 2019), https://www.postguam.com/sports/nation/disgraced-nba-ref-opens-up-about-game-fixing-scandal/article_6d8df246-fa1d-11e9-bf9c-03f2ed4ba72b.html [<https://perma.cc/XAQ9-ZZGJ>] (discussing an FBI investigation into the 2002 Western Conference finals, which Bavetta refereed).

86. Chris Sheridan, *Federal Agents Asking Questions About Bavetta*, ESPN (June 12, 2008), <https://www.espn.com/nba/news/story?id=3439554> [<https://perma.cc/47WH-EWJS>].

87. See Jaime Weinman, *How Steroids Saved Baseball*, MACLEAN'S (Feb. 23, 2009), <https://www.macleans.ca/general/how-steroids-saved-baseball/> [<https://perma.cc/K3TB-6EZM>] (describing the excitement of increased home runs in baseball).

88. Joe Distelheim, *The Year That Saved-and Stained-Baseball*, HARDBALL TIMES (May 3, 2018), <https://tbt.fangraphs.com/the-year-that-saved-and-stained-baseball/> [<https://perma.cc/47WH-EWJS>].

swirled that the record setters were fueled by steroids.⁸⁹ Due to evidence of cheating among baseball's leading hitters (and pitchers), MLB implemented a testing program targeting *only nonunionized minor league players* in 2001.⁹⁰ And this occurred only after Congress took an interest in the scandal.⁹¹

Given this landscape, it may come as little surprise that aggrieved fans, spectators, and gamblers have sought to sue leagues and teams. But it may come as a greater surprise that the law has largely insulated the leagues from liability. This is despite the sudden popularity of DFS and legalized sports gambling which, as we explain next, has fundamentally altered sports.

II. GAMBLING AND DAILY FANTASY SPORTS

In the past few years, legalized sports gambling has not only grown exponentially but also received a warm embrace from the professional sports leagues and their respective teams.⁹² Whereas federal and state laws, as well as the leagues, had long banned sports wagering due to its “immoral” qualities and potential to destabilize sports,⁹³ this landscape changed in the wake of *Murphy v. National Collegiate Athletic Association*,⁹⁴ which enabled states to legalize sports gambling.⁹⁵ *Murphy* not only propelled gambling's popularity but also inspired the leagues to further existing partnerships with DFS companies, like DraftKings and FanDuel, as well as connect with bookmakers.⁹⁶ Noteworthy is that despite the league's modern entanglement with legal wagering, rarely if ever have gamblers, spectators, or fans redressed injuries caused by cheating or match fixing.⁹⁷ This Part traces the legal

perma.cc/4KRP-PN25].

89. See Zachary D. Rymer, *Full Timeline of MLB's Failed Attempts to Rid the Game of PEDs*, BLEACHER REP. (June 10, 2013), <https://bleacherreport.com/articles/1667581-full-timeline-of-mlbs-failed-attempts-to-rid-the-game-of-peds> [<https://perma.cc/466W-XETN>].

90. *Id.*

91. Jeff Barker, *Scandals Put the NFL in Congress' Crosshairs*, BALT. SUN (Sept. 21, 2014, 11:54 PM), <https://www.baltimoresun.com/business/bs-bz-congress-nfl-tax-exempt-20140919-story.html> [<https://perma.cc/GL88-KTJC>].

92. Andrew Beaton & Katherine Sayre, *The NFL Keeps Warming Up to Gambling*, WALL ST. J. (Feb. 21, 2020, 3:57 PM), <https://www.wsj.com/articles/the-nfl-keeps-warming-up-to-gambling-11582318648> [<https://perma.cc/CK82-YWPC>].

93. See Shaheen Borna & James Lowry, *Gambling and Speculation*, 6 J. BUS. ETHICS 219, 222–23 (1987) (explaining the historical association between morality and gambling).

94. 138 S. Ct. 1461 (2018); see Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 498–509 (2020) (noting that more than forty states introduced or passed some form of legislation to legalize sports wagering within the first two years after the *Murphy* decision).

95. For an overview of sports gambling regulation, see John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575 (2020); see also Holden & Edelman, *supra* note 29.

96. David Purdum, *Inside How Sports Betting Went Mainstream*, ESPN (Aug. 9, 2018), https://www.espn.com/chalk/story/_id/24310393/gambling-how-media-daily-fantasy-new-thinking-us-pro-sports-commissioners-helped-sports-betting-become-accepted [<https://perma.cc/U2QH-JZRD>].

97. Despite efforts by some, most notably former New York Attorney General Eric Schneiderman, to recover money for consumers from DFS companies who engaged in

framework of sports betting in a historical setting, reviews the obstacles confronting gamblers, fans, and spectators who endeavor to remedy cheating, and asserts the need for reform in light of *Olson*.

A. The History of (II) Legal Sports Gambling

The explosion of legal sports gambling is attributable to the Supreme Court's decision in *Murphy* in 2018, which opened the floodgates. Although prior to 1992 states wielded power to legalize sports betting, only a handful did—the most notable being Nevada.⁹⁸ Based on fears that gambling would destabilize sports, the professional leagues and NCAA lobbied Congress to prevent states from authorizing wagering on “their” games.⁹⁹ This paid off with passage of the Professional and Amateur Sports Protection Act (PASPA).¹⁰⁰ While PASPA lacked a *per se* ban, it

deceptive advertising, this money, even when recovered, appears to very rarely reach consumers. See Joe Drape, *New York Wants Fantasy Customers Repaid*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/02/sports/revised-complaint-seeks-return-of-money-bet-on-fantasy-sports.html?searchResultPosition=11> [<https://perma.cc/4STJ-73GA>]. Both companies implicated in the Schneiderman's complaints settled for \$6 million each, but it is unclear if any of that money was used to repay consumers. See Joe Drape, *DraftKings and FanDuel to Pay \$6 Million Each to Settle New York Claims*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/sports/draftkings-and-fanduel-to-pay-6-million-each-to-settle-new-york-claims.html> [<https://perma.cc/34LQ-KSH7>]; Alexander F. Tilton, *Mayer v. Belichick: “Spygate” Scandal Is Not the Court’s Concern*, 18 SPORTS LAW. J. 341, 344–49 (2011) (describing historical efforts by fans and spectators to recover against sporting events and teams following incidents that resulted in fans not receiving the sporting event they expected).

98. Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 163–64 (2010) (noting that Nevada operated casino-style gaming, whereas, Oregon and Delaware operated National Football League lottery games, and Montana operated sports betting pools on football and stock car racing).

99. See Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 U. NEV. L.V. GAMING L.J. 281, 301 (2011) (describing sports league efforts to ban sports wagering). The proposition that the sports leagues own the games, such that they have a right to restrict what a third party can do with information generated from a sporting event, is unsupported by the First Amendment or intellectual property law. See Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997) (“We believe that the lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection.”); see also C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 823–24 (8th Cir. 2007) (“The Court in *Gionfriddo* concluded that the ‘recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball’s website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.’ We find these views persuasive.” (alteration in original) (quoting *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001))); John T. Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31 (2019).

100. 28 U.S.C. §§ 3701–3704 (1992).

froze the sports gambling landscape in place as if it was 1992, forbidding states from legalizing the activity if they had not already.¹⁰¹

But in 2011, New Jersey challenged PASPA by holding a nonbinding referendum asking voters whether they supported sports wagering to prop up the state's struggling casinos and horse racing tracks.¹⁰² The ballot measure passed by a two-to-one margin.¹⁰³ Shortly afterwards, New Jersey enacted a bill allowing wagering on professional and most college sports in a direct challenge to PASPA.¹⁰⁴ But before New Jersey could launch sports betting, the four major leagues and the NCAA sued Governor Chris Christie to enforce PASPA.¹⁰⁵ The district court entered a permanent injunction in favor of the leagues,¹⁰⁶ which the U.S. Court of Appeals for the Third Circuit upheld.¹⁰⁷

Undeterred, New Jersey returned in 2014 with a modified version of its bill.¹⁰⁸ The leagues elected again to enforce PASPA but as the second lawsuit proceeded, a notable shift had occurred in the acceptance of sports gambling animated by the emergence of DFS.¹⁰⁹ In 2018, when New Jersey petitioned the Supreme Court for the second time,¹¹⁰ the *Murphy* Court held that PASPA unconstitutionally commandeered states into maintaining their bans on sports gambling.¹¹¹ Justice Alito wrote that "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own."¹¹² In the first two years since *Murphy*, nearly every state has introduced legislation to legalize a form of sports gambling—more than twenty states have successfully done so.¹¹³ And as states legalize sports

101. John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. STATE U. L. REV. 329, 330 (2019).

102. See MaryAnn Spoto, *Sports Betting Backed by N.J. Voters*, NJ.COM (Nov. 9, 2011, 2:10 AM), https://www.nj.com/news/2011/11/nj_residents_vote_on_legalizin.html [<https://perma.cc/ZSQ3-L2TU>].

103. See *id.*

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

105. Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 553 (D.N.J. 2013); 28 U.S.C. § 3703 (1992) ("A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.").

106. *Nat'l Collegiate Athletic Ass'n*, 926 F. Supp. 2d at 579 (holding "that PASPA is a constitutional exercise of Congress' powers pursuant to the Commerce Clause. PASPA does not violate the Tenth Amendment, Due Process Clause or Equal Protection Principles; nor does it violate the Equal Footing Doctrine").

107. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).

108. See *Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014).

109. *Nat'l Collegiate Athletic Ass'n*, 61 F. Supp. 3d at 495; John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 125–32 (2020) (describing the emergence of daily fantasy sports).

110. See Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 3 (2017).

111. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018).

112. *Id.* at 1484–85.

113. See *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP.,

gambling, and as technology firms pioneer ways of capitalizing on this market, the acceptance of sports gambling has evolved along with its offshoot, DFS.

B. The Rise of DFS and Legal Sports Wagering

DFS has substantially altered the tapestry of sports and gambling.¹¹⁴ While gambling has played a role in U.S. culture predating the Revolutionary War—for instance, horse racing has maintained a constant presence on the continent since the mid-1600s¹¹⁵—most forms of gambling were considered taboo, immoral, and illegal until relatively recently.¹¹⁶ Substantially altering this landscape is the rise of DraftKings and FanDuel, which have sought to capitalize on America’s love for fantasy sports.

To explain DFS, it originated from fantasy sports which date back to the 1920s as a tabletop game by the Ethan Allen furniture company.¹¹⁷ The modern iteration of fantasy sports, though, is associated with former *New York Times* editor Daniel Okrent and his creation of the Rotisserie Baseball League.¹¹⁸ Fantasy sports were historically contests played amongst friends where each participant would select real-world athletes to compose a fictional team.¹¹⁹ The teams would then compete against each other in predetermined statistical categories.¹²⁰ While early fantasy contests were often more about the comradery than a prize, entry fees have long been associated with the activity.¹²¹ Fantasy sports were perceived for decades as a pastime for avid fans who, in many instances, enjoyed low-stakes gambling; after all, it is common for a league’s victor to take the “pot.”¹²²

<https://www.legalsportsreport.com/sportsbetting-bill-tracker/>
KFBVX].

[<https://perma.cc/X6G7-KFBVX>].

114. John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, 15 ENT. & SPORTS L.J. 1, 3 (2017).

115. Holden, *supra* note 95, at 596.

116. “Waves of legal gambling” is a phrase coined by gaming law scholar I. Nelson Rose, who has documented three distinct periods (or waves) of gambling policy in the United States. See generally I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361 (2010); Holden & Edelman, *supra* note 29, at 6.

117. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4 (2012).

118. Okrent created the Rotisserie League after learning about a baseball simulation game created by University of Michigan professor Bill Gamson. The Rotisserie League is named after the former *La Rotisserie Francaise* restaurant where Okrent and friends would gather each year and select their teams. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4–7 (2012).

119. *Id.* at 7.

120. *Id.* at 7–8.

121. See *id.* (describing the first Rotisserie League—one of the first fantasy contests—as having an entry fee of \$260).

122. *Id.*

This landscape inspired DraftKings and FanDuel to seize on fantasy sport's popularity, spawning a burgeoning DFS industry by 2014.¹²³ No longer are fantasy sports played primarily between close friends who convene for entire seasons, as DFS has condensed seasons into a single day or even hours.¹²⁴ Making DFS especially salient beyond its scale—surpassing a billion dollars—is its intimate relationship with sports leagues that had long rejected the threat of sports wagering.¹²⁵ Consider that each of the U.S. leagues have officially partnered with DraftKings and FanDuel in hopes of capitalizing on the revenue flowing through DFS markets. Emphasizing DFS's effects on the business and *culture* of gambling, scholars credit DFS's popularity with helping to inspire a societal change of consciousness about sports gambling resulting in *Murphy*.¹²⁶

Today, DFS is neither a minor nor uncontroversial market. Not only have DFS companies attracted hundreds of millions of dollars in outside investments—driven by the \$205.9 million spent on advertising in less than a year¹²⁷—but also the attention of state attorneys general (“AGs”) who have grown wary of DFS's similarities with illegal gambling.¹²⁸ Despite the belief of some AGs that DFS violates their state laws, DraftKings and FanDuel have suffered few long-term consequences.¹²⁹

Due to this momentum, the leagues have gone from partnering with DFS companies to establishing formal ventures with sportsbooks—the very actors who the leagues had long rejected.¹³⁰ While some of these partnerships began when a sportsbook was previously a DFS operator, it is notable that some leagues have taken equity stakes in those companies.¹³¹ Both MLB and the NBA held equity positions

123. Fantasy sports were viewed as such a complimentary product for fans that the Major League Baseball Players' Association even lobbied Congress for them to be exempted from federal anti-gambling legislation, while endorsing the statute more broadly. See John T. Holden, *The Unlawful Internet Gambling Enforcement Act and the Exemption for Fantasy Sports*, 28 J. LEGAL ASPECTS SPORT 97, 104–05 (2018); Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 120–27 (2016).

124. Edelman, *supra* note 123.

125. *Id.*

126. See Holden et al., *supra* note 109, at 125–35 (describing the rise of the DFS industry).

127. Ian Casselberry, *DraftKings and FanDuel Have Spent \$206 Million on Ads So Far This Year*, AWFUL ANNOUNCING (Oct. 10, 2015), <https://awfulannouncing.com/2015/draftkings-and-fanduel-have-spent-206-million-on-ads-so-far-this-year.html> [<https://perma.cc/H2FY-P7Z4>].

128. See Holden, *supra* note 95, at 585–87 (describing the response of various attorneys general to DFS contests and finding that the contests violated state gambling laws).

129. DraftKings and FanDuel did agree to a settlement with the New York Attorney General for \$6 million each in association with claims that the companies had engaged in deceptive advertising. See Holden et al., *supra* note 109, at 135.

130. See *US Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting-deals/> [<https://perma.cc/47MU-3U7C>] (listing partnership agreements between sports leagues and teams and various gambling operators).

131. See, e.g., John Lombardo, *NBA Signs Four-Year Deal with FanDuel that Includes Equity Stake in Fantasy Company*, SPORTS BUS. J. (Nov. 12, 2014),

in DraftKings and FanDuel, respectively, with at least MLB maintaining their equity through the transition from a DFS company to full-fledged sports betting operator.¹³² While some leagues have since divested themselves of ownership shares in gambling operators,¹³³ others like the NHL have sought to gain new equity stakes in growing sport betting operators such as the Australian-founded PointsBet.¹³⁴ Even where leagues have not taken an ownership position in gambling operators themselves, the NFL and several prominent league owners, like the Dallas Mavericks' Mark Cuban, have acquired stakes in gambling data providers.¹³⁵ In fact, some teams may even introduce their own sportsbooks from inside their stadiums.¹³⁶

The point is that DFS reflects society's new attitude about gambling in an era without PASPA.¹³⁷ However, no matter how deeply entwined the leagues become with gambling, it is notable that they have largely insulated themselves from liability even after instances of cheating. Given the rise of legal wagering and DFS, this insulation may no longer make sense.

C. Aggrieved Fans and Gamblers, and Litigation

This Section explains the legal landscape in which gamblers and third parties struggle to show reliance on cheating or privity to the event, depriving them of a legal remedy. It then casts doubt on whether leagues like MLB and teams such as the Astros should continue to enjoy *de facto* immunity for acts of cheating in light of *Olson*.¹³⁸ While *Olson* was unremarkable in its fidelity to precedent—it held that third parties like aggrieved gamblers cannot show reliance or privity¹³⁹—the novelty is that this case sprung from users of DraftKings who could directly tie MLB's profitability to bets placed on compromised games. To explain the saliency of *Olson*,

<https://www.sportsbusinessjournal.com/Daily/Issues/2014/11/12/Marketing-and-Sponsorship/NBA-FanDuel.aspx> [https://perma.cc/W4UJ-S82Z].

132. See Dustin Gouker, *So Do NBA, MLB and NHL Now Own Parts of Gambling Companies?*, LEGAL SPORTS REP. (May 24, 2018), <https://www.legalsportsreport.com/20715/nba-mlb-nhl-relationship-with-fanduel-draftkings/> [https://perma.cc/MWT4-HP4A] (noting the relationships between daily fantasy operators, turned gambling operators, and professional sports leagues).

133. See Holden & Schuster, *supra* note 99, at 33 n.3.

134. See, e.g., *NHL Takes Equity Stake in PointsBet in New Deal*, NAT'L POST (Feb. 10, 2021), <https://nationalpost.com/pmn/sports-pmn/nhl-takes-equity-stake-in-pointsbet-in-new-deal> [https://perma.cc/U2KN-BH7U] (noting that the NHL acquired an equity stake in gambling operator PointsBet).

135. Eben Novy-Williams, *NFL Takes First Major Gambling Step with Sportradar Data Deal*, BLOOMBERG QUINT (Aug. 12, 2019, 10:10 PM), <https://www.bloombergquint.com/onweb/nfl-takes-first-major-gambling-step-with-sportradar-data-deal> [https://perma.cc/7DHW-P5WC].

136. See Chris Altruda, *Texas Bill Would Allow Pro Teams to Be Licensed Sportsbook Operators*, SPORTS HANDLE (Feb. 23, 2021), <https://sportshandle.com/texas-sports-betting-bill-ballot-question/> [https://perma.cc/32VZ-ZNAX] (noting a bill in the Texas legislature that would allow professional sports teams in Texas to be licensed sports betting operators).

137. See Holden, *supra* note 95, at 587.

138. *Olson v. Major League Baseball*, 447 F. Supp. 3d 174 (S.D.N.Y. 2020).

139. *Id.*

the following discussion traces how leagues have long relied on arguments of privity and reliance to evade liability from cases brought by fans and gamblers in the wake of cheating, match-fixing, and similar scandals.

1. Reliance

To prove fraud and qualify for relief, the defrauded party must show that the fraudster intentionally misrepresented or omitted some material fact and that the defrauded party detrimentally relied on such mistruths or lies.¹⁴⁰ This element poses a significant problem for gamblers.

In *Olson*, discussed in the Introduction, the district court ruled that the plaintiffs who had lost money wagering against the Astros—who were unaware of the team’s cheating—lacked reliance on any affirmative statements by MLB promising gamblers an environment free of cheating.¹⁴¹ Without such misstatements inducing gamblers to bet on the Astros, the court held that the aggrieved gamblers’ presumption of a fair landscape was unwarranted.¹⁴²

In a similar case, plaintiffs who lost money playing video gambling machines while aboard a cruise ship sought to sue the gambling operator in a class action.¹⁴³ The gambling machines were each based on a physical game such as poker—e.g., video poker—but the odds of winning on the video machines were worse than the counterpart games; this defrauded the gamblers, as they claimed, because they assumed the odds of winning equated to the actual game.¹⁴⁴ The court rejected the

140. See generally *Keenan v. D.H. Blair & Co.*, 838 F. Supp. 82, 85 (S.D.N.Y. 1993) (“Plaintiffs’ fraud claims are premised upon section 10(b) of the 1934 Act and Rule 10b–5 promulgated thereunder and upon common law fraud principles. A section 10(b) claim consists of the following elements: (1) defendant’s misrepresentation or omission of a material fact in connection with the purchase or sale of a security; (2) plaintiff’s detrimental reliance upon the defendant’s misrepresentation or omission; (3) scienter, defined as the intent to deceive, manipulative, or defraud; and (4) employment of the mails, an instrumentality or interstate commerce, or a national securities exchange in furtherance of the fraud.”).

141. *Olson*, 447 F. Supp. 3d at 179 (“A predicate of plaintiffs’ reliance theory is thus that defendants made a misrepresentation about fantasy baseball itself, and the absence of such a misrepresentation was thus important to the Court’s conclusion that the FAC did not, and could not, allege the reliance necessary to support their fraud or negligent misrepresentation claims. Manfred’s potential misrepresentation about the Yankees thus does nothing to resolve the ultimate deficiency the Court found in plaintiffs’ initial complaint—a failure to allege a misrepresentation about fantasy baseball that might render plausible their theory of reliance.”).

142. *Id.*

143. *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004).

144. *Id.* at 659–60 (“The Class Representatives’ central claim is that the Casinos have engaged in ‘a course of fraudulent and misleading acts and omissions intended to induce people to play their video poker and electronic slot machines based on a false belief concerning how those machines actually operate, as well as the extent to which there is actually an opportunity to win on any given play.’ They argue that the Casinos: ‘have encouraged the public to perceive electronic gambling devices as true games of chance in which each individual play of the game is subject to determinable odds of winning; that the odds are the same on each individual play of the game; that the risk and the rules by which the machines operate do not vary among individual plays of the game’”).

class because the plaintiffs failed to show reliance: even though one might implicitly assume fair odds, almost all of the plaintiffs had not actually relied on any specific statements suggesting the odds presented a reasonable chance of winning.¹⁴⁵ Notably, the plaintiffs sought to plead a theory based on reliance on prices, yet the district court rejected this argument as existing exclusively in securities law.¹⁴⁶

Furthermore, one of the world's best poker players, Phil Ivey, lied to the Borgata Casino that he required a certain type of cards and shuffling instrument due to his superstitious nature. The items had actually enabled an edge-sorting scam.¹⁴⁷ Ivey won millions.¹⁴⁸ The court rejected the Borgata's claim in ruling that the casino was unable to show reliance.¹⁴⁹ Even though Ivey had deceived the Borgata, the Borgata could have chosen whether or not to provide Ivey with the items—to the court, the casino had not justifiably relied on Ivey's statements. Akin to lack of reliance, lack of privity has caused courts to dismiss lawsuits by third parties.

2. Privity

Before addressing gamblers, we consider how third parties have long struggled to establish a legal relationship with cheating in sports due to a lack of privity.¹⁵⁰ After Mike Tyson was disqualified for infamously biting off a piece of Evander Holyfield's ear, boxing spectators sued for breach of contract because the fight had failed to end in a knockout or decision.¹⁵¹ The New York court held, however, that the plaintiffs

145. *Id.* at 667–68 (finding no reliance).

146. *See id.* at 666 (“The shortcut of a presumption of reliance typically has been applied in cases involving securities Although the Class Representatives urge us to follow the analysis of these securities cases, their claims are best characterized as either affirmative misrepresentations or ‘mixed claims’—claims that, in any event, would not be entitled to the presumption.”).

147. *Marina Dist. Dev. Co., LLC v. Ivey*, 216 F. Supp. 3d 426, 428 (D.N.J. 2016) (describing the scheme).

148. *Id.* at 430.

149. *Id.* at 438–39 (“To meet the elements of fraud, Borgata must show that Ivey and Sun made a material misrepresentation and that Borgata relied upon that misrepresentation to its detriment. Ivey and Sun’s five specific requests to Borgata, and their instruction to the dealer to turn the cards a certain way, did not violate any rules or regulations. Ivey and Sun did not need to claim superstition to make their requests and card turning instructions permissible—they already were. If Ivey and Sun had simply made their requests without explanation, Borgata was still empowered to grant or deny those requests. That Borgata chose to believe that Ivey and Sun were superstitions does not amount to detrimental reliance, when no explanation at all could have resulted in the same course of events.” (footnote omitted)).

150. *See, e.g., Castillo v. Tyson*, 268 A.D.2d 336, 336–37 (N.Y. App. Div. 2000) (noting the plaintiff sued after alleging they were deprived of a “legitimate heavyweight title fight.”); *see also* Yoojung Rhee, Simon A. Brandon-Lai & John T. Holden, *Aggrieved Fans, Consumer Demand & Another Deflategate Lawsuit*, SPORTS LITIG. ALERT (Apr. 15, 2016), <https://sportslitigationalert.com/aggrieved-fans-consumer-demand-another-deflategate-lawsuit> [https://perma.cc/8CTL-Q463] (describing the *Castillo*, *Bowers*, and *Mayer* cases).

151. *See* Brian A. Rosenblatt, *I Know, It’s Only Rock and Roll, but Did They Like It?: An Assessment of Causes of Action Concerning the Disappointment of Subjective Consumer Expectations Within the Live Performance Industry*, 13 UCLA ENT. L. REV. 33, 47 (2005).

were not in privity with the defendants, and that the rules of boxing allow for disqualification such that a fan might reasonably expect it to occur.¹⁵² The New York court further rejected the argument that plaintiffs were third-party beneficiaries.¹⁵³ A disqualification is among the range of possibilities for a fight's outcome, but the court held that "there can be no breach of warranty claim absent privity of contract between plaintiffs and defendants."¹⁵⁴

Courts have even denied recovery when leagues have acknowledged that teams cheated.¹⁵⁵ For example, fans initiated a failed lawsuit in 2016 against the NFL after commissioner Roger Goodell concluded that the New England Patriots conspired to use deflated footballs in violation of league rules.¹⁵⁶ In another scandal involving the Patriots, a season ticket holder of the New York Jets alleged nine claims springing from a game in which the Patriots defeated the Jets after impermissibly videotaping the Jets' signals.¹⁵⁷ The U.S. Third Circuit Court of Appeals—while noting that it did not condone the Patriots' actions—rejected the plaintiff's \$61 million lawsuit because the plaintiffs paid to see a game, which was sufficient to satisfy the contract contained within a ticket.¹⁵⁸ The Third Circuit Court of Appeals noted that, while the case presented novel legal issues, the plaintiff received what he had paid for: admission to a game.¹⁵⁹ The complaint failed to "establish a cognizable right, interest, or injury" that could have been provided by the justice system, since he had received what he was entitled.¹⁶⁰

Given the challenges of proving privity, it should be mentioned that aggrieved gamblers have attempted to navigate around this obstacle by suing those who had actually taken their money rather than the leagues. These lawsuits have notably targeted operators of fantasy sports and DFS companies in hopes of recovering lost bets or "entry fees." But as this discussion explains, the law's hostility to wagering is neatly illustrated by gambling loss recovery statutes, which disgorge victorious gamblers of their "winnings" (as opposed to entry fees) and repatriates the money with the losing party. The purpose has historically been to discourage gambling,¹⁶¹

152. *Castillo*, 268 A.D.2d at 337.

153. *Id.*

154. *Id.*

155. See A.J. Perez, *Federal Judge Calls Patriots Fans' Deflategate Lawsuit 'Plainly Without Merit'*, USA TODAY (Apr. 23, 2016), <https://www.usatoday.com/story/sports/nfl/patriots/2016/04/23/judge-calls-patriots-fans-deflategate-lawsuit-plainly-without-merit/83449852/> [<https://perma.cc/2VUT-NJ9R>] (noting a lawsuit seeking an injunction against the NFL imposing a penalty against the New England Patriots for deflating footballs was without merit).

156. Associated Press, *Patriots Fans Sue NFL in Effort to Get First-Round Pick Back*, ESPN (Apr. 6, 2016), https://www.espn.com/nfl/story/_/id/15145235/new-england-patriots-fans-sue-nfl-get-back-first-round-pick-lost-deflategate [<https://perma.cc/77QJ-FAJ6>].

157. *Mayer v. Belichick*, 605 F.3d 223, 225 (3d Cir. 2010).

158. *Id.*

159. *Id.* at 230–31.

160. *Id.* at 232.

161. See generally Nick Chappell, *State Laws on Ability to Recover Gambling Losses*, LET'S GAMBLE USA (Jan. 13, 2019), <https://www.letsgambleusa.com/state-laws-on-ability-to-recover-gambling-losses/> [<https://perma.cc/S85Q-U6NB>] (noting states that recognize the right to recover gambling losses); see also Joseph Kelly, *Caught in the Intersection Between*

as recovery statutes have assisted persons in avoiding their wagering losses as a matter of public policy since at least 1710, when gambling was prohibited.¹⁶² But since forty-eight states have legalized some form of gambling, gamblers will struggle to cancel their debts.¹⁶³

For example, in 2006, Charles Humphrey, a prominent lawyer and former professional poker player, unsuccessfully sued Viacom, CBS, and ESPN, which offered pay-to-play fantasy sports.¹⁶⁴ The U.S. district court ruled that fantasy sports leagues lack key elements of wagering under New Jersey's statute, remarking that entry fees and prizes were, rather than bets, tantamount to "bridge tournaments, local and state rodeos or fair contests . . . literary or essay competitions . . . livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like."¹⁶⁵

Humphrey would not reflect the last unsuccessful attempt of fantasy sports losers.¹⁶⁶ Fans sought recovery against FanDuel and Patrick Kaiser, who operated a website that funneled users to FanDuel.¹⁶⁷ The plaintiffs alleged, since the contests entailed illegal gambling, that they were entitled to a remedy under Illinois' gambling loss recovery statute.¹⁶⁸ Akin to the *Humphrey* court, the court held that FanDuel and Kaiser were facilitators of the plaintiff's gambling, but neither constituted winners *per se* despite their commissions.¹⁶⁹

In a notable development, rumors circulated in 2015 on message boards that something akin to insider trading was occurring in DFS.¹⁷⁰ As it turned out,

Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States, 5 CHAP. L. REV. 87, 87–88 (2002) (describing the Statute of Anne, which allowed bettors to recover gambling losses).

162. Only Utah and Hawaii have no forms of legal gambling (including no lotteries). See Beau Thompson, *Internet Gambling*, 2 N.C. J.L. & TECH. 81, 82 (2001); Michael Martinez & Kyung Lah, 'I am Not a Sore Loser,' Says Gambler Suing Vegas Casino After Losing \$500K, CNN (Mar. 7, 2014), <https://www.cnn.com/2014/03/06/us/california-drunken-gambler-las-vegas-casino/index.html> [<https://perma.cc/REX9-W9ER>] (noting the case of Mark A. Johnston, a California resident, who incurred a \$500,000 gambling debt in Las Vegas, which he claims occurred after the casino served him so much alcohol that he was "blackout" drunk).

163. See Kelly, *supra* note 161, at 88 (noting that enforcement of gambling debts in the United States occurs under three scenarios: (1) in-state enforcement when both the gambler and creditor are in the same state, (2) sue in the state where the gaming facility is located and seek enforcement in the sister-state where the gambler-debtor is located, or (3) sue the gambler in the state they are domiciled).

164. *Humphrey v. Viacom*, No. 06–2768 (DMC), 2007 WL 1797648, at *4, *7 (D.N.J. June 20, 2007) (noting that the complaint lacked ascertainable losers, and "the payment of an entry fee to participate in a fantasy sports league is not wagering, betting or staking money").

165. *Id.* at *7 (quoting *State v. Am. Holiday Ass'n*, 727 P.2d 807, 809, 812 (Ariz. 1986)).

166. See Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 7 n.10 (2015) (citing to *Langone v. Kaiser* as a gambling loss recovery case involving DFS).

167. *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587, at *1 (N.D. Ill. Oct. 9, 2013).

168. *Id.*

169. *Id.* at *6.

170. John T. Holden, Will F. Green & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECON. 8, 10 (2017).

employees of FanDuel and DraftKings had—upon accessing their respective company’s proprietary information—bet on each other’s sites and *won* significant amounts.¹⁷¹ Despite the appearance of impropriety, a third-party review of a FanDuel employee who won \$350,000 found no evidence of wrongdoing, offering cover to all parties.¹⁷² However, casting doubt on whether gamblers should continue to lack redress is *Olson*.

3. The Importance of *Olson*

Olson represents the near-perfect illustration of the need to reconsider whether gamblers deserve a remedy in light of modern developments.¹⁷³ Kristopher Olson sued MLB and the Houston Astros alleging that he and similar actors were defrauded.¹⁷⁴ The plaintiffs claimed that MLB’s ownership interest in DraftKings kept it from rectifying cheating in order to protect MLB’s investment.¹⁷⁵ To the plaintiffs, so long as MLB profits from steering fans to gamble on baseball via DFS, it should owe them a duty to provide a climate free of cheating. The court disagreed with Mr. Olson based on settled case law, ruling that the leagues had no obligation to gamblers.¹⁷⁶

But in stark contrast to the long history of failed gambling lawsuits, *Olson* represents a critical change in the wagering landscape. Rather than bets placed with exogenous parties to the actual games, the plaintiffs could show that MLB had directed them to gamble with MLB’s partner and *subsidiary*. As leagues ushered their fans to gamble with their co-venturing DFS companies—a relationship that has proven lucrative—we assert that leagues should no longer be able to claim injuries arising from cheating are too attenuated.¹⁷⁷ Perhaps the rise of DFS and legalized sports wagering indicates that locking gamblers out of the courthouse as disinterested third parties who lack reliance is no longer viable. The next Part shows how a

171. Jeb Lund, *Daily Fantasy: You’re Screwed, Because You’re Supposed to Be*, ROLLING STONE (Oct. 7, 2015, 5:26 PM), <https://www.rollingstone.com/culture/culture-sports/daily-fantasy-youre-screwed-because-youre-supposed-to-be-41148/> [<https://perma.cc/J3T3-Q3DS>].

172. *Id.*

173. *See, e.g., Dew-Becker v. Wu*, No. 124472, 2020 IL 124472 (Ill. Apr. 16, 2020) (holding that daily fantasy sports contests are games of skill—not gambling—and as a result, Illinois gambling loss recovery statutes do not allow for recovery by those who lost playing DFS.). The *Dew-Becker* decision effectively overrules an Illinois Attorney General opinion from 2015, which argued that daily fantasy contests violated Illinois gambling laws. *See* John Holden, *Finally an End to Years of Madness in the Illinois DFS Saga*, LEGAL SPORTS REP. (Apr. 24, 2020), <https://www.legalsportsreport.com/40106/illinois-dfs-case-draftkings-fanduel/> [<https://perma.cc/9A8G-TBHT>].

174. *See Olson v. Major League Baseball*, 447 F. Supp. 3d 174 (S.D.N.Y. 2020).

175. *See id.*

176. *Id.*

177. *See, e.g., US Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sports-betting-deals/> [<https://perma.cc/DV5M-2GSL>] (noting the relationships between the sports gambling industry and professional sports leagues and teams); *see also* Waters, *supra* note 11 (noting that the NHL has taken an equity position in sportsbook operator PointsBet).

mechanism meant to promote the integrity of securities trading would similarly benefit gambling markets as well as most investable markets.

III. FRAUD ON THE GAMBLING MARKET

Using original empirical analysis, we support the doctrine of fraud-on-the-market by showing its potential utility in gambling markets. Securities and sports markets face a similar problem: third parties depend on fair play, yet insiders encounter incentives to create informational asymmetries. Instead of self-correcting markets as the law typically assumes, fraud in sports and securities markets alter the equity and performance of both. But rather than characterizing investors as lacking in reliance or too attenuated—as done historically in sports—fraud-on-the-market provides a mechanism to redress duplicitous conduct in securities markets. In important part, the doctrine transforms attenuated investors into victims who can show reliance. Notably, though, the doctrine has endured volleys of criticisms from scholars and jurists who contend that it fails to reflect reality and, in turn, no longer serves a purpose.

Given the leagues' relationship with gambling providers and DFS companies, as well as their broader role within the gambling market, we argue that importing fraud-on-the-market into the sports wagering market would not only remedy valid injuries but also compel leagues to identify and punish cheating and deceit. In doing so, the analysis shows that the fundamentals of fraud-on-the-market make sense for securities litigation as well as most other investable markets. It demonstrates that gamblers wagering on MLB games rely to their detriment on promises of fair and static competition when important but subtle changes to the game have altered the market such that prices do not reflect the true values of wagers.

A. The Vital Role of Information in Markets

Information is not only resilient but also the backbone of efficient markets.¹⁷⁸ The belief is that markets absorb information about a good's value reflected by its price.¹⁷⁹ For instance, after millions of people buy and sell cars, the information produced by the transactions influence prices whereby luxury cars cost more than entry level cars. Even if some information is faulty, accurate information should prevail in the aggregate.¹⁸⁰

For example, in the stock market, information is expected to influence a stock's price almost immediately. If information sheds light on Company A's success as well as identifies Company Z's failures, markets should quickly incorporate this information as investors put more money into Company A while withdrawing it from Company Z, altering each stock's price.¹⁸¹ If one learns of a company's merger or

178. See *DeMarco v. Lehman Bros.*, 222 F.R.D. 243, 246 (S.D.N.Y. 2004) (explaining the value of information in securities markets).

179. *Id.*

180. *Id.*

181. *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011) (discussing how the exposure of information is supposed to affect market prices).

new product via a television program, an investor who wishes to capitalize on this information has already missed the boat.

The corollary is that market failure arises when consumers lack accurate information. This can happen when parties engage in fraudulent conduct. For instance, the classic “pump and dump” scheme occurs when a party encourages investors to buy stock based on inaccurate news.¹⁸² But as shareholders buy the stock and inflate its price, insiders sell their shares at the higher (inaccurate) price before negative (accurate) news erodes the stock’s value back to its proper price. Here, the firm has distorted the market with misleading statements, causing defrauded individuals to misjudge the investment’s odds: they expected for the investment’s value to exceed the purchase price, yet it becomes destined to fall below its artificially high value.¹⁸³ The incentive to introduce faulty information into the market drives securities law, which mandates that firms must disclose certain information while prohibiting types of false statements.¹⁸⁴

Gambling markets suffer from the same frailties as other investable markets. For instance, a betting line reflects the odds that a specific team will win by a certain margin—if a line between two football teams is a “pick ‘em” where no one is favored, both teams are expected to play with 50/50 odds of winning.¹⁸⁵ But if players throw a game, or if one team engages in wide-ranging cheating, the exposure of private information (here, the cheating) would change the line, reflecting the actual odds of the contest. We argue that, due to the similarity of market reaction, it makes little sense to treat securities fraud as a specialized type of injury.

B. Fraud on the Sports Market.

Sports cheating is analogous to securities fraud because (1) gambling markets encourage actors to compromise sports covertly and (2) the incentives to cheat exceed the league’s incentives to catch and punish culprits. Consider that the goal of match-fixing is to do so *secretly* in order to bet on private information; if everyone knew of a scheme, the information would be reflected in betting line adjustments. When gamblers wager on distorted lines (e.g., the act of betting on an ostensibly even game where cheating has truly made the odds 1,000:1), this creates the same informational asymmetries condemned by securities laws. But because actors in sports markets lack a legal duty to disclose accurate information or forebear from spreading false statements, gamblers tend to operate with less confidence in the quality of sports markets relative to investing markets.

We argue that leagues can no longer claim that gamblers lack reliance. Whereas teams and leagues had long rejected gambling, they have now struck lucrative

182. *Id.*

183. *Id.*

184. *Sargent v. Genesco, Inc.*, 492 F.2d 750, 760 (5th Cir. 1974) (“The basic intent of section 10(b) and rule 10b-5 and indeed, of the Exchange Act, is to protect investors and instill confidence in the securities markets by penalizing unfair dealings.”).

185. See Danny Donahue, *What Is a Pick ‘em in Sports Betting*, N.Y. DAILY NEWS (May 23, 2020), <https://www.nydailynews.com/sports/gambling/sns-actnet-sports-betting-definition-pickem-20200523-zkktthiedbgibervbpzgqke6aq-story.html> [<https://perma.cc/2ZBT-2KNK>] (describing the betting line value of a “pick ‘em”).

partnerships with DFS companies in conjunction with the rise of *legal* sports wagering. As leagues encourage fans to patronize their partnered DFS sites, they have so formally entangled themselves with gambling providers and fans that their claims of “too attenuated” can no longer stand. The problem is that fans will continue to struggle to show detrimental reliance—after all, most fans and gamblers assume that events are fair rather than relying on expressly misleading statements by leagues—but this is precisely what securities law rectifies. Indeed, securities law has developed a mechanism in the form of fraud-on-the-market, as explained next, for investors to show detrimental reliance when they had historically been too attenuated from the fraud or lacking in reliance.

C. Rule 10(b)

1. The Historical Challenges of Remedying Securities Fraud

Investors had traditionally struggled to remedy fraud due to the challenges of proving detrimental reliance. Rule 10(b) of the Securities Act of 1934, while not expressly meant to remedy fraud, enables the SEC to promulgate such a mechanism.¹⁸⁶ It prohibits “use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device . . . as necessary or appropriate in the public interest or for the protection of investors.”¹⁸⁷ To support a private action under 10(b), the Supreme Court cited the legislative record to find that “[t]here cannot be honest markets without honest publicity. Manipulation and dishonest practices of the marketplace thrive upon mystery and secrecy.”¹⁸⁸ 10(b)’s backbone is thus common law fraud.

One who alleges securities fraud must demonstrate: “(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss.”¹⁸⁹ The crux is that investors are logically required to show reliance on the deceptive comments to establish a fraud claim.¹⁹⁰ Put simply, “[i]nvestors can recover damages in a private securities fraud action only if they prove that they relied on the defendant’s misrepresentation in deciding to buy or sell a company’s stock.”¹⁹¹ Actionable statements must exceed puffery, vague comments, or optimism, as the defendant must have actually meant to espouse false or misleading statements that investors would have considered salient.¹⁹²

186. *Loritz v. Exide Techs.*, No. 2:13-cv-2607-SVW-Ex., 2014 WL 4058752, at *4 (C.D. Cal. Aug. 7, 2014).

187. 15 U.S.C.A. § 78j(b).

188. H.R. REP. NO. 73-1383, at 11 (1934); *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988).

189. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009) (quoting *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1014 (9th Cir. 2005)).

190. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 263 (2014).

191. *Id.*

192. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 726 (1975) (alleging misleading statements); *Langevoort*, *supra* note 29, at 978 (“Defendants commonly claim that whatever was said, no matter how positive, was too general, speculative, or vague to be

However, this framework had traditionally created a major hurdle for aggrieved investors concerning the challenges of proving reliance. The solution to this problem was fraud-on-the-market.

2. Fraud-on-the-Market

Claims of securities fraud had long failed because few investors knew of the deceptive comments when investing or, better yet, invested *because of* the statements. Rather, the typical investor purchases stock based on informal associations with a company's product, media reports, or third hand sources, but not due to the company's comments. Under a formal interpretation of fraud, this lack of reliance would impede investors' claims in almost all scenarios—that was until 1988 when *Basic v. Levinson* formalized the fraud-on-the-market theory.¹⁹³

In the years leading up to *Basic*, some courts strayed from the common law of fraud by loosening the plaintiff's burden of showing reliance and causation.¹⁹⁴ The sea change came out of the Ninth Circuit in 1975 when it ruled in *Blackie v. Barrack* that materiality was enough to show reliance.¹⁹⁵ The *Blackie* court held that misleading statements could create the presumption that investors were duped, obviating the need to show actual reliance.¹⁹⁶ Other circuit courts adopted *Blackie* in that investors may depend on “the supposition that the market price is validly set and

anything more than ‘puffery,’ such that it was neither material nor misleading regardless of what was left unsaid. The reasonable investor, these defendants argue, knows not to rely on statements devoid of hard facts or concrete representations, and can read between the lines well enough to know what is not being said; the investor would thus tread carefully rather than assume that he has been told all that is important. Soft language, in other words, does not matter at all.”).

193. *Basic Inc.*, 485 U.S. at 226.

194. Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435, 439 (1984) (“In rule 10b-5 cases, courts initially required plaintiffs to establish, in addition to materiality, both reliance and causation. These requirements were unquestionably appropriate and not particularly burdensome when the violation resembled the common-law tort of deceit, as when an individual sued on the basis of misrepresentations made to him in direct negotiations. The decision of the Second Circuit in *SEC v. Texas Gulf Sulphur Co.*, however, expanded the rule 10b-5 remedy to include misstatements contained in publicly available documents. Thus, the rule 10b-5 claim was no longer directly analogous to the common-law tort.” (footnotes omitted)).

195. *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).

196. *Id.* at 906 (“We think causation is adequately established in the impersonal stock exchange context by proof of purchase and of the materiality of misrepresentations, without direct proof of reliance. Materiality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price—when the purchase is made the causal chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a *prima facie* case.”).

that no unsuspected manipulation has artificially inflated the price.”¹⁹⁷ To advocates, *Blackie*’s theory was necessary for rule 10b-5 to fulfill its purpose.¹⁹⁸

The U.S. Supreme Court revolutionized securities litigation in 1988 by embracing a version of fraud-on-the-market in *Basic v. Levinson*.¹⁹⁹ *Basic*’s import was that one can show reliance on misleading statements without actual reliance because securities markets naturally absorb information into prices.²⁰⁰ In essence, deceptive comments can distort a stock’s price from its efficient point by making the stock appear better or worse than it is.²⁰¹ Misleading statements about a firm’s performance can thus alter the price of its stock.²⁰² Since investors purchase stock based on price signals, false information may presumably influence an investor’s behavior and cause them to misperceive the investment’s true odds (e.g., whether the stock’s value will increase over its purchase price).²⁰³ Based on fraud-on-the-market, investors can show detrimental reliance despite never having come into contact with misleading

197. *Id.* at 907; *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1148 (1982) (“The strongest support for a generalized fraud-on-the-market theory comes from the Ninth Circuit . . . [i]n *Blackie v. Barrack*”); Black, *supra* note 194, at 454.

198. Michael A. Lynn, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule 10b-5*, 50 GEO. WASH. L. REV. 627, 645 (1982) (“Justification for the theory must therefore lie, if anywhere, in its service to the objectives of the Exchange Act and rule 10b-5. By enacting the 1933 and 1934 Acts, Congress intended to protect investors in the national securities exchanges and to promote informed investment decision-making by requiring full disclosure of material information in the issuance and trading of securities.”).

199. *Basic Inc. v. Levinson*, 485 U.S. 224, 241–42 (1988).

200. *See* *Peil v. Speiser*, 806 F.2d 1154, 1160–61 (3d Cir. 1986) (“The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. The misstatements may affect the price of the stock, and thus defraud purchasers who rely on the price as an indication of the stock’s value. By artificially inflating the price of the stock, the misrepresentations defraud purchasers who rely on the price as an indication of the stock’s value. The causal connection between the defendants’ fraud and the plaintiffs’ purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. In both cases, defendants’ fraudulent statements or omissions cause plaintiffs to purchase stock they would not have purchased absent defendants’ misstatements and/or omissions.” (citation omitted)).

201. *Id.*

202. *Id.*

203. *Basic Inc.*, 485 U.S. at 246 (“The presumption is also supported by common sense and probability. Recent empirical studies have tended to confirm Congress’ premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.”).

information by relying on tainted prices.²⁰⁴ The Court reaffirmed fraud-on-the-market in the 2014 case *Halliburton Co. v. Erica P. John Fund, Inc.*²⁰⁵

The consequence of fraud-on-the-market is substantial. Investors can now support reliance without actually relying on anything.²⁰⁶ While the Supreme Court could have strictly adhered to the common law of fraud, it chose to protect individuals who were swindled by deception yet would have previously lacked a remedy under formal theories of reliance. The promise of fraud-on-the-market is that the threat of liability may discourage firms from misleading investors in the first place.²⁰⁷ That said, fraud-on-the-market has incurred heavy criticism.

3. Does Fraud-on-the-Market Make Sense?

Fraud-on-the-market is beleaguered. As a leading article stated, fraud-on-the-market “just doesn’t work. At least that is the consensus view among academics respecting the primary class action vehicle under the federal securities laws.”²⁰⁸ The calls to end fraud-on-the-market came to a head in 2014 when the Supreme Court reaffirmed it, though in a rather tepid show of support over several justices’ objection.

A prime source of contention involves whether stock prices absorb and reflect all (public or material)²⁰⁹ information in prices—the “efficient markets hypothesis.”²¹⁰

204. Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313, 1336 (2018) (“[A]ll plaintiffs receive a presumption of reliance, so long as they can show that the security they purchased traded in an informationally efficient market. In this type of market, material statements—by definition—move market prices, meaning that false or misleading ones will generally distort the price. The presumption is thus referred to as the fraud-on-the-market presumption (the “FOTM presumption”), as it is the misrepresentation’s impact on the market price that is held front and center.” (footnotes omitted)).

205. 573 U.S. 258, 280 (2014).

206. Haeberle & Henderson, *supra* note 204, at 1337 (“But a natural consequence of this doctrine is that once a lead plaintiff shows that the security traded in an efficient market, *any* investor who bought at the inflated market price can join the class of aggrieved individuals. And much of the universe of the investing community that buys stock during any substantial period does so for reasons that have nothing to do with the false or misleading statement at issue. Instead, they are buying based on other information—or for extra-informational purposes altogether (such as mere portfolio accumulation or diversification reasons). For that reason, nothing about the statement or price caused them to enter into the transaction; they would have bought even if the misstatement had never been made—and even if the price were far higher. But to the extent they have bought at an inflated price after a corporate misstatement, they too can join the class.” (footnote omitted)).

207. Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 110 (2017) (“The threat of damages for such statements can deter corporations from issuing false statements in the first place.”).

208. William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 72 (2011) (footnote omitted).

209. Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 911 (1989) (discussing the importance of the efficient market hypothesis to fraud-on-the-market’s viability).

210. *Id.*

This theory is critical because, for fraud-on-the-market to operate, the market must actually incorporate false or misleading statements into securities' prices.²¹¹ The issue with grounding any doctrine in the efficient markets hypothesis, critics argue, is illustrated by stock market crashes and other forms of sudden and extreme volatility: these events should not occur where individuals rationally invest in markets reflecting all information about securities.²¹² Another scholar went further and called fraud-on-the-market "junk science."²¹³ His point was that markets are efficient in the aggregate but not necessarily with individual stocks, making it misplaced to premise any doctrine on singular performances.²¹⁴

Another problem is that misstatements might not move a market at all. If a market is efficient, it would suggest that accurate information should likely prevail over inaccurate information in correcting the market.²¹⁵ So given the volatility of markets as well as presence of unsophisticated investors, commentators assert that the efficient markets hypothesis and fraud-on-the-market theory just do not pass the sniff test.²¹⁶

This brings us to 2014 when many observers believed that the Supreme Court intended to put fraud-on-the-market out of its misery.²¹⁷ Although it was affirmed, Justice Roberts did so with modest approval. He essentially stated that *Basic* should survive based on *stare decisis* as no real problems have come from the precedent.²¹⁸ Another wing of the Court would have ended it: "Logic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic*

211. *Id.*

212. *Id.* at 915 (explaining that the stock market crash may cast doubt on the efficient market hypothesis).

213. J.B. Heaton, *Kill Cammer: Securities Litigation Without Junk Science*, 11 WM. & MARY BUS. L. REV. 417, 420 (2020) ("Federal securities litigation is a hotbed of junk science about market efficiency. It was not always so. It need not be the case going forward. Securities litigation's fraud on the market presumption 'says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements.' Junk science entered securities litigation when courts applying the fraud on the market presumption embraced the ad hoc speculations of a federal district court in *Cammer v. Bloom*." (footnotes omitted) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011))).

214. *Id.* at 457 ("While market efficiency remains the subject of ongoing research in financial economics, it is crucial to acknowledge that financial economists virtually never test, as litigants do, whether the pricing of a *single* stock is efficient." (emphasis in original)).

215. Charles R. Korsmo, *Market Efficiency and Fraud on the Market: The Danger of Halliburton*, 18 LEWIS & CLARK L. REV. 827, 849 (2014) ("Likewise, not all misstatements will move the market price even if the market is highly efficient.").

216. Carol R. Goforth, *The Efficient Capital Market Hypothesis-an Inadequate Justification for the Fraud-on-the-Market Presumption*, 27 WAKE FOREST L. REV. 895, 902 (1992) ("Some of these criticisms rely on the idea 'that market efficiency is implausible on the basis of common sense experience.'" (quoting Robert Ferguson, *An Efficient Stock Market? Ridiculous!*, 9 J. PORTFOLIO MGMT. 31, 31 (1983))).

217. Korsmo, *supra* note 215, at 858 (discussing the debates leading up to the ruling).

218. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) ("Given that possibility, we see no reason to exempt the *Basic* presumption from ordinary principles of *stare decisis*.").

presumption, and *stare decisis* cannot prop up the façade that remains. *Basic* should be overruled.”²¹⁹

The point is that courts and scholars continue to debate the ongoing viability of fraud-on-the-market and its underlying assumptions.²²⁰ While the Supreme Court could have jettisoned it from securities litigation, fraud-on-the-market was reaffirmed and thus remains good law, at least for the moment. We assert, however, that fraud-on-the-market makes sense in most investable markets. Rather than locking defrauded gamblers and other investors out of the courthouse, our empirical research of sports markets finds evidence in support of fraud-on-the-market, which we detail next.

D. Effects of Clandestine Changes on Betting Lines

We argue that cheating can threaten the integrity of gambling markets by creating a market failure based on distorted information. In light of the similarities between sports and securities markets, we propose a remedy: gamblers should be able to rely on public information, such as each league’s rule books prohibiting cheating, to support a fraud claim *even if the investor or gambler has never come into contact with this information*. By incorporating fraud-on-the-market into sports markets, it would recognize that acts of cheating and other deceptions affect betting lines, even though gamblers act on false promises of fair play. After all, if teams and leagues exposed their own cheating, it would change betting lines to reflect the information. Given the parallels between gambling and investing—as well as the mirror incentives to shroud wrongdoing—gamblers should be able to rely on the presumption of fraud-on-the-market.

We show that duplicity creates informational injuries affecting betting markets—in other words, gambling markets do not self-correct but instead gamblers depend on faulty information to their detriment. When players, teams, and leagues cheat or conceal scandals, gamblers rely on the errant betting lines as they place wagers. To make this case, we analyze data from baseball’s gambling market to show how surreptitious changes to MLB baseballs rendered a substantial impact on the efficiency of prices in the totals wagering market. This altered the quality of information to the detriment of gamblers. Due to the lack of information and then misinformation regarding altered baseballs, the odds of a winning a bet on MLB games had swung in a manner significantly altering the fortunes of bettors, supporting reliance of fraud-on-the-market in sports markets or most other investable markets.

1. The Empirical Question

Even small nudges to gameplay or equipment, can impact the value of bets placed in sports gambling markets. Here, we use an example from MLB’s totals market to exhibit the role of undisclosed or unknown changes that resulted in large swings in

219. *Id.* at 285 (Thomas, J., concurring).

220. *See, e.g.,* Korsmo, *supra* note 215, at 829 (questioning the continuing logic of the fraud-on-the-market theory and the efficient market hypothesis).

betting outcomes (MLB's totals market is explained below). Purposeful and explicit manipulation of games would likely result in far larger changes to the prices of placing certain bets (asset prices) in the market.

It is now well-known, and reluctantly confirmed much later by MLB, that an unspecified change to the flight of baseballs began in 2015 shortly after the midseason All-Star Game (ASG). An MLB commissioned report concluded in 2018 that the post-2015 ASG home run spike is

not due to either a livelier, 'juiced' ball, or any change in batter or pitcher behavior, It seems, instead, to have arisen from a decrease in the ball's drag properties, which cause it to carry further than previously, given the same set of initial conditions—exit velocity, launch and spray angle, and spin. So there is indirect evidence that the ball has changed, but we don't yet know how.²²¹

This apparent alteration resulted in a large increase in home runs and scoring that was sustained and increased in subsequent seasons. Expert and media reports noted this increase in suspecting changes to the baseballs themselves, during which MLB only noted that baseballs were within (wide) specifications used for approval.²²² Subsequent reports commissioned by MLB confirmed reductions in drag on baseballs that started in the second half of 2015.²²³ Although specific manufacturing changes were initially not linked to the reduction in drag, the proliferation of these balls is consistent with the timing of manufacturing process improvements reported by Rawlings, the manufacturer of official MLB baseballs.²²⁴

221. Dave Sheinin, *MLB Finally Admits Changes to Ball Itself Fueled Home Run Spike, But Doesn't Say How or Why*, WASH. POST (May 24, 2018), <https://www.washingtonpost.com/news/sports/wp/2018/05/24/mlb-finally-admits-changes-to-ball-itself-fueled-home-run-spike-but-doesnt-say-how-or-why/> [<https://perma.cc/G45L-QF8U>].

222. Rob Arthur & Ben Lindbergh, *A Baseball Mystery: The Home Run Is Back, and No One Knows Why*, FIVETHIRTYEIGHT (Mar. 30, 2016), <https://fivethirtyeight.com/features/a-baseball-mystery-the-home-run-is-back-and-no-one-knows-why/> [<https://perma.cc/2DY4-4W4F>]; Rob Arthur, *It Looks Like the Baseball Is Behind MLB's Power Surge*, FIVETHIRTYEIGHT (June 17, 2017), <https://fivethirtyeight.com/features/it-looks-like-the-baseball-is-behind-mlbs-power-surge> [<https://perma.cc/ZTA8-FNA3>]; Dr. Meredith Wills, *How One Tiny Change to the Baseball May Have Led to Both the Home Run Surge and the Rise in Pitcher Blisters*, ATHLETIC (June 6, 2018), <https://theathletic.com/381544/2018/06/06/how-one-tiny-change-to-the-baseball-may-have-led-to-both-the-home-run-surge-and-the-rise-in-pitcher-blisters/> [<https://perma.cc/T2AB-FECG>].

223. JIM ALBERT, JAY BARTOFF, ROGER BLANDFORD, DAN BROOKS, JOSH DERENSKI, LARRY GOLDSTEIN, ANETTE (PEKO) HOSOI, GARY LORDEN, ALAN NATHAN & LLOYD SMITH, REPORT OF THE COMMITTEE STUDYING HOME RUN RATES IN MAJOR LEAGUE BASEBALL (2018), http://www.insidesocal.com/dodgers/files/2021/10/Full-Report-of-the-Committee-Studying-Home-Run-Rates-in-Major-League-Baseball_052418.pdf [<https://perma.cc/A73D-WSVJ>] [hereinafter ALBERT ET AL., 2018 REPORT]; JIM ALBERT, ANETTE (PEKO) HOSOI, ALAN NATHAN & LLOYD SMITH, PRELIMINARY REPORT OF THE COMMITTEE STUDYING HOME RUN RATES IN MLB (2019) (on file with authors) [hereinafter ALBERT ET AL., 2019 REPORT].

224. ALBERT ET AL., 2018 REPORT, *supra* note 223, at 49.

The ball's alteration paired with cagey responses regarding increases in home runs from MLB²²⁵ distorted gambling markets. Consider a "Totals" bet which involves the total amount of runs scored in a game by both teams combined—e.g., if the line in a Totals bet is eleven, then any combination of runs by both teams surpassing eleven runs would make a winner of those who bet the "Over" and a loser out of those who bet the "Under." Although Totals markets tend to be relatively efficient—shading toward the Over due to betting volumes on that side—we show that unexpected changes to MLB's baseballs resulted in extreme changes in betting outcomes. For years, a strategy of betting on the Under for every game would have made the gambler a net winner until the baseballs changed; at that point, the new flight path of MLB balls flipped the script and turned a religious Over betting strategy into the best approach. In important part, *gamblers did not adjust their betting strategy* for the sudden turn in fortunes. They instead relied on cagey statements by MLB about how nothing had changed. In this sense, misstatements distorted gambling lines on which gamblers relied to their detriment.

We exhibit this in two ways. First, we show the clear change in rates of successful bets on Overs in all Totals bets before and after the ball change. Secondly, we reproduce a recently published betting strategy pairing umpire information with bet prices to make successful bets from 2009 to 2014,²²⁶ and extend this to 2015. For all years, and in both exhibitions, we split each year's betting data into two periods of pre- and post-ASG to create comparable sets of data in each year as they relate to returns in the betting market and timing of apparent alterations to the baseball. Results show considerable changes to values of bets that are not reflected in bet prices that would be inferred from historical data.

2. Data

Betting data come from the website Sports Insights²²⁷ and consist of all regular season games from 2009 through 2015. The data include game results, total runs scored, and an average totals line and price across a number of providers.²²⁸ For various reasons, some MLB games do not have betting lines, and therefore the data do not include all games. We also remove doubleheader games from the data due to complications with identification of series game order.²²⁹ This leaves 16,634 games within the data set that are tied to Totals lines.

For the replication approach, we use data from MLB's pitch tracking technology PITCHf/x (now referred to as Statcast)²³⁰ to model individual umpire strike zones with a spatial regression model. These data include every regular season pitch thrown since 2008 paired with their respective location as the pitch crosses home plate and

225. Kaplan, *supra* note 30.

226. Brian M. Mills & Steven Salaga, *A Natural Experiment for Efficient Markets: Information Quality and Influential Agents*, 40 J. FIN. MKTS. 23 (2018).

227. SPORTSINSIGHTS, www.sportsinsights.com [<https://perma.cc/8U88-CREP>].

228. We note that a large portion of bets placed at these sites were likely to be illegal at the time under most state laws.

229. Mills & Salaga, *supra* note 226, at 29.

230. *Baseball Savant*, MLB, <https://baseballsavant.mlb.com/> [<https://perma.cc/CUV7-VKWQ>].

call made by the umpire.²³¹ Because umpire tendencies are aggregated over the prior season or half season at the pitch level, games featuring umpires that have not worked behind home plate during that time are removed from the possible bets. Finally, due to limited public knowledge regarding umpire assignments, the first game of a regular season series is not included in the group of possible games for the replicated betting strategy. This reduces the number of games available for bets to 11,372.²³²

3. Betting Simulation

Betting All Overs or Unders: Our first test assesses whether gamblers were likely harmed by the concealment of private information about MLB's baseballs when they relied on sticker prices in wagering markets. We begin by aggregating success rates and payouts from betting only on Overs or only on Unders for all games in the sample from 2009 through 2015. These are aggregated overall by season and for pre- and post-ASG splits. Evaluating success rates on Overs (Unders) is as simple as calculating the percentage of wins out of all bets placed, removing any push outcomes from the data.²³³ If the total combined runs in a given game exceed the Totals line, then the Over bet is considered a win. If fewer runs are scored in the game, then the Under bet is considered a win.

For our payout calculations, or the amount a bettor wins or loses, we use a baseline bet of \$100. Here, if the price is positive (e.g., +110),²³⁴ our bet amount is \$100. The payout for this bet, if it is successful, will be \$210, resulting in \$110 in profit for the bet. An unsuccessful bet results in a loss of \$100. However, if the price is negative, we place a bet equal to the absolute value of the price. As an example, if the price is -115, then we place a bet of \$115. A successful bet in this case pays \$215, resulting in \$100 profit. An unsuccessful bet results in the loss of \$115. As with the success rates above, these are aggregated overall at the seasonal level and at the pre- and post-ASG level. We calculate win rates and payouts for both Overs and Unders. Although win rates are symmetrical, payouts are not, due to unbalanced prices on each bet option.

231. In total, there are nearly 5.7 million pitches in the data set, with nearly 3.6 million of those requiring the home plate umpire to make a ball or strike call. Furthermore, pitches not requiring judgment from the umpire—such as pitchouts—were removed from this data when modeling umpire strike zone tendencies.

232. Although umpire assignments are unknown in the first game of a regular season series—and therefore information about umpires cannot be leveraged in placing bets for these games—subsequent games in the series have a known rotation and assignment information for the remaining games in the series is thus revealed fully at the start of the first game.

233. Pushes refer to bets in which the posted total is reached exactly. For example, if the total line is nine runs, and both teams score exactly nine runs combined, then money is returned to all bettors.

234. A wager placed at a line of +110 means that if a bettor places a \$100 bet and wins, the bettor will receive \$110 plus their wager of \$100 for a total of \$210. If the line was instead -110, a bettor would need to wager \$110 to win \$100 dollars. *See generally, What is a Moneyline Bet?*, LINES, <https://www.thelines.com/betting/moneyline/> [https://perma.cc/UWG2-EUVE].

Betting Based on Umpire Tendencies: In reproducing the betting strategy using umpire information, we apply the same approach to aggregation and payout calculations as with the blanket Over and Under bets placed above. We use a moving average of the home plate umpire game-average tendencies—aggregated from the ninety-day average pitch deviation from the spatial regression model—over the immediately preceding 180 days. We place bets on games only when umpire identity is known prior to the start of the game (i.e., games after the first game of a series). Decision rules are as follows: If an umpire's game-level favorability toward pitchers appears in the 95th percentile or above among his peers over the last 180 days,²³⁵ we place a bet on the Under.²³⁶ If an umpire's favorability toward batters appears in the 95th percentile or above among his peers over the last 180 days, we place a bet on the Over. This necessarily reduces the number of bets made relative to the Over and Under blanket strategy and identifies a total of 961 potentially favorable bets from mid-2009 through 2015. Of these bets, 543 would be placed as Under bets, while 418 would be placed as Over bets.

4. Results of Betting Simulation

Results of Betting All Overs or Unders: We first note that, due to betting volume, Totals lines set by oddsmakers tend to be asymmetrically set in ways that have historically been more favorable to betting Unders in general. In our betting simulation across the entire sample and in most years, Unders win more than 50% of bets (excluding push outcomes).²³⁷ These results are presented in Table 1 and Table 2.

We turn to the exhibition of success rates and returns in the pre- and post-ASG periods across seasons in Table 1 and Table 2. In nearly every half season split, betting Overs resulted in significant losses. The two exceptions are 2011 and 2015, when both seasons' second halves experienced unusually high Over-bet win rates. We focus on 2015, as the swing in return was larger, and explanations for 2011's similarity are unclear.²³⁸ As we explain in short order, *the change to ball flight*

235. The MLB season is roughly 180 days long, resulting in the use of approximately one season's worth of umpired games for each measurement.

236. Although it turns out that it would be profitable on Under bets to use any game featuring an umpire more favorable to pitchers than an average umpire, we restrict our exposition to a direct replication of this work.

237. Due to bet prices, betting Unders across the board is not profitable (despite winning more than 50% of the time) but does not result in losses as large as betting all Overs. Further, when placing a bet, the bookmaker charges a commission, called the vigorish, or juice. Because of this built-in cost, a bettor actually needs to succeed at wagering at greater than a 50% rate in order to be profitable. Where so-called standard odds of -110 are used, a bettor would need to win 52.4% of their bets to be profitable. See *What is Vig and How Does It Work?*, PLAY COLO., <https://www.playcolorado.com/sports-betting/what-is-the-vigorish/> [<https://perma.cc/A6NQ-KPUX>].

238. However, both runs and home runs spiked in the second half of 2011, which was sustained through much of 2012 as well. Betting markets likely adjusted to this change in 2012, but clearly did not do so in 2011. It seems likely that there was some other unknown change to gameplay during this time, though we leave analysis of this period to further investigation.

increased home runs and run scoring dramatically, which was not properly integrated into the betting market. The result was an increase in the post-ASG success rate on Over bets from 48.1% from 2009 to 2014, to a 53.0% success rate in 2015.²³⁹

239. A chi-square test confirms the difference between the post-ASG period in 2015 was statistically significantly different than from 2009 to 2014 combined. Because pushes are removed from the data, changes to Under bets are perfectly inverse of the results for Overs, as shown in Table 2.

Table 1 – Success Rates and Payouts for Regular Season Games (Overs Only)

Year	Pre-ASG			Post-ASG			Overall		
	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)
2009	1,247	47.0	- 8.22	1,022	47.5	- 6.84	2,269	47.2	- 7.60
2010	1,244	49.4	- 2.80	1,038	47.8	- 6.78	2,282	48.7	- 4.61
2011	1,263	50.0	- 1.98	972	52.9	+ 3.16	2,235	51.3	+ 0.25
2012	1,217	49.2	- 3.21	1,061	47.8	- 6.61	2,278	48.6	- 4.79
2013	1,325	49.8	- 2.44	943	45.9	- 10.84	2,268	48.2	- 5.93
2014	1,324	50.1	- 1.99	937	46.7	- 7.75	2,261	48.7	- 4.38
2009- 2014	7,620	49.3	- 3.41	5,973	48.1	- 5.94	13,593	48.8	- 4.52
2015	1,235	49.4	- 3.63	1,010	53.0	+ 4.05	2,245	51.0	- 0.17
All	8,855	49.3	- 3.44	6,983	48.8	- 4.49	15,838	49.1	- 3.91

*Number of bets, average payouts, and win rates exclude push outcomes. Win rates and net payouts calculated using closing totals and moneyline values. Bets are scaled in the same way as Mills & Salaga, *supra* note 226, using a \$100 baseline bet, adjusted by the moneyline value. The average simulated bet was \$108.29 from 2009 to 2015.

Table 2 – Success Rates and Payouts for Regular Season Games (Unders Only)

Year	Pre-ASG			Post-ASG			Overall		
	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)
2009	1,247	53.0	+ 3.48	1,022	52.5	+ 2.14	2,269	52.8	+ 2.88
2010	1,244	50.6	- 2.26	1,038	52.2	+ 1.73	2,282	51.3	- 0.44
2011	1,263	50.0	- 3.08	972	47.1	- 8.61	2,235	48.7	- 5.48
2012	1,217	50.8	- 1.95	1,061	52.2	+ 1.12	2,278	51.5	- 0.51
2013	1,325	50.2	- 2.82	943	54.1	+ 5.70	2,268	51.8	+ 0.73
2014	1,324	49.9	- 3.54	937	53.3	+ 2.52	2,261	51.3	- 1.03
2009- 2014	7,620	50.7	- 1.40	5,973	51.9	+ 1.41	13,593	51.2	- 0.16
2015	1,235	50.6	- 1.63	1,010	47.0	- 9.53	2,245	49.0	- 5.18
All	8,855	50.7	- 1.42	6,983	51.2	- 0.15	15,838	50.9	- 0.86

*Number of bets, average payouts, and win rates exclude push outcomes. Win rates and net payouts calculated using closing totals and moneyline values. Bets are scaled in the same way as Mills & Salaga, *supra* note 226, using a \$100 baseline bet, adjusted by the moneyline value. The average simulated bet was \$108.29 from 2009 to 2015.

Consider the manner in which concealed information about changes in baseballs transformed the betting market in 2015. Over bets during the pre-ASG period lost \$3.63 per bet, while in the post-ASG period *won* \$4.05 per bet. This swing amounts to \$7.68 per bet, nearly 50% higher than the only other similar swing in 2011. Interestingly, across-the-board Under bets were profitable in most seasons in the post-ASG period, with the same 2011 and 2015 exceptions. From 2009 to 2014, the average return for betting the Under in the post-ASG period was \$1.41, while in 2015, each bet resulted in a *loss* of \$9.53. This was remarkable enough to turn the return for the entire post-ASG period sample from 2009 to 2015 negative. In essence, gambling lines failed to incorporate the concealed information.

Results of Betting on Umpire Tendencies: Although betting only Overs or Unders helps to make clear that a bet’s value may lack private information reflected in prices after the ball change, this is a generally unprofitable strategy for bettors in the first place. To strengthen these results, we replicated the successful betting strategy from Mills and Salaga to show similar mispricing in the market after the change to the ball. Results from these betting simulations are found in Table 3 and Table 4. This previous work was largely focused on the success of integrating umpire strike zone tendency information when betting Unders, and we therefore focus most closely on Table 4.

Table 3 – Reproducing Mills & Salaga (2018) Umpire Strategy Through 2015 (Overs Only)

Year	Pre-ASG			Post-ASG			Overall ^a		
	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)
2009	4	50.0	- 5.00	18	77.8	+ 54.72	22	72.7	+ 43.86
2010	16	43.8	- 7.40	40	47.5	- 14.81	56	46.4	- 12.69
2011	34	55.9	+ 8.94	29	62.1	+ 22.24	63	58.7	+ 15.06
2012	42	50.0	- 3.12	18	50.0	- 0.72	60	50.0	- 2.40
2013	35	48.6	- 4.97	39	43.6	- 17.97	74	46.0	- 11.82
2014	18	27.8	- 49.61	16	50.0	- 3.69	34	38.2	- 28.00
2009- 2014	149	47.7	- 7.72	160	53.1	+ 3.51	309	50.5	- 1.91
2015	46	52.2	+ 0.00	40	50.0	- 0.55	86	51.2	- 0.26
All	195	48.7	- 5.90	200	52.5	+ 2.70	395	50.6	- 1.55

*Number of bets, average payouts, and win rates exclude push outcomes. Win rates and net payouts calculated using closing totals and moneyline values. Bets are scaled in the same way as Mills & Salaga, *supra* note 226, using a \$100 baseline bet, adjusted by the moneyline value. The average simulated bet was \$108.29 from 2009 to 2015. In 2009, only a partial season was available for the betting strategy from Mills & Salaga, *supra* note 226, due to the need for previous umpire data to meet the threshold for betting. Therefore, most bets take place after the halfway point in the 2009 season.

^aWe note that due to small changes in data cleaning and availability, our precise payout numbers differ slightly from those in Mills & Salaga, *supra* note 226, at 37 tbl. 8, col. 4, though not in any substantive way.

Table 4 – Reproducing Mills & Salaga (2018) Umpire Strategy Through 2015 (Unders Only)

Year	Pre-ASG			Post-ASG			Overall ^a		
	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)	Bets (N)	Win Rate (%)	Avg. Payout (\$)
2009	5	100.0	+ 104.2	19	57.9	+ 13.42	24	66.7	+ 32.33
2010	76	63.2	+ 24.33	38	50.0	- 2.34	114	58.8	+ 15.44
2011	42	66.7	+ 32.21	40	47.5	- 8.03	82	57.3	+ 12.59
2012	46	63.0	+ 22.98	49	55.1	+ 7.45	95	59.0	+ 14.97
2013	24	50.0	- 6.42	10	60.0	+ 18.90	34	52.9	+ 1.03
2014	67	56.7	+ 11.33	22	63.6	+ 25.59	89	58.4	+ 14.85
2009- 2014	260	61.5	+ 20.71	178	53.9	+ 5.40	438	58.5	+ 14.49
2015	43	53.5	+ 3.58	28	39.3	- 27.46	71	47.9	- 8.66
All	303	60.4	+ 18.75	206	51.9	+ 0.94	509	57.0	+ 11.26

*Number of bets, average payouts, and win rates exclude push outcomes. Win rates and net payouts calculated using closing totals and moneyline values. Bets are scaled in the same way as Mills & Salaga, *supra* note 226, using a \$100 baseline bet, adjusted by the moneyline value. The average simulated bet was \$108.29 from 2009 to 2015. In 2009, only a partial season was available for the betting strategy from Mills & Salaga, *supra* note 226, due to the need for previous umpire data to meet the threshold for betting. Therefore, most bets take place after the halfway point in the 2009 season.

^aWe note that due to small changes in data cleaning and availability, our precise payout numbers differ slightly from those in Mills & Salaga, *supra* note 226, at 37 tbl. 8, col. 4, though not in any substantive way.

We first reproduce returns from past work, showing that from 2009 through 2014, this strategy resulted in over 700 potentially favorable bets, with 438 of these being Under bets. The overall return per Under bet during this period was \$14.49, a return of about 13.4% per wager.²⁴⁰ In every season during this period, identified Under bets were profitable. However, in the 2015 season, the average *loss* per bet was \$8.66. This change is even more stark when comparing the pre-ASG and post-ASG periods in 2015. In the pre-ASG period, Under bets returned \$3.58, while there was a *loss* of \$27.46 per bet in the post-ASG period, a negative swing in returns of \$31.04 per

240. The average bet overall in the data was \$108.29 based on the closing price. We note that due to small changes in data cleaning and availability, our precise payout numbers differ slightly from those in Mills & Salaga, *supra* note 226, at 37 tbl. 8, col. 4, though not in any substantive way.

bet.²⁴¹ The aggregate losses in this post-ASG period in 2015 were 36% larger than the *combined* total of all other half-seasons that resulted in losses on Under bets with this betting strategy.²⁴²

Although Over bets were generally not profitable when leveraging umpire strike zone information, it is possible that placing Over bets identified as potentially favorable during this period may have negated some losses from the large change to profitability of umpire-favorable Unders. Indeed, while there was a shift toward more successes on Overs than in other seasons (Table 3), the shift was not strong enough to provide profitable bets when pairing hitter-friendly umpires with Over bets. These bets still lost \$0.55 per bet overall in 2015, and per-bet losses for all Over and Under bets in 2015 were \$4.06, compared to gains of \$7.71 per bet from 2009 to 2014.²⁴³ In sum, even small changes to gameplay (in this case, the ball) seem to have clear effects on the market and the accuracy of pricing for bets.

1. Discussion

The analysis demonstrates that market actors depend on price signals even when private information has distorted those lines or prices. In the gambling market, changes in MLB's ball boosted scoring to the degree that a winning or losing wagering strategy flipped. It seems that MLB's statements led gamblers to presume a static gambling environment. Even though many gamblers were unaware of MLB's statements, comments suggesting that the balls had remained unaltered froze the gambling lines in place even though the odds had actually changed. In this sense, many gamblers who had bet on Unders in Totals markets had relied on the lines to their detriment. The point is that the impact of misstatements in MLB wagering provides support for fraud-on-the-market in the gambling market and other investable markets like the conventional securities context. Indeed, similar to how fraud is theorized to affect securities prices on which investors rely, we find this relationship in the gambling market.

D. The Remedy

Attentive readers might question whether the professional leagues have actually made the types of statements, or engaged in the types of acts, enabling gamblers to claim justifiable reliance on a fair landscape. When a team cheats, should this be considered a breach of the league's duty to detect and prevent duplicitous conduct? With securities fraud—like other types of fraud—an aggrieved investor must show false or misleading statements upon which investors have detrimentally relied in the form of distorted prices. After all, for fraud to affect stock prices, the fraudster must have actually made the types of material comments affecting market prices.

Given the above evidence that cheating affects betting lines, we find it problematic that gamblers cannot establish detrimental reliance on fraud. To this end, rarely, if ever, have gamblers relied on misstatements relating specifically to the

241. See *infra* Table 4.

242. See *infra* Table 4.

243. See *infra* Tables 3 & 4.

fraud. We assert next that gamblers are owed a fair betting landscape, which the leagues establish by publishing and following official rulebooks; the implication is that the games are fair. Because this type of evidence is currently insufficient, our research shows that the fraud-on-the-market doctrine should create the presumption of detrimental reliance. In fact, concealed changes in the game *did* affect the odds of winning to the detriment of gamblers.

Further, we find evidence of the leagues, teams, and gambling operators asserting the fairness of their games. The first source comes from the joint ventures between leagues and DFS companies. For instance, DraftKings makes the affirmative statement that “[w]e do everything we can to make the game fair”²⁴⁴ They also claim that regulations of wagering under New Jersey law provides gamblers with a “fair” landscape in which to bet.²⁴⁵ FanDuel, likewise, expressed its “commit[ment] to making FanDuel a more fair and level playing field[.]”²⁴⁶ exclaiming that “it’s always a fair matchup.”²⁴⁷

Navigating away from gambling and DFS operators to the leagues themselves, each league enforces a rule book that establishes the parameters of fair play and attendant punishments.²⁴⁸ By detailing the requirements of how teams must compete on and off the field and making affirmative comments claiming the fairness of their games,²⁴⁹ the leagues and operators provide sufficient acts and statements allowing gamblers to expect fair play—or at least enforcement of their rules. In other words, as the leagues establish lucrative relationships with companies like FanDuel and DraftKings through which they usher their fans to these gaming operators, such a joint venture mixed with affirmative statements and implicit promises made in the rule books gives gamblers a justifiable reliance on fair play.²⁵⁰ We also theorize that amending the laws to promote the rights of gamblers would *enhance* sports integrity by incentivizing the leagues to maintain a fair and competitive landscape.

In short, an objective goal of this Article is to recognize key similarities between investors and gamblers so harms remedied by securities law may also be remedied in the sports gambling market. We assert that those who bet on platforms like FanDuel or DraftKings deserve recourse when cheating causes them losses, given

244. *Meet Our Regulators*, DRAFTKINGS.COM, <https://www.draftkings.com/community-guidelines> [<https://perma.cc/K983-8CBP>].

245. *Football*, DRAFTKINGS.COM, <https://casino.draftkings.com/?page=1> [<https://perma.cc/4N9F-XCNN>] (click “How To Play”; click “Learn More”) (“We are regulated by the New Jersey Division of Gaming Enforcement as an [i]nternet gaming operator in accordance with the Casino Control Act N.J.S.A. 5:12-1 and its implementing regulations. Our games are tested by the New Jersey Division of Gaming Enforcement to provide games that are fair and operate correctly.”).

246. *No-Pros Zone*, FANDUEL.COM, <https://www.fanduel.com/no-pros-zone> [<https://perma.cc/L562-GXVL>].

247. *Why FanDuel?*, FANDUEL.COM, <https://www.fanduel.com>.

248. *See, e.g.*, OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE, NAT’L FOOTBALL LEAGUE (2019), <https://operations.nfl.com/media/3831/2019-playing-rules.pdf> [<https://perma.cc/C4F7-Q3NQ>].

249. *See id.*

250. *See, e.g.*, *Major League Baseball and FanDuel Strike Sports Betting Deal*, CNBC (Aug. 15, 2019, 1:02 PM), <https://www.cnbc.com/2019/08/15/major-league-baseball-and-fanduel-strike-sports-betting-deal.html> [<https://perma.cc/LV2P-TVAA>].

the depth of operators' relationships with the leagues. So long as the leagues have sought to profit from DFS and the gambling industry by funneling their fans to operators for the sake of wagering, this creates a bond with gamblers that had not existed previously.

A chief advantage of this approach is that it would enhance the integrity of sports. If leagues lack incentives to identify and punish cheating, the costs arising from gambler lawsuits would reverse this course. In the Astros example, the leagues would have likely taken a more proactive approach in investigating and preventing sign stealing if the leagues feared that DFS players and gamblers could allege a fraud-on-the-market lawsuit. This would generate costs that currently do not exist to promote the integrity of sports. Today, after all, the Astros *profited* from the cheating, considering the extent to which the benefits of winning the World Series exceeded the nominal punishments.

While there has been a great deal of academic effort spent on advocating for a rollback of the fraud-on-the-market theory in securities markets, the theory actually appears well-suited to be expanded to protect consumers in other industries. The presumption of bettors is like that of investors: they are not playing a rigged game. Since the establishment of securities laws in the first part of the twentieth century, investors have had the benefit of corporate disclosures and legal protections from acts that might undermine the integrity of the market. Bettors, by contrast, have virtually nothing that guarantees the underlying sporting events are legitimate, despite the fact that the sports leagues are now active partners in promoting wagering. The disconnect between the protections of these two markets can no longer be justified by arguing that sports betting is a moral vice and should not be encouraged.

E. Implications

Additional areas known for investment where fraud may manipulate prices without one's direct knowledge of misstatements include the art and cryptocurrency markets. In both instances, investors purchase assets with a degree of reliance on the good's price. When the asset's price is influenced by fraud to the investor's detriment, fraud-on-the-market would likely make sense as it would in the sports gambling market.

1. Art Market

A significant area where actors can manipulate market prices via porous information is the art market. Art's price is substantially affected by its provenance as well as authenticity: a fake or stolen work is virtually worthless.²⁵¹ A problem facing art dealers is that if information escapes about whether an artwork is stolen or faked, it can devastate the work's value.²⁵² This has led dealers and auction houses to engage authenticators in secret in case the expert declares the work to be faked; here, the dealer seeks to manipulate information in a manner obscuring prices away

251. Gregory Day, *Explaining the Art Market's Thefts, Frauds, and Forgeries (and Why the Art Market Does Not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. 457, 486 (2014).

252. *Id.* at 485.

from their efficient point.²⁵³ After all, an efficient market would include this information. Beyond merely concealing information, it is common for dealers, owners, and auctioneers to then fill the market with contrary information in hopes of driving prices up.

But rather than compelling dealers to disseminate only accurate information, or otherwise forbidding them from spreading false statements, the art market lacks any type of regulating structure. As a former FBI agent stated about the art market, it is a “last sort of bastion[] of unregulated business . . . [i]f you’re a collector, if you’re in this art world, it truly is buyer beware.”²⁵⁴ Notable is the importance of misinformation on downstream transactions: a seller who knows of adverse information has no duty to share it. Instead, buyers are tasked with the plenary responsibility of determining whether a work is fraudulent or stolen.²⁵⁵ Consider that one dealer could supply a forged authenticity statement, which later sellers could supply.²⁵⁶

At issue is that buyers can struggle to sue for fraud upon buying a forged or stolen painting when clandestine information exists about the work’s value. By incorporating fraud-on-the-market into the art market, buyers could purchase works with added confidence if sellers could no longer shroud information. This would allow buyers to allege fraud by virtue of merely purchasing a work at prices distorted by lies, misstatements, or materially misleading comments. And given the informational problems plaguing the art market, it would at least begin to remedy the types of issues dissuading people from buying art as well as depressing its value. The point is indeed that the art market is similarly prone to misinformation, which a fraud-on-the-market theory could help to ameliorate.

2. Cryptocurrencies

An area in which fraud-on-the-market could help is cryptocurrencies. Cryptocurrencies exist in something of a categorical abyss, with the Securities and Exchange Commission (SEC) electing not to classify popular cryptocurrencies like Bitcoin and Ether as securities.²⁵⁷ The SEC’s conclusion was that the current decentralized version of the cryptocurrencies did not satisfy the definition of a security.²⁵⁸ While observers in the industry cheered the decision of the SEC, it could leave some cryptocurrency investors with little remedy if they suffer losses.

253. *See id.* at 479–80.

254. Scott Cohn, *Think You Can Spot a Fraud? This \$80 Million Art Scam Fooled the Experts*, CNBC (Aug. 17, 2018, 8:00 AM), <https://www.cnbc.com/2018/08/16/think-you-can-spot-a-fraud-this-80-million-art-scam-fooled-experts.html> [https://perma.cc/YB9Z-BP3K] (quoting Meridith Savona).

255. *See* Benedetta Ricci, *The Art of Forgery – Art Forgers Who Duped the World*, ARTLAND, <https://magazine.artland.com/the-art-of-forgery-art-forgers-duped-world/> [https://perma.cc/9FPB-9XN2].

256. *See id.*

257. Louise Matsakis, *Rest Easy, Cryptocurrency Fans, Ether and Bitcoin Aren’t Securities*, WIRED (June 14, 2018, 4:19 PM), <https://www.wired.com/story/sec-ether-bitcoin-not-securities/> [https://perma.cc/GZ2F-TZ2H].

258. *Id.*

This is potentially problematic because the cryptocurrency market has attracted fraud based upon misleading statements. Another example occurred when John McAfee, formerly of antivirus software fame, used his Twitter account to perpetrate an alleged pump-and-dump scheme.²⁵⁹ The claim is that his “lies and deception” caused investors to overvalue “altcoins” in a manner allowing him to generate millions of dollars.²⁶⁰ OneCoin reflects a similar scam where the currency’s value was derived from false statements in creating a \$4 billion Ponzi scheme.²⁶¹ Indeed, rather than anecdotes, the enthusiasm for cryptocurrencies has generated numerous scams. On May 22, 2021, the issuers of a cryptocurrency, DeFi100, announced, “We scammed you guys and you can’t do shit about it. HA HA. All you moon bois [sic] have been scammed and you can’t do shit about it.”²⁶² The Federal Trade Commission has notably commented that reports of crypto scams have “skyrocketed.”²⁶³

Recall, though, that investors would have little ability to sue for fraud if the investor has not directly come into contact with the misstatements and invested because of them. After all, especially in industries where excitement fuels investments—such as with cryptocurrencies—it would seem unduly burdensome for investors to prove reliance on specific statements in order to prove fraud. In other words, given the connection of some cryptocurrencies to influencers, it is far from a stretch to envision statements being made by a highly public figure impacting the price of a cryptocurrency.²⁶⁴ The indeterminate status of cryptocurrencies threatens to leave investors with fewer remedies than other types of investments, but an extension of the fraud-on-the-market theory could help protect investors.

259. Jonathan Stempel & Chris Prentice, *UPDATE 3-Antivirus Pioneer McAfee Charged by U.S. with Cryptocurrency Fraud*, YAHOO! FIN. (Mar. 5, 2021), https://finance.yahoo.com/news/1-u-says-john-mcafee-171457564.html?utm_source=dlvr.it&utm_medium=twitter [<https://perma.cc/C4GB-24R8>].

260. *Id.*

261. Jamie Crawley, *\$4B Ponzi Scheme OneCoin and ‘CryptoQueen’ Leader Found in Default in US Lawsuit*, COINDESK (Sept. 14, 2021, 8:56 AM), <https://www.coindesk.com/4b-ponzi-scheme-onecoin-and-cryptoqueen-leader-found-in-default-in-us-lawsuit> [<https://perma.cc/S86M-7GVJ>].

262. Ryan Broderick, *Inside the Cryptocurrency Scam Vortex*, VERGE (Jun. 10, 2021, 10:05 AM), <https://www.theverge.com/22522380/cryptocurrency-scams-hacks-bitcoin> [<https://perma.cc/23VG-VDQ8>].

263. Emma Fletcher, *Cryptocurrency Buzz Drives Record Investment Scam Losses*, FED. TRADE COMM’N (May 17, 2021, 10:29 AM), <https://www.ftc.gov/news-events/blogs/data-spotlight/2021/05/cryptocurrency-buzz-drives-record-investment-scam-losses> [<https://perma.cc/L5SJ-67VW>].

264. For purposes of illustration, consider the potential influence of Tesla’s Elon Musk on the meme-based cryptocurrency, Dogecoin. *See, e.g.,* Alicia Adamczyk, *What’s Behind Dogecoin’s Price Surge—and Why Seemingly Unrelated Brands Are Capitalizing on Its Popularity*, CNBC (May 12, 2021, 12:05 PM), <https://www.cnbc.com/2021/05/12/dogecoin-price-surge-elon-musk-slim-jim.html> [<https://perma.cc/K8TS-9GXE>] (discussing Elon Musk’s connection to Dogecoin).

CONCLUSION

This Article provides empirical support for fraud-on-the-market via analysis of the sports gambling market. It makes the case that sports markets must allow those who bet via DFS, or league-endorsed sportsbooks, to redress fraud and cheating scandals. No longer may the leagues and teams claim that gambling occurs exogenously to their competitions, given their entanglement with DraftKings and FanDuel. They indeed profit lucratively from delivering their fans to the sports gambling industry. To remedy cheating, gamblers should be able to remedy informational injuries plaguing wagering markets just as securities markets protect investors from fraud. By recognizing the fraud-on-the-market theory, investors should be able to show that they relied on price signals in wagering, which teams and leagues distorted with cheating. Giving gamblers a cause of action would incentivize firms to identify and punish cheating rather than turning a blind eye as well as failing to punish the culprit. It would thus improve the integrity of sports. Recognizing, though, that fraud-on-the market is beleaguered in securities litigation, this research provides support for it across the sea of investable markets.