“It is the gods’ custom to bring low all things of surpassing greatness.”

-- Herodotus

I. INTRODUCTION

Free Pete. Those two words provide a succinct summary of this article’s argument. Non-baseball fans may not appreciate the phrase, but for anyone with a deep appreciation for professional baseball, the phrase carries far more weight than its brevity suggests. The phrase refers of course to Pete Rose, the former professional baseball player and manager of the Cincinnati Reds.\(^1\) Once heralded as “Charlie Hustle” because of his consistent effort on the field, Rose became a household name in Major League Baseball (“MLB”) in the 1960s.\(^2\) Few careers have reached the heights of Rose’s career, as he won multiple World Series championships with the Cincinnati Reds and set several records that still stand to this day.\(^3\)

Unfortunately, Rose’s illustrious career would soon be eclipsed by his expulsion from the league for gambling on professional baseball.\(^4\) After MLB’s investigation revealed that Rose had bet on baseball games—including Reds’ games while he was the team’s manager—Rose received a lifetime ban.\(^5\) However, given MLB’s recent actions regarding its involvement with daily-play fantasy sports providers, Rose’s lifetime punishment is highly inequitable.

A far cry from traditional season-long fantasy leagues, daily-play fantasy leagues embody an entirely different type of fantasy game, which provides
lucrative opportunities for top participants. Whereas traditional fantasy sports lasting a full season are typically classified as games of skill and thus not subject to gambling scrutiny, daily-play fantasy games face a much steeper battle fighting the stigma of gambling. Providers of these daily-play fantasy sports, such as FanDuel, allow participants to bet thousands of dollars daily on the statistical performances of professional athletes.

Based on the questions surrounding the legality of daily-play fantasy sports, MLB’s recent partnership with DraftKings, another daily-play fantasy provider, comes as a surprise, especially considering that the league gave Pete Rose a lifetime ban for betting on baseball. After all, Rose’s gambling on baseball games is not that different from actions taken by participants in daily-play fantasy sports. Presumably, Rose’s thought process for betting on Reds’ game likely consisted of reviewing each player in the batting rotation, analyzing the strengths and weaknesses of each player in the lineup, comparing the opposing team’s strengths and weaknesses, and then considering other factors such as weather conditions. When this analysis suggested that the Reds had a good chance to win, he placed his bet accordingly. Comparing this analysis to the actions taken by a participant in a daily-play fantasy league reveals the glaring similarities between the two activities.

This article examines that comparison and argues that, based on the similarities between Pete Rose’s actions and daily-play fantasy sports, MLB should lift Pete Rose’s lifetime ban and allow him to be considered for induction into the hall of fame. MLB cannot use one hand to throw the book at Pete Rose while using the other hand to earn revenue by supporting daily-play fantasy sports providers. The article starts by examining the history of gambling with an emphasis on Pete Rose’s gambling controversy in order to provide a backdrop for discussion of the legality of daily-play fantasy sports. The article then provides a background of the evolution of fantasy sports and the relevant legislation derived from both gambling and fantasy sports. Finally, the article looks at the new trend in fantasy sports regarding daily-play fantasy leagues, focusing on the amount of skill versus chance utilized in such leagues. The article then concludes that in light of MLB’s support of daily-play fantasy sports, Pete Rose’s lifetime ban is inequitable and should be removed.

7. Id.
8. Id.
10. See infra Part II(A).
11. See infra Part II(B)-(C).
12. See infra Part III.
13. See infra Part IV.
II. BACKGROUND

A. Gambling and Pete Rose

It is no big secret that sports and gambling share a long history together. Notable controversies surrounding gambling and sporting events span back multiple decades across a number of different professional and collegiate sports. In 1920, MLB banned eight members of the Chicago Black Sox from professional baseball for life for allegedly losing the 1919 World Series deliberately, in an event now referred to as the “Black Sox Scandal.” Other gambling controversies center on gambling tactics known as “point-shaving,” which involves an attempt to fix the final score of a game to cover the “spread.” In gambling terms, the “spread” is a technique used to make wagers placed on games more controllable by bookies. Bookies are parties that accept wagers on sporting events, sometimes illegally. “Point-shaving” is the term used when athletes purposefully alter the score of a game to cover a certain “spread” created by bookies. Other controversies involving betting on sports have also taken place in the National Basketball Association (“NBA”) and in international sports.
Of the infamous sports gambling controversies, few are as well known as that of Pete Rose’s gambling on professional baseball.22

When it comes to professional baseball careers, few players have left the field with as many accolades and accomplishments as Pete Rose. During his career, Rose won three batting titles,23 three World Series championships (two with the Cincinnati Reds and one with the Philadelphia Phillies),24 and two Gold Glove awards.25 When he retired as a player in 1986, he held records in total hits (4,256), games played (3,562), and at-bats (14,053).26 To put that in perspective, Rose is one of only two players to accumulate over 4,000 hits; the second highest hit total belongs to Ty Cobb,27 who some believe may have been the best baseball player of all time.28

Unfortunately, Pete Rose’s conduct off the field greatly overshadowed his performance on the field. In response to receiving reports that Rose may have gambled on professional baseball games, including Reds’ games in which Rose acted as the team’s manager, MLB Commissioner hired John M. Dowd to conduct a full investigation of the matter.29 Dowd’s investigation revealed Rose placed multiple bets from 1986 to 1989, including multiple bets on Reds’ games.30 Taped recordings revealed a system in which Rose would place bets indirectly by using a third party to place bets with a bookie.31 Testimony

21. Erick S. Lee, Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues, 29 LOY. L.A. ENT. L. REV. 53, 65 (2008). In 2007, NBA referee Tim Donaghy admitted to betting on games in which he was a participating referee. Id. Also, many Italian soccer clubs were allegedly involved in a large-scale gambling scheme involving match-fixing in 2006, in what some refer to as the largest gambling controversy in soccer history. Id.

22. Barra, supra note 5.


30. Id. at 916.

31. Id. at 917. (“The evidence showed that with few exceptions, Rose did not deal directly with bookmakers but rather placed his bets through others. As discussed in Section III, during the 1985 and 1986 seasons, Rose placed bets on baseball with Ron Peters, a bookmaker in Franklin, Ohio.
provided by others involved with Rose’s gambling showed that Rose bet on a wide range of sports other than professional baseball as well. Handwriting experts later confirmed that betting sheets recovered from Rose’s home contained Pete Rose’s handwriting.

After the evidence provided in the Dowd Report revealed that Rose had gambled on professional baseball games—including Reds’ games—Commissioner Bart Giamatti banned Rose from MLB for life in 1989. Giamatti based the ban on Rule 21(d) of the MLB Rules, which states:

- Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform, shall be declared ineligible for one year.
- Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has a duty to perform shall be declared permanently ineligible.

Rose denied the allegations for several years; however, in 2004, he came clean and confessed to gambling on professional baseball games during his tenure as a player and manager. One important caveat to that, however, is that there was no evidence showing Rose gambled against the Reds.

Some sports commentators have questioned whether Rose’s lifetime ban from MLB and the Hall of Fame is equitable. Rose’s punishment appears harsh when compared to punishments doled out for similar offenses. Consider the transgressions committed by Denny McClain, another professional baseball player with a sordid off-field reputation: McClain was convicted of a number of different crimes, including racketeering, selling drugs, money laundering, etc. However, because McClain’s criminal activities did not involve gambling on professional baseball directly, he remains eligible for the Hall of Fame.

Cursory glances at other recent sports scandals also raise questions about the fairness of Rose’s punishment. Most recently, the two-game suspension handed

32. Id. at 923.
33. Id. at 983–85.
34. Pete Rose Biography, supra note 1.
35. Dowd, supra note 29, at 915–16.
36. Pete Rose Biography, supra note 1.
37. Dowd, supra note 29, at 917 n.3.
38. Barra, supra note 5.
39. Id.
40. Id.
41. Id.
down to National Football League ("NFL") running back Ray Rice by Commissioner Roger Goodell for assaulting his then-fiancé perplexes many sports commentators. Video of the incident showed Ray Rice hauling his unconscious fiancé out of an elevator after the assault. It seems counterintuitive that the punishment for an offense like gambling should be more severe than physical assault on a defenseless woman.

The same argument could be made regarding Michael Vick’s dogfighting controversy back in the mid-2000s, for which the NFL quarterback was sentenced to twenty-three months in prison. As part of the underground dogfighting ring, unwanted dogs and dogs of no value were executed in a number of ways, including “electrocution, hanging, drowning and other violent means.” Despite the horrific, brutal nature of these executions, Commissioner Roger Goodell eventually reinstated Vick and gave him the chance to redeem himself.

Juxtaposing these punishments and their corresponding offenses with that of Pete Rose’s lifetime ban certainly raises questions about the fairness of Rose’s punishment. This is especially true when considering Pete Rose’s punishment in the context of fantasy sports.

B. Fantasy Sports

Join a conversation in any sports bar and you will probably end up in a discussion about fantasy sports. Since its inception in the 1980s, fantasy sports have grown exponentially across multiple professional sports platforms, boasting 33.5 million participants and counting. Those brave enough to actually participate in a fantasy sports league may find the line between innocent hobby and sleep-depriving addiction blurry. Signing on to your fantasy sports league multiple times a day to check your lineup becomes a regular part of your schedule. You may find yourself spending hours doing research trying to discover which players will lead to fantasy success. Conversations with friends inevitably turn into heated debates over which running back to play in your flex spot.

43. Id.
45. Id.
47. Erik Matuszewski, Fantasy Sports Luring Wall Street in Its Fastest-Growing Sector, BLOOMBERG (Jan. 5, 2014), http://www.bloomberg.com/news/2014-01-06/fantasy-sports-luring-wall-street-in-its-fastest-growing-sector.html (“More than 33.5 million people now play fantasy sports in the U.S., according to the trade association, with leagues based on the NFL far outpacing Major League Baseball as the most popular. Fantasy sports are gaining popularity outside the U.S. also, with leagues for soccer and cricket.”).
This type of mindset is common among avid fantasy sports players and is becoming more common as participation in fantasy sports continues to grow.\textsuperscript{48} Many fantasy sports participants do not care particularly about any actual sports team or the outcome of any particular game.\textsuperscript{49} Hours drift by as these fantasy sports enthusiasts stare at the computer screen pouring over endless amounts of statistical data, searching for a pattern that will determine which players to start week in and week out.\textsuperscript{50}

Granted, fantasy sports for most participants are innocent and do not venture beyond a competitive hobby.\textsuperscript{51} However, despite its seemingly innocuous nature, fantasy sports leagues create a number of interesting legal issues, most notably whether or not paying to participate in them constitutes gambling.\textsuperscript{52} With the advent of daily-play fantasy leagues,\textsuperscript{53} arguing that fantasy sports leagues are “innocent” and do not constitute gambling becomes far more difficult.\textsuperscript{54}

1. History

Early variations of sports simulation games can be traced back as early as the 1920s.\textsuperscript{55} However, the earliest versions of the fantasy sports existing today would not come into being until the 1960s when Bill Winkenback, part-time owner of the Oakland Raiders, and a few employees of the Oakland Tribune created the first fantasy football league, the Greater Oakland Professional Pigskin Prognosticator’s League.\textsuperscript{56} Not long after, Daniel Okrent, an editor-at-large for Time Inc., created the first fantasy baseball league known as the “Rotisserie League,” a name derived from the bistro in New York where the league was created.\textsuperscript{57} When two separate periodicals published articles about fantasy sports in the early 1980s, their popularity began to grow.\textsuperscript{58}

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Lee, supra note 21, at 69–70 (discussing the results of several studies showing that most fantasy sports participants are adults not particularly vulnerable to the typical pitfalls associated with gambling).
\textsuperscript{52} See Nicole Davidson, Internet Gambling: Should Fantasy Sports Leagues Be Prohibited? 39 SAN DIEGO L. REV. 201, 228 (2002) (arguing that pay-to-play fantasy sports leagues violate federal and state laws).
\textsuperscript{55} Id. at 4.
\textsuperscript{57} Edelman, supra note 54, at 7–8 (“In April 1980, Okrent and his friends returned to the La Rotisserie Francaise restaurant, along with Sklar, to conduct the first-ever Rotisserie League baseball player auction. For purposes of this auction, each of the league’s ten participants posted a
With the onset of the Internet, the tracking and computation of bulk amounts of data became much easier, causing the popularity of fantasy sports to surge.\textsuperscript{59} Today, fantasy sports have become a cultural sensation among sports enthusiasts, with over 33.5 million people playing fantasy sports.\textsuperscript{60} The Internet provided a platform for fantasy sports enthusiasts to indulge in countless hours of crunching numbers and compiling statistics in order to gain a competitive edge.\textsuperscript{61} Instead of painstakingly handwriting statistics and using calculators to compile sports statistics, participants can now access endless amounts of fantasy sports data almost instantly via computers or even smart phones.\textsuperscript{62} Some companies even offer services that provide fantasy sports statistics and updates continuously to their customers.\textsuperscript{63}

2. Rules

Fantasy sports entail a group of participants creating fictitious teams comprised of professional athletes; the actual, statistical performances of the professional athletes dictate each participant’s score.\textsuperscript{64} Depending on which fantasy sport you are playing, the rules of the game will vary. For example, in fantasy baseball, there are different types of leagues you can join. You can join a private league typically consisting of eight to twelve participants, each of whom creates a fantasy team, or you can join a public league in which you compete against other participants randomly selected.\textsuperscript{65} Once in a league, participants select professional athletes to comprise their fantasy team by using either a draft format or an auction format.\textsuperscript{66}

Under the draft format, league participants either select players in real time via a live draft by using pre-ordered draft lists created by the participant or by


\textsuperscript{59} Mueller, \textit{supra} note 56, at 530–31.
\textsuperscript{60} Matuszewski, \textit{supra} note 47.
\textsuperscript{61} Mueller, \textit{supra} note 56, at 530–31.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} at 529.
\textsuperscript{66} Edelman, \textit{supra} note 54, at 13–14.
automatic selection of players. Under the auction draft format, participants select players through either a “traditional” auction or a “modified” auction. In “traditional” auctions, participants begin with a set amount of money from which to place bids for their desired players; the bidding for players continues until each participant completes their team’s lineup. Under a “modified” auction, participants can “buy” players from their set amount of money, and the fantasy sports provider determine the price of each individual player.

A standard team consists of the same positions used for an actual baseball game: one pitcher, one catcher, three outfielders, and four infielders. Standard leagues also provide for a “utility hitter” as well, which can be a player at any position. Participants may also carry six bench players that can be substituted during the season. Once the teams are set, the scoring system allocates points for different statistics tracked and recorded for professional athletes; a fantasy league participant’s points depend on the individual statistics accumulated by each player on his or her respective fantasy team.

As for the actual matchups, a participant competes against a different participant each week during the season. This is known as “Head-to-Head” play, the goal being to score more points than your opponent each week. If a participant scores more points than his or her opponent, he or she accumulates a win for that week and the opponent receives a loss. At the end of the season, the teams with the most wins compete in the playoffs to determine the overall winner of the league. The rules between leagues can vary greatly given the number of statistics, participating teams, and other factors, but the overall principle remains the same.

A similar type of system is used in other fantasy sports as well. For example, in fantasy football, there are also private and public leagues; an initial draft is held in which participants select players for their respective teams, and the draft can either be a live draft or an automated draft. The scoring system is based on the statistics accumulated by the respective players each week during the actual NFL season. Points are assigned based on different categories, such as rushing

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67. *Official Rules*, supra note 65 (“You can choose your MLB players by participating in a real-time online draft (“Live Draft”), by having your Team automatically selected for you based off your own pre-selected MLB player rankings (“List Draft”), or by having a roster of players automatically assigned to you (“Simple Draft”).”).

68. *Id.* not 54, at 13.

69. *Id.*

70. *Id.*


72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

touchdowns, total rushing yards, passing touchdowns, etc. Participants compete against other participants each week in head-to-head matches, and a playoff system is used to determine the winner at the end of each season.

A participant’s success hinges on his or her ability to accurately predict the statistical output of the respective players. This is not only true of the initial draft but throughout the season as well. Participants must constantly decide which athletes to play or bench and which athletes to trade while simultaneously keeping an eye on current statistical trends. Knowing which players to play and when to play them is paramount to winning in fantasy sports.

Another type of fantasy sports leagues are “Pick’ em” leagues in which participants must choose the winners of multiple, actual sporting events in order to accumulate points. In this format, participants compete over the course of a specified period of time, most likely a week or season, and the participant who picks the most winners of the actual games is declared the winner. In certain “Pick’em” leagues, the use of point spreads may even come into play, whereby players may accumulate points not only by choosing the winner, but also by choosing a losing team that covers the spread.

In addition to the various types of fantasy leagues, other important distinctions exist regarding specific timeframes involved. Two additional types of leagues serve as the source of the current legal discussion over the legality of fantasy football: pay-to-play leagues and daily-play fantasy sports leagues. Pay-to-play leagues usually entail customers paying an initial fee in order to create a fantasy team; in addition to being able to create a team, customers are provided with other benefits. Depending on the entrance fee, winners of pay-to-play leagues are awarded various prizes, ranging from t-shirts to flat-screen TVs.

77. See id.
78. See id.
80. See id.
81. See id.
82. See id.
83. Lee, supra note 21, at 61.
84. Id.
85. Id.
86. Humphrey, 2007 WL 1797648, at *1 (“Although the rules and services vary somewhat from one fantasy sports provider to another, the websites operate as follows. Participants pay a fee to purchase a fantasy sports team and the related services. The purchase price provides the participant with access to the support services necessary to manage the fantasy team, including access to “real-time” statistical information, expert opinions, analysis and message boards for communicating with other participants. The purchase price also covers the data-management services necessary to run a fantasy sports team. Using these services, the participants “draft” a slate of players and track the performance of those players in key statistical categories throughout the season. Participants are grouped into “leagues” of as many as twelve teams and compete not only against the members of their own leagues, but can also compete against the winners of the other leagues.”).
87. Id. at *2.
The more recent trend in fantasy sports is the proliferation of daily-play fantasy sports.88 This style of fantasy sports is vastly different from the stereotypical, season-long slugfest with your old college roommates. More akin to online poker and other traditional types of gambling, daily-play fantasy sports allow participants to compete in daily competitions in a format similar to that of typical fantasy leagues.89

In daily-play fantasy sports, participants choose players and leagues in a fashion similar to traditional sports leagues, albeit with minor variations.90 Participants can choose from a variety of different leagues across different sports and with a wide range of entry fees.91 If your team performs better than the other teams in your selected league, you win your respective league and the prize.92 Although they have the same format and are based off the same principles as traditional fantasy sports, the timing component of daily-play fantasy sports may be problematic from a gambling perspective.

For example, consider the daily-play fantasy sports providers known as FanDuel93 and DraftKings94. If you go to either website and create a profile, you can enter any number of different tournaments throughout the week. For example, DraftKings provides different types of fantasy sports tournaments to enter, including head-to-head matchups, leagues, and “50/50s.”95 A list of current tournaments is provided with prizes that often exceed two million dollars.96 These sites also provide the amount of the entry fee and number of participants for each tournament.97 Drawing the parallels between these setups and those of online poker websites is not difficult. The setup is essentially the same as a poker tournament where participants pay a buy-in to enter the tournament with a prize awarded to the winner.

Some daily-play fantasy participants have even turned daily-play fantasy sports into a lucrative career. Peter Jennings, a former professional poker player and stockbroker, began participating in daily-play fantasy sports after the federal

88. Manfred, supra note 53.
89. Id.
90. Id.
91. Id. (“If you’re familiar with early-2000’s online poker, daily fantasy sports works in a similar way. There are dozens of daily leagues with different buy-ins (from $2 to a few hundred dollars), different draft styles (salary cap, snake draft, etc.), and different sizes (2 people to 550 people). You choose your league, pay your entry fee, pick your team, and collect your winnings if your team gets better stats than the other teams in your league. And then you do it all again the next day.”).
92. Id.
95. Id. (follow the “FAQs” link). A “50/50” is a contest in which participants win cash or prizes as long as they finish in the top fifty percent, and a head-to-head matchup pits two participants against each other in a winner-take-all format. Id.
96. See, e.g., id. (follow the “View Contests” link).
97. See, e.g., id. (follow the “View Contests” link).
government shut down multiple online poker sites. Jennings’ foray into daily-play fantasy sports proved to be extremely profitable; in one weekend, he managed to turn $20 into $150,000 playing daily-play fantasy sports. He now works as an analyst for another daily-play fantasy provider.

The structure and pacing of daily-play fantasy sports and the similarities they share with online poker raise a number of questions about whether they constitute gambling. However, with providers of daily fantasy sports leagues experiencing increasing revenues and participants reaping lucrative paydays, it seems likely that the prevalence of daily fantasy sports will continue to grow.

C. Gambling Legislation

The increasing prevalence of online gambling is indicative of the constantly growing popularity of gambling on sports. Opponents of sports gambling offer a wide range of reasons for disallowing it. Probably the most common reason proffered for disallowing sports gambling is that it compromises the integrity of the sport. Other common concerns are possible increases in crime, exploitation of susceptible parties prone to gambling addiction, and exploitation of financially unstable parties in general.

1. The Federal Wire Act

Illegal gambling schemes conducted by organized crime syndicates became more prevalent in the 1950s. In response to these issues, the federal government passed the Wire Act of 1961 ("Wire Act"). The Wire Act essentially prohibited using any sort of wire communication to facilitate any type of wager or to transfer money related to a bet or wager relating to a sports event. However, the Wire Act does not “prevent transmission of information assisting

98. Brustein, supra note 6, at B9.
99. Id.
100. Id.
101. Manfred, supra note 53.
102. See Lee, supra note 21, at 60 (noting the increasing participation in online gambling since the early 2000s and particularly the exorbitant amount of money wagered on the 2008 Super Bowl between the New England Patriots and the New York Giants).
103. See id. at 62–66 (discussing the argument that gambling on sports provides a possible financial incentive for athletes to compromise their performance); see also Dowd, supra note 29, at 916 (“Betting on baseball by a participant of the game is corrupt because it erodes and destroys the integrity of the game of baseball. Betting also exposes the game to the influence of forces who seek to control the game to their own ends. Betting on one’s own team gives rise to the ultimate conflict of interest in which the individual player/bettor places his personal financial interest above the interests of the team.”).
104. Lee, supra note 21, at 66–68.
106. Id. at 11.
the placement of bets from a state where the bet is legal to another state where it is legal.\textsuperscript{107}

2. Internet Gambling Prohibition Act

It was not until proposed legislation known as the Internet Gambling Prohibition Act of 1999 (“IGP”) that the topic of fantasy sports became directly involved in federal legislation.\textsuperscript{108} Certain definitions in the IGP that targeted Internet gambling were so broad that a large contingency of the sports world became afraid that the IGP would apply to fantasy sports.\textsuperscript{109} The concern led MLB Player’s Association (“MLBPA”) to send an advocate to argue against the passage of the IGP in 1998.\textsuperscript{110} The MLBPA argued that the same externalities created by other Internet gambling activities were not present in fantasy sports gambling.\textsuperscript{111} As a result, the bill was amended to state that it would not apply to any bets or wagers associated with fantasy sports, leaving the issue of fantasy sports a matter of state law.\textsuperscript{112} Although the bill did not pass through the Legislature, its treatment of fantasy sports was indicative of how fantasy sports would fare in the current legal climate.

3. Unlawful Internet Gambling Enforcement Act of 2006

The creation of the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) resulted mainly because “traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”\textsuperscript{113} Under the UIGEA, banks and other financial institutions are prohibited from conducting any financial exchanges between illegal online gambling sites.\textsuperscript{114} As one article points out, the UIGEA “makes it a felony for those engaged in the business of betting or wagering to ‘knowingly accept’ transactions made in the participation of unlawful Internet gambling.”\textsuperscript{115} Under the UIGEA, a “bet” or “wager” is defined “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to

\begin{itemize}
\item \textsuperscript{107} Rousso v. State, 239 P.3d 1084, 1088 (Wash. 2010) (citing 18 U.S.C. § 1084(b) (2006)).
\item \textsuperscript{108} See Michael J. Thompson, \textit{Give Me $25 on Red and Derek Jeter for $26: Do Fantasy Sports Leagues Constitute Gambling?}, 8 SPORTS LAW. J. 21, 26–27 (2001).
\item \textsuperscript{109} See \textit{id}. at 26–28.
\item \textsuperscript{110} \textit{Id}. at 27.
\item \textsuperscript{111} \textit{Id}. at 28.
\item \textsuperscript{112} \textit{Id}.
\item \textsuperscript{113} Interactive Media Entm’t & Gaming Ass’n, Inc. v. Att’y Gen. of the U.S., 580 F.3d 113, 114 (3d Cir. 2009) (quoting 31 U.S.C. § 5361 (2006)).
\item \textsuperscript{115} \textit{Id}. at 150 (citing 31 U.S.C. § 5363 (2006)).
\end{itemize}
chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”

Although the UIGEA “broadly prohibits Internet gambling and related transactions,” the UIGEA also provides specific immunity to fantasy sports leagues, provided the following requirements are met:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

It is clear from the language of the UIGEA that it provides immunity for fantasy sports while still prohibiting other types of sports gambling.

4. Humphrey v. Viacom

Fantasy sports have also been the subject of a complaint filed in the United States District Court for the District of New Jersey. In Humphrey v. Viacom, the plaintiff accused the defendant of violating the qui tam laws of the state by running three pay-to-play online fantasy sports leagues. Qui tam laws exist in various states and serve as a deterrent to gambling in general. The plaintiff indicated that he was invoking these laws to recover losses incurred by participants in the defendant’s allegedly unlawfully gambling schemes.

120. Id. at *2.
121. Id. at *3 (“Although the specific elements of the Qui Tam statutes vary, they share a common origin and purpose. They were intended to prevent gamblers and their families from becoming destitute due to gambling losses and thus becoming wards of the State by providing a method for the gambler’s spouse, parent or child to recover the lost money from the winner.”).
122. Id. at *2.
In its analysis, the Court specifically examined the setup of the pay-to-play fantasy leagues and the structure of the prize payout.123 The plaintiff argued that the payment of an entry fee for a fantasy sports league is the equivalent of a “bet” or “wager” and should thus allow recovery under New Jersey’s qui tam statutes.124 However, the Court relied on previous cases that held “entry fees do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize).”125 Based on these criteria, the Court found that the entrance fee for the pay-to-play leagues did not constitute a “bet” or “wager.”126 Fantasy sports participants merely paid a one-time entry fee to compete in a fantasy league for a specified prize, which the Defendants could not win.127 The Court further relied on the UIGEA’s exception for fantasy sports to confirm that fantasy sports leagues do not constitute gambling.128

III. ANALYSIS

Despite being the subject of multiple pieces of legislation, a concrete definition of what exactly constitutes gambling is somewhat evasive. The task of defining which activities constitute gambling belongs to each individual state.129 As one article points out, this makes nailing down a concrete definition of what constitutes gambling difficult, as the definition varies across the states.”130 American Jurisprudence (Second) defines gambling as “anything that induces persons to risk their money or property without any other hope of return than to get for nothing any given amount from another.”131 This is a broad definition that can and does apply to any number of different activities that are generally not considered gambling. However, across numerous statutes regulating gambling, three particular elements are generally present when defining gambling: (1) players risk something of value; (2) chance is a material factor; and (3) successful play is rewarded by something of value.132

The second element is often the key inquiry; to determine whether a game is one of skill or chance, courts generally use one of three tests: (1) the “predominant purpose test,” (2) the “any chance test,” or (3) the “gambling

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123. See id. at *7.
124. Id.
126. Id. at *9.
127. Id. at *9–10.
128. Id. at *11.
130. Lee, supra note 21, at 72.
instinct test.” Under the “predominant purpose test,” an action is not considered gambling so long as the degree of chance determining the outcome of said action is less than fifty percent. Under the “any chance test,” an action meets the chance element if “a particular game contains any chance that influences the outcome of the game.” The “gambling instinct test” analyzes the characteristics of an activity to determine whether it bears a significant resemblance to gambling.

Chance is generally defined as “a lack of control over events or the absence of controllable causation, that is, the opposite of intention.” However, chance exists in different forms. Games containing some element of chance typically possess one of the following: (1) systemic chance, or (2) imperfect information.

A. Daily-Play Fantasy Sports Are More Akin to Online Poker Than Traditional Fantasy Sports

Systemic chance applies to games that are intrinsically based on some random event occurring or some uncontrollable aspect of the game. Examples include games that utilize activities such as dice rolling, shuffling cards, or random number sequences generated by a computer. Suggesting that systemic chance exists in fantasy sports may hold water when considering the random drafting order of a particular fantasy draft generated by the host site; however, the amount of activity that takes place after the draft, such as trading and substituting players, most likely outweighs the presence of systemic chance in fantasy sports. Systemic chance is probably even less likely to be found in fantasy sports utilizing “auction-style” drafts, as no random drafting order is necessary.

On the other hand, imperfect information applies to games where participants must make decisions within the game based on “hidden or unknown” information. Games such as chess or checkers are good examples of games with perfect information; no “hidden” events or factors can possibly alter the course of the match. Both parties know the pieces, the possible moves, and the past moves of each party, leaving only the possible future actions of each party.

134. Id. at 390–92.
135. Id. at 393.
136. Id. at 393–94.
138. See Cabot et al., supra note 133, at 395–98.
139. Id. at 395–96.
140. Id.
141. Id. at 396–98.
142. Id. at 397.
participant unknown.\(^ {143} \) Games based on imperfect information involve situations where participants only possess partial information regarding the status of the game.\(^ {144} \) Poker for example may involve situations where a participant can see his or her hand as well as the cards showing on the table, but is simultaneously unaware of the opponents’ cards or those yet to be revealed.\(^ {145} \) In these types of games, participants must make decisions using increasingly complicated thought processes in order to be successful.\(^ {146} \) In poker, this could include reading the other players’ actions, analyzing the probabilities of getting the right cards, and determining if and when to raise.\(^ {147} \)

This type of chance with imperfect information more closely represents the type of chance found in daily-play fantasy sports. In daily-play fantasy sports, each participant knows the rules of the game, the scoring system, and the available players. However, the future performances of each player throughout a game, or even a season, are unknown, much like the unseen cards in a game of poker. It is up to the participants to determine the correct combination of players and choices using past statistical performances, favorable matchups, and other additional factors.

The difference again, however, is that daily-play fantasy sports are more frequently subject to chance occurrences than traditional fantasy sports. Certain uncontrollable factors, such as an unforeseen injury, random weather occurrences, or even the ball bouncing in an unexpected manner could change the outcome of a daily-play fantasy event.\(^ {148} \) Similarly, in poker, like an unforeseen injury, a low-probability card could fall that might cause a player to lose, even if statistically speaking, he or she made the play with the highest probability of success. Poker players must use certain factors to make informed choices, such as another player’s past actions, the probabilities of getting a necessary card, and the amount of chips at play. Nevertheless, even if they do everything right, chance may still prevail over skill. Although a fantasy sports participant might make all the right plays from a statistical standpoint, an unforeseen injury could render all of his or her skill completely useless, making chance an extremely large factor in daily-play fantasy sports. Despite these similarities however, only fantasy sports received an exemption from the UIGEA; online poker and other types of gambling did not receive the same exemption.\(^ {149} \)

\(^ {143} \) See id.
\(^ {144} \) Cabot et al., supra note 133, at 396–98.
\(^ {145} \) See id. at 397.
\(^ {146} \) Id.
\(^ {148} \) Brustein, supra note 6, at B9.
\(^ {149} \) Drape, supra note 9.
B. The Skill and Chance in Daily-Play Fantasy Sports and Pete Rose’s Gambling Activities Are Relatively the Same

For the purposes of this article, the “predominant purpose test” will be used as the backdrop for comparing Pete Rose’s gambling activities and daily-play fantasy sports. The reason for this is that the “predominant purpose test” is utilized by the majority of states \(^{150}\) and is the supporting theory behind the exception for fantasy sports under the UIGEA. \(^{151}\) The UIGEA excludes fantasy sports because the results of fantasy sports matches are based on each participant’s ability to accurately predict statistical outputs of professional athletes; participants must use their knowledge and skill to try to beat the other participants. \(^{152}\) Put more simply, the outcome of fantasy sports depends more on skill than chance.

Proponents of fantasy sports believe that fantasy sports should be classified as a game of skill; this is true of daily-play fantasy sports providers and of certain professional sports leagues as well. DraftKings’ website states that it provides games that are based on skill, and are thus legal under federal law and in forty-five states. \(^{153}\) FanDuel makes similar statements on its website, relying on the UIGEA and classification of fantasy sports as skill-based games to state its legality. \(^{154}\) As for professional sports leagues, the NFL and several other professional leagues have sent lobbyists to push for the exemption for fantasy sports from the reach of the UIGEA; meanwhile, sports betting and other games such as online poker were not lucky enough to receive such an exemption. \(^{155}\) Again considering Pete Rose’s lifetime ban, MLB’s role in the fantasy sports realm is even more surprising. \(^{156}\) MLB is currently partnered with DraftKings, which boasts over 500,000 fantasy sports players engaging in tournaments that provide cash prizes. \(^{157}\)

This raises interesting questions. Were Pete Rose’s gambling activities any different than playing a daily-play fantasy sport today? If Pete Rose was the

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152. Id. (“All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.”); see also Humphrey v. Viacom, Inc., No. 06-2768 (DMC), 2007 WL 1797648, at *11 (D.N.J. June 19, 2007) (holding that pay-to-play leagues do not qualify as gambling under the UIGEA).
154. FANDUEL, https://www.fanduel.com/p/Home (last visited Apr. 4, 2015) (must create a profile and follow “Legal” link) (“Fantasy sports is considered a game of skill and received a specific exemption from the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA 2006). FanDuel uses exactly the same rules as any other season-long fantasy sports format, the only difference is that our games last only one day or one week.”).
155. Drape, supra note 9.
156. Id.
157. Id.
manager of the Cincinnati Reds today, would the league see Rose’s participation in a daily-play fantasy sport any differently? It is clear that MLB supports the current trend towards the expansion of daily-play fantasy sports, given its partnership with DraftKings. However, given the similarities between Pete Rose’s actions and those taken by participants in daily-play fantasy sports, equity dictates that MLB remove Rose’s lifetime ban and allow him to be considered for induction into the Hall of Fame.

In daily-play fantasy leagues, participants can only utilize so much skill, as they “lack the opportunity to participate in strategic gamesmanship, such as negotiating trades with other owners, or engaging in other ‘team management’ activities, such as adding or dropping players.” Participants in daily-play fantasy leagues do not have the benefit of an entire fantasy season to insulate themselves from the effects of chance.

Sure, Pete Rose knowingly and willingly gambled on professional baseball games, including games in which he was the acting manager of the Cincinnati Reds. But Rose could have just as easily participated in a daily-play fantasy sports league today; however, although the former activity led to his lifetime ban from professional baseball, his overall thought process may not have proved much different in either scenario. Suppose Rose, while acting as the Reds’ manager, analyzed his roster breakdown and compared it with the opposing teams’ strengths and weaknesses. Then comparing the batting order with the opposing pitcher’s strengths and recent statistical trends, he then decides to place money on the game.

Now imagine that Rose is an acting manager today. Rose stands in the dugout, looking up statistics on his smart phone while mulling over his fantasy options. He looks over the auction style draft trying to determine which players give him the highest probably of winning the daily-play fantasy cash tournament he is currently participating in. Rose’s analysis of which players to choose in his draft would not be much different, if at all, from his analysis in the first scenario. Rose would still be using his baseball acumen in both scenarios to guide his decisions. Granted, more analysis is probably involved in selecting a roster of daily-play fantasy players as opposed to selecting the winner of one game, since it requires analysis across multiple teams and matchups. However, the thought process and decision-making progress would be relatively the same.

As for the chance element, one could argue that the difference between the amount of chance involved in playing daily-play fantasy leagues and choosing

158. Id. (“In fact, Robert Bowman, the chief executive of Major League Baseball Advanced Media, the league’s Internet company, said it was exploring a larger partnership with DraftKings and did not rule out the possibility of cash tournaments or other formats in which money is at stake.”).
160. See id.
161. Pete Rose Biography, supra note 1.
the winner of a single, professional match are not that different. Both involve scenarios taking place over the course of one day and are both subject to “chance factors such as the physical and mental conditions of players, potential problems between team members, and the game-time weather conditions.”\textsuperscript{162} For example, it is logical to assume that losing a star player to a chance injury can significantly lower a professional team’s odds of winning a particular match. Similarly, a daily-play fantasy league participant will be much less likely to win a given tournament if his or her highest rated player is no longer playing due to an injury. Given the effect that an unforeseen injury or weather development can have in daily-play fantasy leagues, one can begin to see how the separation between Pete Rose’s gambling activities and daily-play fantasy leagues is minimal regarding the element of chance.

C. Integrity of the Game

In his official report to the Office of the MLB Commissioner, John Dowd explained how allowing baseball participants to gamble on games in which they participated violated the game’s integrity.\textsuperscript{163} Dowd reasoned that the practice creates a conflict of interests since participants have a separate, monetary interest in the outcome of the game as opposed to the overall interest of the team.\textsuperscript{164} Proponents of prohibiting sports gambling share this sentiment, believing that possible financial gain by altering play may prove too alluring for certain athletes.\textsuperscript{165}

Traditional fantasy sports are not subject to the same concerns as gambling on professional sports. The setups of typical fantasy leagues do not create the same incentives for professional athletes to alter play that gambling on professional games do.\textsuperscript{166} The difficulty in trying to alter play over the course of an entire season would most likely deter professional athletes from any sort of gambling scheme involving fantasy sports.\textsuperscript{167} However, daily-play fantasy leagues do not provide these same safeguards found in typical fantasy sports.

If Pete Rose were still managing the Cincinnati Reds today, he could potentially purchase one or multiple Reds players for his daily-play fantasy team.

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\textsuperscript{163} Dowd, supra note 29, at 916.

\textsuperscript{164} Id.


\textsuperscript{166} Lee, supra note 21, at 66 (“While, hypothetically, an athlete may be able to personally influence the game in which they are participating, the difficulty in rigging the outcome of multiple games weekly, or over the course of an entire season, would likely be a formidable obstacle that would thwart and discourage any attempts of cheating.”).

\textsuperscript{167} Id.
This could potentially create an incentive for Rose to substitute certain players for others, which he would not have done otherwise. Rose might be able to purchase a particular pitcher for the Cincinnati Reds for a lower auction price on his fantasy team, thus allowing him to purchase other players with higher ratings. Or, perhaps, if Rose knew that a majority of fantasy participants in his league were going to purchase a particular Reds player, Rose would have a financial incentive to substitute that player out of the game. This would provide Rose a higher statistical chance of winning his league since the other participants would now be playing with an incomplete team.

Daily-play leagues could also potentially incentivize professional athletes to alter their play. If a daily-play fantasy league’s stakes were high enough, it is at least possible that participants of the league would consider offering professional athletes money to alter their play. Just as in the point-shaving scenarios mentioned earlier in the article, participants could possibly pay athletes to alter their performance in order to shave their own statistics. Although this would prove difficult given the coordination required between participants and athletes and the limited timeframe between daily-play fantasy auctions and actual games, it is still a possibility.

Additionally, as noted earlier in this article, there is no evidence to show that Pete Rose actually bet against the Cincinnati Reds during his tenure as player or manager. So while Rose certainly broke MLB’s rules against gambling, it cannot be said with certainty that he compromised the integrity of the sport by potentially altering the outcome of a game. Betting on the Reds would only have provided Rose additional incentive to win. Meanwhile, if altering the outcome of play is what really concerns MLB, then the penalties it hands out for players using performance-enhancing drugs (PED) should be equally severe. PEDs could potentially affect the outcome of sports games, as they have the “ability or potential to drastically alter the human body and biological functions, including the ability to considerably improve athletic performance in certain instances.” However, for a first violation of PED use, MLB players receive an eighty-game suspension, and a second violation warrants a season-long suspension. Therefore, players who violate MLB’s drug policy and thus compromise the integrity of the games in which they played are given much lighter sentences than that of Pete Rose, yet no evidence actually exists showing Rose violated the integrity of the game by altering the outcome. This is highly unfair to Pete Rose and MLB should thus remove his ban and allow him to be considered for induction into the Hall of Fame.

168. Dowd, supra note 29, at 917 n.3.
IV. CONCLUSION

Pete Rose broke a foundational rule of MLB by gambling on games. The reason for such a rule is obvious, as such actions could create a conflict of interest. But times have changed, and to keep up, MLB has gotten on board with daily-play fantasy sports. These daily-play fantasy sports cling to the idea that they are games of skill and thus are not gambling. However, the setup and elements of chance present in these daily-play fantasy sports reveal a different truth. These types of activities bear far more similarities with other betting activities, such as online poker, as opposed to the traditional, season-long fantasy sports leagues. For MLB to support these daily-play fantasy sports providers is highly hypocritical considering their lifetime ban of Pete Rose, whose gambling activities were minimally different than his participation in daily-play fantasy sports would have been today. MLB needs to recognize the inconsistencies in its policies and remove the lifetime ban imposed on Pete Rose. Or, going back to this article’s original point: Free Pete.