

Gambling on the Internet

by
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I. INTRODUCTION

In 1980, Nelson Rose described the trend of legislatures legalizing various gambling forms as “the third wave of legalized gambling to sweep the nation”¹ In hindsight, that wave, which comprised fourteen state lotteries, spectacular growth of a pari-mutuel horse racing industry, and New Jersey’s legalization of casino gambling,² was a mere puddle compared to what was to follow in the wake of Rose’s article. Spurred by the Indian Gaming Regulatory Act,³ twenty-three states have now legalized casino gambling. The Interstate Horse Racing Act has brought virtually nationwide off-track interstate betting. Utah and Hawaii are the only states that offer no gambling opportunities.⁴ The gambling industry has become a \$550 billion annual business.⁵ The third wave has grown into a fourth tsunami. Included in the fourth wave is the Internet, where some have predicted it will add \$10 billion a year to existing net gaming industry revenues.⁶

Problems arise when one of society’s most tightly regulated activities, gambling, intersects with its least regulated communications medium, the Internet. The “Internet as a wild west” paradigm has been overused,⁷ but it is still valid as comparisons between the image of the frontier where the law was nascent and unenforced, and the current state of the Internet are appropriate, considering the preponderance of illicit activity found on the World Wide Web (web), Usenet groups, and other Internet media. The Internet’s libertarian culture and history, and certain technological realities, have paralyzed law enforcement officials who find laws created for other media unenforceable when applied to the online world. Proponents of this libertarian status quo have described the Internet as “our last great avenue to freedom.”⁸ This freedom has included avenues where individuals with a web connection can gamble

1. Nelson Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 245 n.1 (1980). Rose’s historical framework describes the first wave from colonial times to the Civil War. The first wave was characterized by publicly and privately sponsored lotteries to raise funds for military operations and public works. The second wave began shortly after the Civil War, again featuring lotteries to fund Reconstruction projects. *Id.*

2. *Id.* at 246.

3. Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-68 (1994).

4. See ANTHONY CABOT, *THE INTERNET GAMBLING REPORT* 10 (1997).

5. See David Rohde, *Upstate OTB Wants to Put Horse Wagering on Internet*, N.Y. TIMES, Dec. 26, 1996, at B4.

6. See CABOT, *supra* note 4, at 6; Joshua Quittner, *Betting on Virtual Vegas*, TIME, June 12, 1995, at 63.

7. See, e.g., Hubert H. Humphrey III, *Virtual Casinos, Real Stakes*, N.Y. TIMES, Nov. 19, 1996, at A13.

8. Charles McGrath, *The Internet’s Arrested Development*, N.Y. TIMES MAGAZINE, Dec. 8, 1996, at 83.

on casino games, horse racing, sporting events, lotteries, and more, all from the privacy of their homes.⁹

The belief persists in the mass media and popular culture that gambling on the Internet in the United States is legal; this is not the case.¹⁰ Despite its illegality, there are more than enough web sites to satisfy a techno-gambler's appetite. A survey of the Internet magazine *Rolling Good Times Online* reveals that an individual possessing a credit card has his choice of casino games, lotteries, sports books, and pari-mutuel horse racing.¹¹ A gambler at this site can link to fifteen Internet casinos, twenty Internet sports books, and dozens of lotteries, bingo, and keno games and can purchase tickets, cards, and horse racing wagers at sites all over the world, with a credit card.¹² As the history of gambling in Nevada demonstrates, regulation of Internet gambling is inevitable, due to the status of gambling as a pariah industry.¹³ In 1997, the U.S. Senate¹⁴ and the legislatures of New York¹⁵ and California¹⁶ introduced bills to amend current criminal statutes, expressly proscribing use of the Internet for gambling purposes. The primary question is how a regulatory regime trying to contain Internet gambling will balance the interests of the state in eliminating the vice of Internet gambling with its desire to raise revenue directly.

This article analyzes current proposals to regulate gambling on the Internet, and suggests that their flaws stem primarily from a failure to appreciate the complexity of the vice/economic gain dichotomy that has been incorporated in American gambling regulatory policy. Americans have historically prohibited some forms of gambling while tolerating others. An Internet gambling regulatory system should view the Internet as a medium across which current gambling policies should be extended. Regimes that legalize all forms of gambling on the Internet are politically untenable and unwise. Proposals to outlaw all forms of gambling fail to recognize the Government's interest in permitting and capitalizing on some forms of legalized gambling and fail to suggest adequate methods of eradicating undesired forms of Internet gambling. This article faults existing proposals for being soft and suggests that in devising policy, regulators should treat Internet gambling as an extension of real-life gambling.

Additionally, the proposals in Part V acknowledge that the Government¹⁷ faces unique enforcement, constitutional, jurisdictional, and comity issues in enforcing criminal penalties against those who engage in forms of Internet gambling, casino games, and wagering on sports events, that the government should most strenuously try to outlaw. Once regulators decide to develop an eradication strategy against a web

9. See CABOT, *supra* note 4, at 1; Quittner, *supra* note 6, at 63.

10. See CABOT, *supra* note 4, at 7; Humphrey III, *supra* note 7, at A13; Joe Salkowski, *Arizona Starnet* (visited April 14, 1997) <<http://web.azstarnet.com/public/dispatches/features/bet.htm>>.

11. See *Rolling Good Times Online* (visited April 25, 1997) <<http://web.rgtonline.com/Links1.html>>.

12. See *id.*

13. See JEROME SKOLNICK, *HOUSE OF CARDS* 101-18 (1978).

14. S. Res. 474, 105th Cong. (1997).

15. 1997 N.Y. Laws 2635.

16. 1997 Cal. S.B. 777. This bill did not make it out of committee.

17. This article's proposal focuses on regulatory action that the federal government could take because of the interstate nature of most Internet gambling. This article assumes that current antigambling laws at the state level and proposals like the California and New York bills will enable state governments to enact criminal penalties against violators in their own states. However, to prevent duplication of resources, a federal policy would be most efficient.

gambling game, there are six distinct groups that may be targeted: (1) operators of Internet gambling sites, (2) Internet Service Providers (ISPs) and Online Services (OLSs), (3) operators of indices and search engines, (4) sites that accept gambling advertising, (5) fund transfer providers, and (6) the purchasers of gambling services.¹⁸ Current proposals have limited regulators' gambling eradication tactics on the web to criminalizing the activity of the web gambling vendor or subjecting ISPs and OLSs to civil or criminal liability. This article recognizes that practical and constitutional obstacles will prevent severing any single link in the web gambling chain. Thus, the article's proposals in Part V aim to raise the costs of Internet gambling and create disincentives to deter and depress both the supply and the demand for web gambling services.

II. THEORIES OF GAMBLING REGULATION

A. Traditional Media

1. Defining Gambling

In every American jurisdiction, the legal definition of gambling is substantively unchanged from the common law. There are three elements needed for an activity to be considered gambling: consideration, chance, and a prize of value.¹⁹

This article will group gambling games into four categories: lottery games (including bingo and keno), pari-mutuel track betting (horses, dogs, and jai-alai²⁰), casino games (including slot machines), and sporting events.

2. The State of American Gambling

There are more opportunities to gamble legally than there have ever been in the United States.²¹ As recently as 1976, Las Vegas hosted the only legal casinos and sports books in the country.²² All pari-mutuel betting had to be done in the same state that the horse or dog race was being held (usually on-site), and a handful of states had one lottery drawing a week. A New Jersey referendum legalized casino gambling in Atlantic City in 1976,²³ and the race was on. Twenty-three states and nearly 100 Indian tribes have authorized or are offering casino gambling.²⁴ Thirty-seven states and the District of Columbia offer a state lottery.²⁵

The effect of widespread gambling has been to lower transaction costs to the consumer of gambling services. Americans no longer have to get on a plane and plan a week-long vacation to indulge themselves in legal crap games. Legalized gambling

18. See CABOT, *supra* note 4, at 17.

19. See *id.* at 3.

20. A Basque game involving hurling a hard ball with wicker baskets strapped to one's hands, in an enormous squash court setting. Professional jai alai is currently played in Connecticut and Florida.

21. See ROBERT GOODMAN, *THE LUCK BUSINESS* 2-4 (1995).

22. For a definitive account of the political battles over casino legalization in New Jersey, the second state to legalize casino gambling, see JOHN DOMBRINK AND WILLIAM N. THOMPSON, *THE LAST RESORT* 25-39 (1990).

23. *Id.*

24. See GOODMAN, *supra* note 21, at 105.

25. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 441 (1993).

has sustained a large growth period at 15% per year.²⁶ In 1994, legal gambling generated \$37 billion in yearly revenues.²⁷ The Government has an economic interest in the tax revenues and jobs that stem from legalized gambling.

3. The Vice/Economic Gain Dichotomy

Although recent theoretical discussions of gambling focus on purely economic terms,²⁸ the choice to legalize or prohibit gambling has traditionally been viewed as a balance of the economic benefits that legalized gambling would bestow upon a community against the moral harms that gambling can bring.²⁹ Gambling proponents argue that legalized gambling can be a valuable revenue provider,³⁰ that it will hurt organized crime,³¹ the laws are unenforceable,³² gambling serves as a valuable play activity and entertainment,³³ it offers a substitute social system,³⁴ it offers people a chance to prove their character,³⁵ it offers an opportunity for economic gain,³⁶ and gambling represents a realization of work values.³⁷

The three main arguments against legalized gambling are that it increases crime, results in economic loss, and erodes morality. Increased crime includes the involvement of organized crime in legalized gambling enterprises through corruption and infiltration,³⁸ laundering of illegally obtained profits (drug money) through legalized casinos,³⁹ and increased derivative crime (fraud, embezzlement, petty theft, and prostitution).⁴⁰ Economically it is argued that gambling disproportionately harms the poorest socio-economic groups,⁴¹ that the net economic loss to the state from the costs of increased crime and regulation outweigh the direct benefits,⁴² that discretionary spending of individuals is redistributed from local businesses to casinos, resulting in the communities in which casinos are located being destroyed,⁴³ and that the societal costs of gambling addiction range from \$13,200 to \$52,000 per year per

26. See GOODMAN, *supra* note 21, at 2.

27. See *id.* at 3.

28. See *id.* (Goodman's thesis is that the Las Vegas "miracle" cannot be replicated by communities legalizing gambling because they will not possess a monopoly on the activity. Therefore, one sees primarily local residents patronizing the casinos. Such use of discretionary income is cannibalizing local businesses. When states divert money from training and infrastructure budgets to woo casinos for a short term fix, the industrial base of the local economy gets eroded further. Thus, the economic harms to a community (costs of addiction, decrease of discretionary income spent with existing local businesses) outweigh the minimal gains from tourism.)

29. See SKOLNICK, *supra* note 13, at 24-32 (1978).

30. See Rose, *supra* note 1, at 256. But see *id.* at 259-62.

31. See *id.* at 256. But see GOODMAN, *supra* note 21, at 46-47, 105.

32. See Rose, *supra* note 1, at 255.

33. See *id.* at 263. See DOMBRINK & THOMPSON, *supra* note 22, at 15.

34. See DOMBRINK & THOMPSON, *supra* note 22, at 15.

35. See *id.* at 16.

36. See *id.* at 17.

37. See *id.* at 18.

38. See SKOLNICK, *supra* note 13, at 101-18.

39. See *id.* at 46-49.

40. See *id.* at 37-40, 239-96, 320-23.

41. See GOODMAN, *supra* note 21, at 42.

42. See Rose, *supra* note 1, at 253-54 n.43.

43. See note 28 (compare Atlantic City, 1976, with Atlantic City, 1997).

addict.⁴⁴ The moral arguments center around the proposition that legalizing gambling gives it the state stamp of approval, which results in new bettors,⁴⁵ with a direct correlation to an increase in compulsive gambling.⁴⁶ Opponents argue that gambling is an inappropriate use of welfare funds,⁴⁷ leads to higher suicide rates,⁴⁸ and causes anxiety.⁴⁹ As gambling spreads,⁵⁰ it appears that moral arguments have gone out of vogue as society accepts the moral byproducts of legalized gambling. This does not mean that the arguments themselves have become any less valid.

Finally, the arguments of keeping gambling away from youth,⁵¹ keeping gambling away from low-income urban centers,⁵² and the issues that come from having big business attached to casino gambling⁵³ are also often invoked in discussions of regulatory gambling policy. These arguments should receive strong consideration in devising an Internet gambling regulatory policy.

4. Five Regulatory Models

Faced with these arguments, state legislatures have embraced some forms of gambling with enthusiasm, while shunning others. The Government's attitude towards gambling can be grouped into eradication, decriminalization, a gambler protection model, a government neutral model, and a government protection model.⁵⁴ An eradication approach to a gambling game involves the legislature passing laws that prohibit gambling, combined with the criminal justice system enforcing those laws.⁵⁵ A decriminalization approach involves tolerance of gambling, despite the existence of laws proscribing the activity.⁵⁶ The gambler protection model's proponents believe that because gambling is victimless and inevitable, the Government's role should be to prevent excessive gambling, keep undesirable elements out of the industry, and ensure that casinos provide fair and honest games.⁵⁷ The government neutral model is essentially libertarian. Government's role is to step back and let the market settle it.⁵⁸ Finally, the government protection model recognizes that in some cases, gambling can provide necessary benefits to a community, and the Government should provide

44. See GOODMAN, *supra* note 21, at 51.

45. See NELSON ROSE, GAMBLING AND THE LAW 13 (1986); GOODMAN, *supra* note 21, at 48.

46. See GOODMAN, *supra* note 21, at 48.

47. See DAVID DIXON, FROM PROHIBITION TO REGULATION 219 n.1 (1991).

48. See Rose, *supra* note 1, at 263.

49. See DIXON, *supra* note 47, at 57-60.

50. See Rose, *supra* note 1, at 267.

51. See, e.g., DIXON, *supra* note 47, at 210; GOODMAN, *supra* note 21, at 43-45. These arguments are primarily moral — that it is bad for youths to learn that one can achieve financial gain without an honest day's work: they will therefore turn to crime. Others argue that early exposure to gambling increases the propensity of addiction.

52. See DOMBRINK & THOMPSON, *supra* note 22, at 2. This argument is closely aligned with the sense that the regressiveness of gambling is particularly objectionable.

53. See, e.g., *id.* at 21-23; SKOLNICK, *supra* note 13, at 143-44. The arrival of Howard Hughes brought legitimacy to the casino industry and invited corporate investment, enabling regulators to clamp down on organized crime without fear of closing off a potential growth industry from its sole source of capital. *Id.* at 134-44.

54. See CABOT, *supra* note 4, at 13-16.

55. See *id.* at 14.

56. See *id.*

57. See *id.*

58. See *id.* at 15.

regulation to protect the gaming industry and the Government's (usually economic) interest therein.⁵⁹ The policy choice made by a regulatory agency depends necessarily on its underlying beliefs as to the costs and benefits of the particular form of gambling.

5. Applying the Models to Existing Forms of Gambling

Although lotteries have come in and out of vogue, the concept of a state-run game that raises money for public works projects and rewards a lucky player with inconceivable riches has become a fundamental part of our culture. The reason why lottery games face much less criticism than casino gambling is that they encompass many of the traditional pro-gambling arguments (providing revenue for public projects, hurts organized crime by providing competition for "numbers rackets," and serves as a valuable play activity and entertainment). Lottery games are similarly thought to have few adverse effects; people do not typically turn to crime or suicide to pay lottery debts, and local businesses rarely close because of the lottery.⁶⁰ Lotteries are an example of the government protection model.

Pari-mutuel gambling on horse and dog racing similarly offers states some of the positive aspects of gambling: "painless" revenue, valuable entertainment activity, alternative social system, and giving bettors a chance to prove their character. Several additional arguments can be put forth in favor of legalized horse and dog racing. First, one can argue that predicting winners of horse and dog races should not be viewed as gambling because it lacks the element of chance; handicapping races is a skill. Second, legalized racing promotes improved analytical skills and development of new statistical techniques. Third, it encourages development of the breeding industry.⁶¹ Thus, despite the image that racing preys on senior citizens, low income socio-economic groups, and attracts hustlers and criminals, horse racing enjoys specially protected status from the federal government.⁶² The federal tax code gives breeders of race horses numerous advantages.⁶³ Pari-mutuel gambling is an example of the gambler protection model; it is tolerated and regulated not as a revenue generating activity,⁶⁴ but out of recognition that the activity has independent benefits to society, and a desire that the gambling be moderate, fair, and honest.

State-wide ballot initiatives on casino gambling have employed every argument previously stated in this article about legalized gambling, both in support and opposition.⁶⁵ A discussion of whether legal casino gambling is good public policy is beyond the scope of this article, but it is interesting to note that since the explosion of casino gambling in 1976, only New Jersey citizens have approved it through a state-

59. See *id.* at 15-16.

60. But see GOODMAN, *supra* note 21, at 40. Goodman cites statistics of per capita lottery spending of over \$100 per person in states with legal lotteries, with some cities boasting an average annual lotto spending of \$400 per person. Goodman's statistics indicate that lottery play is particularly regressive, causing one to question whether the moral, economic, and crime arguments against legalized gambling apply to lotteries every bit as much as to casinos.

61. See DOMBRINK & THOMPSON, *supra* note 22, at 187.

62. See Interstate Horseracing Act, 15 U.S.C.A. §§ 3001-07 (West 1997).

63. I.R.C. §§ 168(h)(1), 183, 1231 (1997).

64. See GOODMAN, *supra* note 21, at 90-92 (describing how the racetrack industry has gone from being a tool for raising revenue to a government-subsidized leisure activity).

65. See DOMBRINK & THOMPSON, *supra* note 22, at 25-73 (describing New Jersey and Florida casino ballot initiatives).

wide ballot initiative.⁶⁶ All seven state ballot proposals in 1994 for state-authorized casino gambling failed, and only one in seventy-one proposals favorable to casinos passed in state legislatures in 1994.⁶⁷

The dramatic increase in casino gambling comes without a mandate from the electorate, who in the last nationwide poll on casino gambling, opposed legalization in their communities by a 56% to 41% margin.⁶⁸ The Indian Gaming Regulatory Act⁶⁹ gave Indian tribes the right to negotiate with states as equals, for the right to offer casino games, on tribal lands, so long as the state does not specifically proscribe those games.⁷⁰ The Act requires states to negotiate in good faith, and tribes have the right to impose a federally moderated agreement on a state, or, as a last resort, to sue the state in federal court.⁷¹ The other mechanism by which states have obtained casinos in the past ten years is directly through the legislature.⁷² Voters, however, have consistently said no to casino gambling in their backyards.

Although opponents of casino gambling inevitably use moral, economic, and anti-crime arguments, the anti-crime arguments have resonated most loudly in campaigns against legalized gambling.⁷³ In the 1978 Florida referendum, crime was the main reason for opposing casino gambling for 44% of the voters polled.⁷⁴ In contested initiatives during the 1980s, casino opponents effectively focused on the high crime rates in Atlantic City and Las Vegas.⁷⁵ Despite the growth of legalized casino gambling, the will of the electorate seems to be that casinos are unwelcome. In devising a regulatory policy considering a vast expansion of legalized casino gambling via the Internet, this fact cannot be ignored.

Where casinos are allowed, they are strictly regulated along the lines of a gambler protection model. Such regulation is strict to keep undesirable elements out of the industry and to ensure that the games are honest and fair. In other jurisdictions, casino games are subject to eradication policies.

Sports gambling is the fourth and final category of gambling activity. Sports gambling is the only activity expressly prohibited by federal law,⁷⁶ making this law one of the most frequently broken in the United States Code.⁷⁷ The prohibition of legal sports gambling outside Nevada⁷⁸ resulted from the fear that organized crime was particularly able to influence athletes and therefore affect the outcome of sporting

66. See GOODMAN, *supra* note 21, at 60.

67. See *id.* at 59.

68. See *id.*

69. Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-68 (1994).

70. See NELSON ROSE, *INDIAN GAMING AND THE LAW* 3, 9-11 (1990).

71. See *id.*

72. See GOODMAN, *supra* note 21, at 60-62, 94-101 (describing the lobbying efforts in Louisiana and Iowa).

73. See DOMBRINK & THOMPSON, *supra* note 22, at 24, 65.

74. See *id.*

75. See *id.* at 183-84.

76. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1994).

77. See also CABOT, *supra* note 4, at 4 (estimating that \$60 billion annually is bet with traditional illegal sports bookies in the United States).

78. There are two exceptions to this law. First, the law was written to "grandfather" sports lotteries in Oregon and Delaware where players must pick "parlays"—combinations of teams that all must win their respective games in order for the player to win. Second, pari-mutuel animal racing and jai-alai games are exempt. See 28 U.S.C. §§ 3701-04 (1994); Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7, 23 (1996).

events.⁷⁹ This idealistic view of the sanctity of sports (other than horse racing, dog racing, and jai alai) coupled with a desire that sports and athletes remain free from the association of organized crime, makes sports betting a particularly illicit activity.⁸⁰ Due to enforcement difficulties, however, state and federal governments have effectively decriminalized sports gambling, except in Nevada where it is regulated along the lines of the gambler protection model.⁸¹

Table 1 below provides a summary diagram of the policy models most frequently applied to the categories of gambling that exist legally and illegally in this country.

Table 1. Policy Models Most Frequently Applied

Gambling Form	Policy Model
Lottery (in states where it is legal)	Government Protection (raising revenue)
Lottery (in states where it is illegal)	Eradication/Decriminalization (numbers games sometimes ignored)
Pari-mutuel (in states where it exists)	Gambler Protection (fairness of the game)
Casino games (where legal)	Gambler Protection (keep out organized crime)
Casino games (where illegal)	Eradication
Sports wagering in Nevada	Gambler Protection
Sports wagering in other states	Decriminalization

B. World Wide Web Gambling—What's New? What's Salient?

1. Overarching Policy Considerations

A government agency looking to enact a regulatory scheme for web gambling should first ask this foundation question: is there anything about the web, as a medium of delivering gambling products into the home and workplace, that should change the baseline policy models described in Table 1? For the moment, we will abstract away the federal/state coordination difficulties, jurisdiction, comity, practical enforcement, and constitutional issues to establish a foundation upon which Internet gambling policy can be built.

There are generally three types of hazards that can accrue from permitting private companies or state agencies to deliver gambling products via the Internet: economic, moral, and criminal. Internet gambling sites owned and managed by the private sector would exacerbate many of the economic problems associated with gambling and provide few of the benefits associated with live gambling. Real life casino gambling is a popular short term economic solution for struggling communities because of the accompanying benefits of job creation and additional tax revenues.⁸²

79. See SKOLNICK, *supra* note 13, at 124-27 (discussing Robert F. Kennedy's fight on organized crime during the early 1960s).

80. See generally Bill Bradley, *The Professional and Amateur Sports Protection Act ¾ Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORTS L. 5 (discussing the cancerous effect sports gambling has on American youths).

81. See *id.*

82. See, e.g., DOMBRINK & THOMPSON, *supra* note 22, at 26-27 (describing Atlantic City's destitution as a motivating factor behind the initial push for legalized casino gambling).

The number of jobs created from allowing Internet gambling would be relatively minimal; those jobs that are created would likely go to HTML and CGI programmers and other computer professionals. These workers could certainly benefit society in more useful capacities. Even assuming that a state is able to collect gambling taxes from a private sector Internet gambling site,⁸³ the convenience of Internet gambling would cannibalize state lottery and pari-mutuel revenues by diverting money from the state fund into private pockets.⁸⁴ From an economic standpoint, private Internet gambling, in any form, will result in a net loss for the state.

The economics of permitting Internet gambling nationally are not so clear. It is much cheaper for a government agency to collect revenues directly than to try to collect taxes on Internet revenues from private companies, most of which will locate in more tax-friendly developing countries. The direct flow of gambling revenues from nationalized gambling would increase, but so would the indirect costs that result from gambling activity, including addiction.⁸⁵ Nevertheless, the stronger economic argument favors nationalized Internet gambling for private-sector owned and operated games.

The moral arguments against legalizing Internet gambling are compelling. The user population of cyberspace is quite young, and we can likewise expect the demographic profile of the cybercasino's customer base to include many underage gamblers. The correlation between underage gambling and gambling addiction undermines the arguments for permissive regulatory policies.⁸⁶ The extent to which the demographics of Internet users mirror the profile of heavy gamblers has been the subject of some dispute in the literature.⁸⁷ Regardless, making gambling widely available in every home and workplace lowers the transaction costs of gambling, which increases the number of gamblers and therefore the number of compulsive gamblers.⁸⁸ Furthermore, permitting gambling over the Internet is an inappropriate use of a network paid for with public funds. These moral arguments cut against the argument in favor of government-sponsored Internet gambling. In particular, governments actively promoting and financially benefiting from the weaknesses and illnesses of its citizens offends the concept of the government as a protector.⁸⁹

Admittedly, web gambling is less morally objectionable than some other forms of gambling due to the non-regressiveness of Internet gambling. In the sense that disadvantaged socio-economic groups are underrepresented on the Internet, legalizing web gambling will not disproportionately affect low-income urban populations.⁹⁰

The strongest argument against private enterprise Internet gambling is the potential abuse of this medium as yet another mechanism for organized criminals to evade taxes through skimming, and to make illegally gained profits look like

83. I.R.C. §§ 61, 4401-4424.

84. See GOODMAN, *supra* note 21, at 27.

85. See *supra* notes 41-44 and accompanying text.

86. See GOODMAN, *supra* note 21, at 43-45.

87. Compare CABOT, *supra* note 4, at 7 (arguing that Internet casino gambling is viable because of demographic similarities in education and income between heavy users of casinos and the Internet); and ROLLING GOOD TIMES ONLINE, *Canadian Bill on Internet Gambling Introduced* (visited May 1, 1997) <<http://web.rgtonline.com/thebigstory.html>> (citing Canadian M.P. Michael Bellehumeur) with Glen Barry, *Californian Dreaming* (visited May 1, 1997) <<http://web.rgtonline.com/thebigstory.html>> (claiming that Internet users are from upper socio-economic groups and do not need paternalistic government protection).

88. See GOODMAN, *supra* note 21, at 46.

89. See Rose, *supra* note 1, at 299.

90. See *id.*

legitimate financial gains—a practice commonly known as money laundering.⁹¹ Skimming occurs when casino owners pocket a percentage of the profits before they formally account for them, enabling owners to evade auditing controls imposed by the state. Skimming creates two distinct problems for governments. First, the government is unable to collect tax revenues on skimmed profits,⁹² and second, these profits are often used to finance other illicit activity.⁹³ Skimming was prevalent in the early days of Las Vegas.⁹⁴ However, tight licensing and auditing controls have presumably reduced the skimming.⁹⁵ Casino and pari-mutuel regulatory authorities prevent skimming by auditing the gambling establishment's cash management practices and policies on site.⁹⁶ If private web gambling sites are permitted to exist, regulatory agencies must vigilantly enforce anti-skimming auditing techniques that have been proven to work. Although the absence of cash will make this somewhat easier, policing skimming will be expensive. One benefit from limiting gambling establishments to a single city is that it reduces these auditing costs, as New Jersey has done by restricting gambling to Atlantic City. With web gambling, the cost of policing skimming would depend on the number and geographic distribution of Internet gambling sites.

Private web casinos can be very effective money laundering mechanisms. Money laundering is most effective when both the player and the house cooperate. A simple hypothetical demonstrates this. A player enters a casino with "dirty" cash and buys chips with the agreement of the casino. He then cashes out and declares the money as gambling winnings (perhaps to be offset by non-existent gambling losses to evade taxes).⁹⁷ The casino is allowed to declare an operating loss on the cash, which reduces its tax burden. Therefore, both player and house win, at the expense of taxpayers. If Internet gambling was completely unregulated, organized crime families could open their own Internet casinos for the sole purpose of laundering profits, with the unwitting assistance of the credit card and electronic funds transfer companies. Popular perception is that money laundering must involve cash, which would eliminate the concern that Internet casinos will make the laundering problem more salient. Unfortunately, demand exists for laundering non-liquid funds, which would be very difficult to trace if done via an Internet casino. One benefit of the arrival of "legitimate big business" to the casino industry is that these companies (*e.g.*, Hilton, MGM) are less inclined to engage in skimming and money laundering; the potential cost to their corporate reputations ensures self-policing and provides an adequate disincentive to criminal activity. However, private enterprise Internet gambling would have relatively low barriers to entry, making money laundering easily possible. A consistent goal of gambling regulation has been to keep gambling, especially casino gambling, in the hands of big business or government. Unregulated private enterprise web gambling would largely nullify this achievement.

If the Internet gambling operation came under the wing of a government agency, the problems with skimming and laundering would likely be minimized, but would still exist. Potentially, employees could pocket money that rightfully belonged to the

91. See *id.* at 296.

92. See SKOLNICK, *supra* note 13, at 127.

93. See *id.*; Murray Weiss and Niles Latham, 'Harmless' Wagers are Mobsters' Lifeblood, N.Y. POST, May 19, 1997, at 2.

94. See SKOLNICK, *supra* note 13, at 127-32.

95. See *id.* at 87-89, 287; *Cf. id.* at 277-96.

96. See *id.* at 281-90.

97. See *id.* at 46-49.

state fund, but these skimming problems are the same as those faced by private casinos, and can be handled through internal controls.⁹⁸ As for laundering, it is unlikely that organized crime would attempt to launder dirty money through a government-run lottery, casino, or other gambling instrument.

Although Internet gambling does not invite the street crime and prostitution that often accompanies casino gambling, the Internet raises a different set of criminal issues. Policing the honesty of the games is virtually impossible.⁹⁹

There are few potential benefits accruing from allowing gambling on the Internet. Should states choose to nationalize some forms of Internet gambling, there would likely be some economic gain that could be used to support worthy social programs. Other benefits include encouraging the development of electronic funds transfer systems such as digicash and e-cash,¹⁰⁰ saving money that would otherwise be spent trying to enforce unenforceable laws, serving as a valuable entertainment function, and furthering the libertarian spirit in which the Internet was created.

2. Gambling—Medium Specific Factors

As in real-life gambling, the form that web gambling takes and who runs it should directly affect the resulting regulatory policy. States have already taken stances on Internet gambling that appear paradoxical. For example, within three months of announcing the extension of their telephone OTB wagering system to the Internet, the New York State Racing, Gaming and Wagering Committee members discussed cracking down on privately-run Internet gambling casinos and sports book sites.¹⁰¹ Taking the point of view of a prospective entrepreneur, Anthony Cabot argues that web casino gambling and sports wagering offer the most promising futures; due to their real-life scarcity, operators will face little competition.¹⁰² It is partly those considerations that drive a regulator to the opposite conclusion—web casino gambling and sports wagering in particular cannot be sanctioned by the state. Lotteries and pari-mutuel systems raise fewer issues. It is not only the form of gambling, but whether it is privately or publicly administered, that shapes regulatory policy. In the remainder of this section, this article proposes regulatory models for dealing with the adaptation of gambling to the web.

a. Lotteries—Government Protection

The unabashed goal of public lotteries is to raise revenue, and the Internet can help state lottery commissions better achieve their revenue goals. Despite the fact that states with high jackpot lotteries would love the opportunity to sell tickets via the

98. See Rose, *supra* note 1, at 296; *Governor Favors State Operation Of Any Casino*, N.Y. TIMES, Jan. 26, 1979, at B1. But see Rose, *supra* note 1, at 297-98 (theorizing why no state has chosen to nationalize casinos).

99. See Quittner, *supra* note 6 (describing a 1995 web casino game with odds that are 70-30 in favor of the house).

100. Whether this would benefit society (by creating a new medium over which commerce can easily be conducted) more than it would cost (by greatly facilitating illegal commerce and tax evasion) is a valid and interesting question; however, it is beyond the scope of this article.

101. Compare David Rohde, *Upstate OTB Wants to Put Horse Wagering on Internet*, N.Y. TIMES, Dec. 26, 1996, at B4, with Kimberly Shaye, *Internet Betting Raids are in Cards*, N.Y. DAILY NEWS, Mar. 13, 1997, at 21.

102. See CABOT, *supra* note 4, at 10.

Internet in interstate commerce, this is untenable for two reasons. First, the federal lottery statutes expressly prohibit this activity.¹⁰³ Second, it would not be wise policy to foster unbridled competition in state lotteries. States with relatively low payout rates are likely the states in the worst financial shape. As lottery play is a zero-sum game at a national level, competition would lead to a flow of lottery dollars out of those poorer lotteries into those able to provide higher payouts. Although economic theory states that in the long run, this competition leads to an efficient allocation of resources, state governments are not private firms that can exit the industry. The shortfall to poorer states would have to be compensated through federal transfer payments. Competition among state lotteries is not permitted under federal statutes, and it would be unwise as a matter of policy to promote competition in this industry.

However, nothing in the federal statutes would prohibit states from using the web to sell tickets intrastate. States have proven their ability to regulate lottery games; the web would present added challenges in execution, but the fundamental principles of regulating the games are well established. A positive externality might ensue: because lottery players who fall into depressed socio-economic groups (urban, poor, elderly) spend a higher percentage of their incomes on gambling.¹⁰⁴ Thus, extending lotteries to the Internet might provide the incentive to increase computer literacy within these populations.¹⁰⁵

One concern for federal policy makers would be how to enable states with anti-lottery laws to continue their policies of eradication pursuant to their state interest. By limiting commerce to intrastate purchases, the minority of states with anti-lottery policies will not have their interests subsumed by the majority. The ability to limit sales to customers from certain states has been demonstrated by the New York Horse Racing Association, as will be discussed below in connection with horse racing.

Another danger is that states will overreach their mandate and blur the line between lotteries and casino games. The primary distinction should be one of frequency. Regulations should specify that lotteries are drawn once or twice a week. If a state can show special need, daily lotteries should be the absolute maximum permitted. Games occurring with greater frequency should be treated as casino games.

b. Horse Racing and Pari-Mutuel—Gambler Protection

The Internet could provide a tremendous boon to a struggling horse racing industry; tracks have been closing at an alarming rate. In enacting the Interstate Horse Racing Act in 1978, Congress found that "the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders."¹⁰⁶ The statute distinguishes between on-track and off-track betting systems and offices, based on where the betting occurs, but does not discuss the practice of a host racing association accepting wagers from customers not physically present on site. The practice of offering long distance horse wagering, either through

103. See 18 U.S.C. §§ 1301-07 (1994), discussed at length *infra* Part IV.A.4.

104. See GOODMAN, *supra* note 21, at 39-40.

105. This assumes that the availability of public Internet terminals in schools, libraries, etc. continue to rise. *But see supra* text accompanying note 50, discussing the independent goal to keep gambling away from low-income urban centers. These seemingly conflicting goals can be reconciled by the argument that if poor people are going to be spending their incomes on the lottery anyway, they might as well be honing their computer skills while they are at it.

106. 15 U.S.C.A. §3001 (West 1997).

the web or the telephone, is regulated by the Interstate Wire Act.¹⁰⁷ This Act permits the transmission of information assisting in the placement of bets on a sporting event from a state where betting on that event is legal into a state where betting on that event is illegal.¹⁰⁸ Pursuant to federal law, New York recently instituted web simulcasting and wagering of New York horse racing.¹⁰⁹

From a federal perspective, leaving the decision in the hands of the states to legalize betting on out-of-state horse racing satisfies the Congressional mandate to let states determine their own policy. The economics of the industry are such that the costs of acquiring information necessary to handicap horse and dog racing and the transaction costs that must be incurred to get to an OTB to make the wagers are so costly, making this form of gambling a rare event for the casual bettor. By reducing these costs, the web could provide a shot in the arm to an industry whose existence has independent value beyond the gambling world.¹¹⁰ This would free up state dollars that are currently spent subsidizing the horse racing industry.¹¹¹

New York's experience with screening out bettors from prohibited states illustrates that the practical problems of customer discrimination are not insurmountable. Before opening an account to bet on a New York race, either by telephone or Internet, a bettor must first provide a social security number and proof that he resides in one of the states where such gambling is legal. The micro-level details are unimportant at this stage, but an account-based system could provide a solution to the Internet lottery difficulties mentioned above, and could be used to prevent minors, and if desired, other groups such as welfare recipients,¹¹² from gambling online.

c. Casinos—Eradication & Gambler Protection

Primarily because of money laundering, skimming issues, and the difficulties of regulating the honesty of the games,¹¹³ the problems that accompany privately run web casino gambling are greater than if these Internet casinos were controlled by the state. However, permitting even the most tightly regulated or nationalized web casino games would be ill advised. Where communities have balanced the economic benefits gained from increased tourism and job creation against the harm that comes from diverting wealth away from individual patrons and the local businesses, those communities have made the rational decision to reject casino gambling.¹¹⁴ Empirical evidence shows that people oppose widespread decriminalization or regulation. The fact that it has been rejected in numerous referendums implies that there is a rational basis for this rejection. In addition, the problems of organized crime's influence

107. For a description of New York's system, see Rohde, *supra* note 5.

108. 18 U.S.C.A. §1084(b) (West 1997). Only seven states currently permit their citizens to gamble on out of state races through an outlet other than the official state OTB; New York accordingly restricts access to its telephone and Internet OTB services to citizens of those seven states. See Janelle Brown, *Bet On It: Off-Track Goes Online* (visited April 25, 1997) <<http://web.wired.com/>>.

109. See *id*; see Janelle Brown, *Bet On It: Off-Track Goes Online* (visited April 25, 1997) <<http://web.wired.com/>>.

110. See *supra* note 60 and accompanying text.

111. See GOODMAN, *supra* note 21, at 90-92.

112. Whether this is an unconstitutional condition is a question beyond the scope of this article.

113. See *supra* Part II.B.1.

114. See GOODMAN, *supra* note 21, at 58-59, 80-85.

would not disappear under a nationalization regime.¹¹⁵ Furthermore, the addictive effects of casino gaming are problematic enough without eliminating the transaction costs and enabling gamblers to play any time of day or night, at the click of a mouse. It is reasonable to fear that one effect of legalized web casino gambling will be a decline in industrial efficiency; white and pink collar workers who suffer from gambling addiction may ignore their jobs to gamble from the sanctity of their offices and desks. For these reasons, the foremost goal of a regulatory system should be to attempt to eradicate or reduce the playing of casino games over the web.

d. Sports—Decriminalization

There is nothing about the web that changes the fundamental policies underlying the decriminalization approach to policing sports gambling. As long as they are nominally prohibited activities, sports gambling operations cannot be used to launder money (though they can be used to fund other organized crime activities). The web can make sports gambling more salient; but international offshore bookies are already running toll-free phone numbers as an added convenience for their customers.¹¹⁶ It is extremely difficult to draft anti-sports gambling statutes that do not criminalize office pools and fantasy leagues, which provide sporting fans with a hint of gambling fun at a low cost to society.¹¹⁷ The web will increase the amount of sports betting and make it somewhat more salient,¹¹⁸ therefore law enforcement officials should continue to selectively enforce anti-sports wagering laws against organized crime syndicates and the largest bookmakers based on the compelling interest of maintaining an untainted sports industry.

III. EXISTING LEGISLATIVE AND ACADEMIC PROPOSALS TO REGULATE/PROHIBIT WEB GAMBLING

This section discusses existing proposals on how best to regulate Internet gambling: the Internet Gambling Prohibition Act (IGPA);¹¹⁹ amending the Interstate Wire Act (Wire Act);¹²⁰ and two approaches suggested by academicians and commentators. Although the IGPA in particular takes steps towards achieving the policy goals outlined above,¹²¹ the proposals generally fail to appreciate the economic gains that may accrue from extending nationalized gambling games over the Internet. In addition, the proposals that call for eradication, either piecemeal or wholesale, fail to offer solutions that will accomplish this goal.

115. Money laundering does not require the cooperation of the house (though cooperation does make it easier and more effective). For an argument that the problems of corruption would be exacerbated under a state bureaucracy, see Rose, *supra* note 1, at 297-98.

116. See, e.g., Bowman's International, a United Kingdom/Mauritius corporation offering sports wagering to bettors around the world, via its toll-free phone number. To open an account with Bowman's takes little more than a credit card or Western Union or American Express moneygram.

117. Interview with Tyrone Mitchell, 1996 champion, McKinsey & Company Fantasy Baseball League, in New York, N.Y. (April 10, 1997).

118. See *supra* note 79 and accompanying text.

119. S. 474, 105th Cong. (1997) (amending 18 U.S.C. §§ 1081, 1084).

120. 18 U.S.C.A. §§ 1081-84 (West 1997).

121. See *supra* Part II.B.

A. The Internet Gambling Prohibition Act

The IGPA makes four significant changes to the Wire Act. First, it enables any law enforcement agency to seek an injunction to prevent use of a communication facility for the purpose of transmitting or receiving gambling information in violation of federal law.¹²² Second, where the Wire Act criminalized only the use of interstate wire communication in sports betting, the IGPA replaces this narrow restriction with the far more general language “betting and wagering.”¹²³ Third, the Wire Act specified that only those in the *business* of betting and wagering were subject to liability, where the IGPA calls for reduced penalties for those *casual bettors* not in the business of betting and wagering.¹²⁴ Fourth, it advises the judiciary branch “that the Federal Government should have extraterritorial jurisdiction over the [international] transmission . . . of (1) bets or wagers . . . (2) information assisting in the placing of bets or wagers and (3) any communication that entitles the transmitter or recipient . . . to receive money or credit as a result of bets or wagers.”¹²⁵

The IGPA’s amendment of section 1084(d) of the Wire Act gives federal, state, or local law enforcement agencies the right to compel ISPs to discontinue service to persons violating the Wire Act.¹²⁶ The First Amendment ramifications of this part of the IGPA are discussed below in Part IV.B.3. of this article.

A separate question is whether compelling ISPs to shut off service to companies using the web for gambling operations is good public policy. This provision will help to make web gambling somewhat less salient, but the practical difficulties make it far from a comprehensive solution. The ability of cybercasino operators to quickly change URLs and ISPs, the vast number of ISPs that would need to be contacted and coordinated, and the length of time needed to gather evidence and to get an injunction, all reduce the effectiveness of injunctive relief against ISPs as a means to eradicate unwanted forms of Internet gambling. Nevertheless, the idea of attempting to sever the link in the chain between the vendor and the user of the web gambling services is on the mark. The IGPA enables any law enforcement agency to get an injunction.¹²⁷ As a matter of policy, this should best be handled at the federal level. States might find themselves duplicating effort and wasting resources.

Although eliminating the words “sports only” from the Wire Act was a wise policy decision because it enables regulators to eradicate web casino-type games, the bill goes too far by proscribing horse racing and lottery games. This directly conflicts with the Interstate Horse Racing Act, which permits interstate simulcasting and wagering on races with some restrictions.¹²⁸ Furthermore, it would be a mistake to cut lotteries off from the Internet as a sales channel.¹²⁹ In its zeal to eradicate web casino games, the IGPA uses overinclusive language in proscribing all forms of gambling from the Internet and violates the policy goals discussed above in Part II of this article. The statute should be explicit in stating that, if the involved states have

122. S. 474, 105th Cong. (1997).

123. *Id.* §§ 2-3.

124. *Id.* § 3(a)(2).

125. *Id.* § 4.

126. 18 U.S.C.A. § 1084(d) (West 1997).

127. S. 474, 105th Cong. (1997).

128. 15 U.S.C.A. §§ 3001-07 (West 1997).

129. *See supra* Part II.B.

legalized lotteries or horse race betting, then transmittal of information pertaining to those activities should be permitted.

The IGPA's least expected amendment to the Wire Act is the proposed addition of section 1084(a)(2), which imposes (1) a \$5,000 fine, (2) one year imprisonment, or (3) both, on gamblers wagering over the Internet.¹³⁰ This provision would certainly not be enforced because prosecuting the individual gambler would be extremely costly; however, to the extent that this provision is used for its *in terrorem* effect, it is a sound public policy. If this provision is adopted, the Government should take steps to publicize it as a means of frightening people away from unwanted forms of web gambling. But, the Government should amend the bill to specify that people purchasing state lottery tickets or betting legally on horse racing are exempt from prosecution.

Finally, the IGPA states "that the Federal Government should have extraterritorial jurisdiction" over Internet gambling.¹³¹ Because of the delicate balance of geopolitics and the doctrines of international sovereignty and comity in addition to the resources necessary for each assertion of extraterritorial jurisdiction,¹³² the assertion is unsound.

B. Gorman and Loo's Comment

In 1996, the first treatment of Internet gambling in a legal journal appeared in an article entitled *Blackjack or Bust: Can U.S. Law Stop Internet Gambling*.¹³³ The authors, Seth Gorman and Anthony Loo, examine the state of the current law and the difficulties in enforcing that law. They *conclude* that all forms of Internet gambling should be legalized, so long as Internet casinos block access to minors and agree to submit to United States jurisdiction.¹³⁴ A part of Gorman and Loo's proposal is that Congress promote the use of blocking technology (e.g., Cyberpatrol, Surfwatch, Netnanny) to further the policy goals of Internet gambling. Alternatively, Gorman and Loo suggest eradicating web gambling by holding Internet access providers liable.

Gorman and Loo's proposal fails for the same reasons that hinder the IGPA as a complete regulatory solution. By failing to take into account the delicate equilibrium that permits some forms of gambling, Gorman and Loo fall into the all-or-nothing regulatory trap. In addition, Gorman and Loo's individual suggestions would fail to achieve the article's desired regulatory goals.

Gorman and Loo's first suggestion is that access providers should bear the entire brunt of preventing legalized gambling. If this was the extent of an eradication strategy, web casinos would easily devise technology to work around the legal barrier. The costs of changing domain names and URLs are minimal compared to the potential profitability of a web gambling operation. One could envision a continuous cat and mouse game, in which the web casino sends encrypted e-mails to its customers containing the new URL and effective dates. Changing addresses on a monthly basis would effectively prevent law enforcement officials from discovering the location of the web casino, getting the injunction, and disseminating the information to the ISPs. The equivalent of floating crap games on the net would be created, covertly moving

130. S. 474, 105th Cong. § 3(a)(2) (1997).

131. S. 474, 105th Cong. § 4 (1997).

132. See *infra*, text at Part IV.B.

133. See Seth Gorman & Anthony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling*, 16 LOY. L.A. ENT. L.J. 667 (1996).

134. See *id.* at 703-06.

from storefront to warehouse, to evade detection. Conversely, this policy does have its benefits. It would make unwanted forms of web gambling less salient and impose costs on the casino. By itself, however, it would fail to eradicate web gambling.

Gorman and Loo's alternative proposal is to legalize Internet gambling, with some restrictions.¹³⁵ They propose a loose regulatory scheme in which the regulatory body would only police whether minors had access. In defense of their all-or-nothing proposal, the authors argue that proscribing some forms of gambling while tolerating others would be inconsistent. Gorman and Loo fail to appreciate that this balance has been struck since the founding of the United States. Nevertheless, they posit a model that shows gambling has moved from being a pariah activity to accepted normal behavior.¹³⁶ In so doing, they reveal their naiveté about gambling in America. Gorman and Loo are wrong to interpret the boom in legalized casino gambling as a public mandate for this activity.¹³⁷ In addition, their hope that the costs of privately permitted web gambling will be offset by tax revenues is widely off the mark.¹³⁸

Gorman and Loo rely on blocking software as a counter-measure to erase all the ills from a privately owned and operated web gambling site.¹³⁹ Although the underage gambling aspect of web casinos is problematic, it is not the only danger that regulators must consider. The authors do not propose any solutions on how to deal with money laundering, skimming, the fairness of the games, the decline in industrial efficiency, the increased costs in an adult addiction, and the increased possibilities for corruption and bribery that legalized casino and sports gambling would bring. Nevertheless, Government promotion of blocking software and the development of PICS and other rating systems will play an important role in a government regulatory scheme. Lotteries and horse racing outlets should be limited to adults playing during their leisure time, not while at work. Blocking software can act as a safeguard to help parents and employers prevent children and employees from gambling via the web, but it is not a cure-all.

C. Anthony Cabot's Internet Gambling Report

The Internet Gambling Report was not written to suggest regulatory techniques to deal with Internet gambling, but rather, provide information to potential entrepreneurs considering entering the market.¹⁴⁰ Nevertheless, Cabot's insights are useful in informing regulatory policy. His central thesis is that the international coordination, constitutional, cultural, and practical obstacles will ensure a hospitable environment for suppliers of Internet gambling services.¹⁴¹ Cabot predicts that the inevitable result of the battles between legal solutions and technology will be a bifurcated universe of web gambling. In this bifurcated world, one group of operators bands together to regulate itself (presumably through a certification or collective trademark), thereby communicating to the public that its members are affiliated with, and certified by, a recognized group setting the industry standard.¹⁴² Alongside these

135. See Gorman & Loo, *supra* note 133, at 706.

136. See *id.*

137. See *supra* text accompanying notes 65-75.

138. See *supra* text accompanying note 84.

139. Gorman & Loo, *supra* note 133, at 708.

140. See CABOT, *supra* note 4, at 7 ("What are the Obstacles to Gambling Opportunities on the Internet?").

141. See *id.* at 30-31.

142. See *id.* at 32.

legitimate operators will coexist unregulated web sites offering a competing product.¹⁴³ Cabot hopes that in this bifurcated world, consumers will be induced to purchase their gambling services from members of the coalition, thus ensuring fairness of the games.

Cabot does not specify whether he thinks regulators are powerless to influence the amount of Internet gambling, or whether he merely thinks it is a bad idea to try. Cabot discusses, but discounts, the power regulators have in making gambling less salient by subjecting ISPs, funds transfer providers, search engines and indices, and sites that carry advertising for other web casinos, to criminal and civil liability. His reason for discounting this avenue is that the regulatory power to do so is unclear.

The solace that Cabot finds in the prospect of a self-regulated world is ill-conceived. Self regulation would solve only one minor problem: the issue of web casinos defrauding customers by operating unfair games. Even as a solution to this limited problem, self regulation would be ineffective. Cabot assumes that consumers will be able to distinguish web sites that are members of the self-governing coalition from those that are not. It is not clear that this assumption is warranted. There are a number of ways the unscrupulous operator could deceive his customers into thinking his casino is part of the coalition: the operator could copy the identifying trademark used by members onto the non-member page; use a simple HTML command to show a rival casino's seal of approval on one's own unregulated page; or design a confusingly similar mark to deceive prospective customers. Legal remedies for this sort of trademark infringement bring with them serious practical, jurisdictional, and comity problems in haling the perpetrators into court. Assuming one could physically locate and identify the unscrupulous operators, it is unlikely that the self-regulated group of web gambling sites has the political power to convince governments of the offshore haven countries to help enforce its trademark. Technological loopholes can easily trump Cabot's proposed social solution to the problem of unfair games.

Cabot's solution suffers from many of the same flaws as Gorman and Loo's proposal. Cabot's self-regulated universe does not even claim to solve the money laundering, skimming, increasing costs of addiction, and externalities related to sports gambling problems. These problems would persist and flourish, albeit in the unregulated dark side of Cabot's bifurcated world.¹⁴⁴ In addition, minors would presumably be able to gamble at unauthorized, but legal, web gambling outlets. The paucity of Cabot's solutions likely stems from his perspective as a practicing attorney in Las Vegas who may have close ties to corporations considering entering the web gambling industry.¹⁴⁵ To his discredit, Cabot never acknowledges any of the dangers from a regulator's perspective.¹⁴⁶

143. *See id.*

144. *See id.*

145. *See* ANTHONY N. CABOT ET AL., *INTERNATIONAL CASINO LAW* (2d ed. 1993).

146. *See supra* text accompanying notes 80-96.

IV. POLICING GAMBLING IN THE 1990s

A. Usefulness of Current Law (Statutory and Common Law) in Prohibiting Casino and Sports Internet Gambling

Several antigambling laws can be used by prosecutors and legislators in executing an antigambling policy, including the Interstate Wire Act,¹⁴⁷ the Travel Act,¹⁴⁸ the Professional and Amateur Sports Protection Act,¹⁴⁹ the Interstate Transportation of Wagering Paraphernalia Act,¹⁵⁰ the Federal Antigambling Statute,¹⁵¹ state antigambling laws, and the common law prohibition against the enforceability of gambling debts.¹⁵² This section will discuss the applicability of these statutes or elements of the common law and the suitability of their use in achieving the desired regulatory effects outlined in Part II. Part IV.B. discusses the problems involving jurisdiction, comity, the First Amendment, and practical limitations facing law enforcement officials in enforcing the existing criminal statutes and executing the Internet gambling regulatory policy. At this juncture, it is interesting to note that, with the exception of the antilottery advertising statutes, attempts to reduce gambling have been achieved through taxing gambling winnings and upholding unenforceability of gambling debts in common law. These policies have been ineffective in controlling the amount of real life gambling.¹⁵³ The technological, legal, and practical difficulties discussed in Part IV.B. make the possibility of eliminating the supply of Internet gambling even more remote than eradicating its real life counterpart. Therefore, this article will examine the current statutes with an eye open to ways in which existing laws can be used or new ones drafted to reduce consumer demand for Internet gambling.

1. The Interstate Wire Act

The Interstate Wire Act of the criminal code makes it a federal crime for anyone "engaged in the business of betting or wagering . . . [to] use[] a wire communication facility for the transmission in interstate or foreign commerce" of three things: bets or wagers on a sporting event or contest, information assisting in the transmission of such bets or wagers, and any communication "which entitles the recipient to receive money or credit as a result of bets or wagers."¹⁵⁴ News reporting is exempted from criminal penalty, as are any of the three aforementioned activities, if the transmission originates from a state where betting on the event or contest is legal and is sent to a state in which such betting is legal.¹⁵⁵ The act contains a provision within which a common carrier that is "subject to the jurisdiction of the Federal Communications Commission" (FCC) can be compelled to discontinue, disconnect, or refuse service to

147. 18 U.S.C.A. §§ 1081-84 (West 1997).

148. *Id.* § 1952.

149. 28 U.S.C. §§ 3701-04 (1994).

150. 18 U.S.C.A. §1953 (West 1997).

151. *Id.* §1955.

152. See ROSE, *supra* note 45, at 73 (discussing the Statute of Anne).

153. *Id.*

154. 18 U.S.C.A. § 1084(a) (West 1997).

155. *Id.* § 1084(b).

any facility that is violating the Wire Act upon receiving notice of such violation from any federal, state, or local law enforcement agency.¹⁵⁶

Courts have held that the federal government cannot prosecute individual bettors under section 1084,¹⁵⁷ so we need not consider that application. Enforcing the Wire Act against vendors of Internet gambling services is problematic. As a result, Senator John Kyl has introduced federal legislation amending the statute.¹⁵⁸ The greatest difficulties with applying the Wire Act in its present form to Internet gambling are the problems with obtaining jurisdiction and adequate notice on companies located outside the United States offering Internet gambling services to Americans. These problems will be discussed in Part IV.B. Notwithstanding those issues, one difficulty with using the Wire Act, even against web gambling companies located within the United States, is that the plain language of the statute limits use of the Wire Act to the prosecution of those in the business of gambling on sporting events and contests.¹⁵⁹ The legislative history of the Wire Act confirms this reading of the statute.¹⁶⁰ Case law also confirms this reading. No reported cases have applied the Wire Act to non-sports-related gambling.¹⁶¹ Therefore, even if the jurisdiction, comity, and notice problems were solved, the Wire Act would be ineffective in prohibiting Internet gambling and is far from being a comprehensive solution.

Some have argued that section 1084(a) would make it a federal crime for states to use interstate wire facilities to transmit non-sports-related "wagers or information" in "interstate or foreign commerce."¹⁶² No cases confirm this proposition, and as the language of the statute seems to prohibit only betting on sporting events and contests, this reading of the Act is unsupportable.¹⁶³ The Wire Act is not an obstacle to states extending their lotteries over the Internet and, therefore, does not impede the policy recommended in Part II.B.

One untested application of the Wire Act would be to use provisions of the Act as a tool to try to make Internet gambling more expensive for the gambler.¹⁶⁴ One of

156. 18 U.S.C.A. § 1084(d) (West 1997). As online services are not subject to the jurisdiction of the FCC, this section cannot (in its current pre-IGPA) form, be used to police online service providers, which are not presently treated as common carriers. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that CompuServe was a distributor and not a speaker). Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 105-25 (construing the constitutional problems with Internet service provider liability).

157. See *United States v. Baborian*, 528 F. Supp. 324 (D.R.I. 1981); Robbins, *supra* note 78, at n.133. The statute is written to apply only to those "in the business of betting," which has been narrowly construed by the courts to not apply to individual bettors. See 18 U.S.C.A. § 1084 (West 1994 & Supp. 1997).

158. Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong., discussed at length *supra* Part III.A.

159. The use of interstate wire facilities to transmit information about and wager on horse racing is an exception to this statute, carved out in the Interstate Horse Racing Act, 15 U.S.C.A. §§ 3001-07 (West 1994 & Supp. 1997).

160. H.R. REP. NO. 967-2631 (1961).

161. See CABOT, *supra* note 4, at 19.

162. Robbins, *supra* note 78, at n.117 (quoting I. Nelson Rose, *Interstate Betting*, CASINO EXECUTIVE, June 1995, at 22).

163. The only state lotteries that might conceivably be prohibited under § 1084 are the Oregon and Delaware sports lotteries.

164. This could be done by drafting new legislation based on the language of § 1084. See *infra* Part V.E., for a proposed statute imposing liability on credit card companies and funds

the biggest fears about Internet gambling is its accessibility for anyone with a credit card. If web gamblers could no longer use credit cards, but had to send a check or money order through the mail in order to establish an account with their web casino or establish an offshore bank account, this extra inconvenience would be a cost imposed on the gambler, and would reduce the amount of "impulse" Internet gambling.¹⁶⁵ The Wire Act states that anyone using a wire communication facility to transmit money or credit as a result of bets or wagers is subject to a fine and up to two years in jail.¹⁶⁶ Most Internet casinos use credit card debits and credits to transfer funds between the player and the house. At some point during the transaction process, the casino presumably checks the validity of the credit card number and expiration date, and sends the transaction across the wire to the credit card company. The credit card company presumably sends a confirmation across interstate wires to the casino and forwards the proceeds over the wires to the casino upon collection from the cardholder. In each transaction, a credit card company makes several transmissions to the casino which could be read as violations of section 1084.

The likely defense that a credit card company would assert upon being threatened with liability under this statute is that it cannot be reasonably expected to police transactions to distinguish the legal from the illegal. Legislators could eliminate this defense by amending the statute to add a section requiring funds-transfer companies to discontinue service to violators of this Act upon notice from a federal, state, or local law enforcement agency, which would be analogous to the common carrier provision of section 1084(d). Not only would this serve the desired effect of cutting off Internet casinos' primary source of funds transfer, it also satisfies fundamental principles of equity. Credit card companies get a percentage of every transaction they handle. Permitting these companies to profit from these illegal transactions without legal liability offends the sensibilities of our legal system. Credit card companies and other funds-transfer mechanisms should not be permitted to piggyback on the criminal operators of web gambling outlets to their profit. Although this solution would not eliminate Americans' ability to gamble via the web,¹⁶⁷ it would impose a cost on both vendors and users of web gambling services, which would reduce the effectiveness of the web as a gambling medium.

2. The Travel Act

Title 18 U.S.C. § 1952, commonly known as the Travel Act, is often used to prosecute organized gambling activities. The statute's broad language makes it particularly suitable to Internet gambling prosecutions. On its face, it is the single most effective weapon prosecutors have against vendors and users of web gambling services. Nevertheless, the same problems of jurisdiction and comity mentioned earlier with respect to the Wire Act apply to the Travel Act when prosecuting offshore

transfer providers which make Internet gambling more salient by facilitating the transfer of funds between vendors and users of web gambling services.

165. Cf. SKOLNICK, *supra* note 13, at 340-41 (praising the British regulations which compel a potential casino gambler to declare his intention to gamble at least forty-eight hours before sitting down to play as a way to reduce impulse gambling.)

166. 18 U.S.C.A. §1084(a) (West 1997).

167. See Robbins, *supra* note 78, at n.77 and accompanying text, discussing some web casinos' policy of requiring patrons to establish offshore bank accounts.

vendors of gambling services. Practical limitations make the prospect of enforcement against domestic companies seem remote as well.¹⁶⁸

The Travel Act makes it illegal to "travel in interstate or foreign commerce or use[] the mail or *any facility* in interstate or foreign commerce with the intent to perform an unlawful activity, which includes any business enterprise involving gambling . . ." (emphasis added).¹⁶⁹ Computer networks would seem to fall into the category of "any facility in interstate or foreign commerce." In *United States v. Smith*, the district court held that the Government can use the Travel Act to prosecute interstate gambling over telephone wires because the wires transport data (voices) the same way more tangible materials are transported over state lines.¹⁷⁰ The transportation of data packets involving gambling information over the Internet is as clear a violation of the Travel Act as are the voices in *Smith*. Based on *Smith*, federal prosecutors could successfully fine and imprison officers of companies violating the Travel Act, assuming the individuals can be haled into an American court.

Although the Wire Act only applies to those in the business of gambling, there is no such restriction in the Travel Act. Therefore, the prosecutors could charge individual users for violating the Travel Act. As a matter of policy, it would be inadvisable to spend federal resources on prosecuting individual gamblers. Nevertheless, as a means of attempting to influence consumer preferences, the Department of Justice (DOJ) should issue and publicize an advisory opinion clarifying that it is a violation of the Travel Act for individuals to patronize web casinos located in other states or offshore. If the DOJ could deter some potential gamblers away from web casinos and sports books, the policy goals outlined in Part II.B. would be furthered. Perhaps one highly publicized conviction of a mere user of web gambling services would go far in deterring potential web gamblers, though it would likely be unpopular in the media.

3. The Professional and Amateur Sports Protection Act

It is unlawful for either a Government entity or a person "to sponsor, operate, advertise, or promote" any betting operation "based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate."¹⁷¹ No mention is made of the medium over which this prohibited gambling is to take place. Based on fundamental principles of statutory construction, it is reasonable to assume, therefore, that the Professional and Amateur Sports Protection Act applies equally to Internet sports gambling as it does to wagering on sports in person or over the telephone. Unlike the Wire Act, however, this Act does not require the violation to be interstate.¹⁷² Therefore, this Act is an effective weapon through which federal prosecutors can reach intrastate web gambling on sports events. Similar to the Travel Act, this statute is not restricted to gambling services providers, which makes it an effective technique to deter individual bettors.

This statute could be construed to proscribe a wide range of activities. Fantasy Leagues and office pool type contests for prizes, such as the type frequently run by The Sporting News and ESPN, contain the three elements of gambling: (1) consideration, (2) chance, and (3) a prize of value. Unless the sponsoring

168. See *infra* Part IV.B.

169. 18 U.S.C.A. § 1952 (West 1997).

170. *United States v. Smith*, 209 F. Supp 907, 916 (E.D. Ill. 1962).

171. 28 U.S.C. § 3702 (1994).

172. Robbins, *supra* note 78, at 15.

organization is independently suspected of other wrongdoing, it would be inadvisable to use the Professional and Amateur Sports Wagering Act to shut down web contests whereby the contestant who predicts the most winners in the NCAA College Basketball tournaments wins a vacation.¹⁷³ The statute is written very broadly; it would be bad policy to enforce it to its full extent.

4. The Lotteries Act

In Part II.B.2., this article outlined a policy of permitting the Internet sale of lottery tickets to residents of the state in which the lottery is conducted. However, interstate lottery competition would be untenable under the federal Lotteries Act, which prohibits the transporting of lottery tickets “or instruments purporting to be or to represent tickets” in interstate commerce.¹⁷⁴ The exceptions set out in 18 U.S.C. § 1307 permit state-authorized lotteries to mail out tickets to addresses in that state.¹⁷⁵ Section 1307 exceptions do not allow states to mail out tickets to addresses in other states. Proponents of interstate web lottery competition could argue that electronic interstate transfer of lottery ticket information is not covered by the Act, but the broad language of section 1301 stating that an “instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery . . .” seems to be all encompassing. Thus, restricting web lotteries to intrastate commerce is not only sound public policy, it is required under federal law.

The Lotteries Act would not prevent states from selling tickets over the web or from introducing an entirely new web lottery product, so long as sales of the tickets are restricted to state residents. The Act prohibits the knowing transmission of information to be used for the purpose of procuring lottery tickets in interstate commerce and of radio or television broadcasting of lottery information into a state where such a lottery is not permitted.¹⁷⁶ These statutes have been construed as permitting newspapers to print lottery information and carry advertisements in spite of their interstate distribution, and permitting radio and television stations to broadcast lottery advertisements so long as their signals do not extend into non-lottery states.¹⁷⁷

The prohibitions on radio and television advertising in section 1304 do not apply to web lotteries. A web site is not a radio or TV station, so by the plain language of the statute, the prohibition does not apply to the Internet. Just as section 1304 should not bar web intrastate lotteries, neither should section 1301. The bar against the knowing transmission in interstate or foreign commerce of information in procuring a ticket only applies to those attempting to procure a ticket for an out-of-state resident.¹⁷⁸ So long as the state lottery commission only sells to residents of its state, the transmission of lottery information to anyone calling up its URL will not be a federal crime under section 1301. Thus, federal law should not interfere with state lottery commissions wishing to establish a web page whereby they could sell tickets to state residents.

173. A contest meeting these specifications sponsored by Pizza Hut and ESPNET (A Disney-owned service) was held in March 1997 at <<http://espnetsportszone.com>> (link no longer active).

174. 18 U.S.C.A. § 1301 (West 1997).

175. *Id.* § 1307(b)(1).

176. *Id.* §§ 1301-07. See generally *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

177. See *Edge Broad.*, 509 U.S. at 419.

178. 18 U.S.C.A. § 1301 (West 1997).

The Lotteries Act can and should be used, as a complement to the Wire Act and the Travel Act, to prohibit private enterprises from running lotteries via the web. The enforcement and jurisdiction difficulties involving foreign suspects, however, remain the same.

5. The Interstate Transportation of Wagering Paraphernalia Act

The Interstate Transportation of Wagering Paraphernalia Act (ITWPA) prohibits distributing materials for illegal gambling activity in interstate or foreign commerce.¹⁷⁹ For purposes of speed and aesthetic design, many web gambling vendors require customers to install applications on their home computers.¹⁸⁰ It should not matter whether these operations involve downloading an application through FTP via the web or by sending diskettes through conventional transportation means. Either activity would be prohibited under the Act.¹⁸¹ The ITWPA can be an effective tool for prosecutors who would need to prove only that a software was sent interstate to acquire a conviction, not that any actual gambling took place.

6. The Federal Antigambling Statute

If five or more persons, in concert, act "to conduct, finance, manage, supervise, direct or own" a gambling business that is illegal in the state in which it is conducted, they violate 18 U.S.C. § 1955.¹⁸² This statute is not particularly helpful to prosecutors in prosecuting web gambling offenses. First, virtually all activities that can be prosecuted under this statute are also reachable under the Travel Act.¹⁸³ Second, if the business is operated in an offshore jurisdiction, or a domestic state where such a business is legal, there is no violation of the statute under section 1955(b)(1)(i). Because the vast majority of web gambling operations are located offshore, and the few domestic providers would surely close up shop and move offshore as soon as it became apparent that prosecutors were looking to enforce antigambling laws, section 1955 is of limited utility in attempting to eradicate or deter web gambling.

7. State Antigambling Laws

A discussion of the wide array of state antigambling laws is beyond the scope of this article. These laws are important for federal policy, however, because under the Racketeer Influenced and Corrupt Organizations Act, federal courts have jurisdiction over acts that violate certain state laws.¹⁸⁴ State attorneys general have asked the

179. 18 U.S.C.A. § 1953 (West 1997).

180. See, e.g., Robbins, *supra* note 78, at n.156, discussing WagerNet.

181. The classification of software as gambling paraphernalia was settled in 1989 in *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990). Nothing in the Act leads one to believe that delivery over the Internet is any less of a violation than delivery through the mails. See Robbins, *supra* note 78, at 28.

182. 18 U.S.C.A. § 1955(b)(1)(ii) (West 1997).

183. The primary difference between § 1955 and § 1952 is that § 1955 is written to criminalize the ownership of a gambling business while § 1952 is not. See 18 U.S.C.A. § 1955(a) (West 1997).

184. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1951-1968 (West 1997).

federal government to intervene and assume jurisdiction over Internet gambling.¹⁸⁵ As a typical example, the Florida Attorney General's office issued a 1995 opinion saying that "evolving technology appears to be far outstripping the ability of government to regulate gambling activities on the Internet and of law enforcement to enforce such regulations."¹⁸⁶

Nevertheless, one state has attempted to deal with Internet gambling by prosecuting a Nevada-based Internet casino. In *Minnesota v. Granite Gate Resorts, Inc.*,¹⁸⁷ the Minnesota Attorney General, Hubert H. Humphrey III, brought deceptive trade practices, false advertising, and consumer fraud actions against defendant Granite Gate. The substantive case is pending, but it is interesting to note that Minnesota did not bring action on antigambling charges. In December 1996, the court denied the defendant's motion to dismiss for lack of jurisdiction.¹⁸⁸ Even if this case gives one particularly rabid attorney general¹⁸⁹ a favorable precedent, this article advises against the use of state courts in proscribing unwanted forms of web gambling due to the limited resources of state attorneys general, the essentially interstate and international nature of the medium, and the lack of technological expertise of law enforcement officials at the state level. A federal regime could eliminate the needless duplication of resources in prosecuting defendants offering Internet gambling services nationally and internationally. In addition, the Commerce Clause poses a constitutional roadblock to states enacting legislation proscribing Internet gambling. If state-run Internet lotteries and pari-mutuel outlets are legal, it would be unconstitutional for one state to impose criminal or civil liability on another state operator.¹⁹⁰

8. Common Law Prohibition Against Enforcing Gambling Debts

In deciding whether to make gambling debts legally enforceable, most states have chosen not to repeal the common law rule of the Statute of Anne.¹⁹¹ The Statute says that:

[A]ll notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given . . . for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting . . . or for repaying any money knowingly lent . . . shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever . . .¹⁹²

185. See Rolling Good Times Online, *Attorneys General Speak Out on Cybergambling* (visited May 6, 1997, but no longer active) <<http://web.rgtonline.com/thebigstory.html>>.

186. Op. Fla. Att'y Gen. (1995), 1995 WL 698073.

187. *Minnesota v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996).

188. *Id.*

189. Hubert H. Humphrey III, *Virtual Casinos, Real Stake*, N.Y. TIMES, Nov. 19, 1996, at A25.

190. Cf. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096 (1995).

191. 9 Anne, c. 14 (1710).

192. *Id.* This section of the Statute of Anne has been repealed in New York, New Jersey, Nevada, and Puerto Rico. But in most other states, it is good law.

In states where the Statute is still on the books, courts have treated contracts having anything to do with gambling as void, illegal, and unclean.¹⁹³ Courts generally dismiss suits for the enforcement of gambling debts without hearing the merits, choosing instead to leave parties where they lie.¹⁹⁴ The effect of the Statute of Anne has been that if a plaintiff is owed a note, bill, bond, or other debt for monies won at gambling, and the defendant has refused to pay the debt, the winning party can only get a judgment in a court of a state that has repealed the applicable sections of the Statute of Anne.¹⁹⁵ To get jurisdiction over a defendant in a state that has repealed the Statute of Anne, a plaintiff must show that the defendant has minimum contacts with the forum state sufficient to satisfy the constitutional guarantees of due process.¹⁹⁶ This will often be impossible, thus making the debt unenforceable by legal means.

A defendant who receives notice that a suit has been brought to collect a gambling debt in a foreign state where such debts are enforceable has two options: he can argue that the forum state's courts have no jurisdiction to hear the case; or, assuming he has no assets in the state in which the suit is being brought, he can wait until the plaintiff attempts to enforce the judgment in a state where the defendant has assets. There he can argue that full faith and credit of the judgment should not apply as the foreign laws are against the public policy of his home state.¹⁹⁷ A defendant has plenty of avenues available to prevent legal enforcement of gambling debts.¹⁹⁸

A leading case exemplifies the difficulties plaintiffs have in collecting gambling debts. In *Resorts Int'l Hotel, Inc. v. Agresta*, a "New Jersey casino sued a Virginia resident to recover on a note given for gambling losses."¹⁹⁹ The Virginia court held that even though the contract would have been enforceable in New Jersey, enforcement of the contract in Virginia "would violate express public policy and positive law of Virginia."²⁰⁰

There are two ways in which the common law prohibition against enforcement of gambling debts may be helpful to a regulator attempting to discourage web gambling. First, suppose a lucky player decides to open an account with an offshore web operation. To open an account, a player must first send funds to the web casino through bank transfer, check, credit card debit, or some other means of electronic funds transfer. Suppose the lucky player wins a substantial amount but the casino refuses to pay.²⁰¹ Assuming the web casino has no assets in states where gambling debts are enforceable, a player will eventually have to resort to the court system of the casino's home country and hope that the casino has some assets upon which a judgment can be collected.²⁰² A player sending his money to a web casino relies only on the notion that the casino will find it more profitable to cultivate customer goodwill and stay in business indefinitely than to close up shop and run off with its customers' money. As patrons of web.wagersports.com discovered in early 1997, relying on the

193. See ROSE, *supra* note 45, at 74.

194. See *id.*

195. See *id.* at 73-74, 151.

196. See *International Shoe v. Washington*, 326 U.S. 310 (1945).

197. See ROSE, *supra* note 45, at 151-52.

198. It should be noted, however, that people who are in the practice of being owed gambling debts have found ways to get around the legal regime by engaging in self-help tactics.

199. 569 F. Supp. 24, 24 (1983).

200. *Id.*

201. This hypothetical is based on the real-life events surrounding the disappearing act performed by web.wagersports.com in early 1997.

202. See Matt Connor, *Rules of the Game Need Definition, Observers Say that it is Not Safe to Gamble on the Internet*, INTERNATIONAL GAMING & WAGERING BUS., Apr. 1997, at 53.

above can be costly. The casino, which offered the option of both Internet and telephone betting, turned off its phone lines and disappeared, leaving some customers out tens of thousands of dollars.²⁰³ Because of low costs of exiting the market and reentering under another name and domain name, it is not unreasonable to expect that an unscrupulous firm would recognize that it could gain high short run profits from defrauding customers in this way.²⁰⁴

Government regulators can use events like the Wagersports fraud to help deter gamblers from wagering over the web. The Government should spread the message that it is powerless to do anything about such occurrences, it believes sudden web casino closings will happen repeatedly in the future, and it strongly advises citizens not to send money to these outlets. Many web gamblers are already skeptical of these businesses.²⁰⁵ A strong stance by the Government might make some would-be gamblers decide against web gambling.

The second way that the Government can use the common law unenforceability of gambling contracts to deter web gambling is less tested, but if successful, could be very effective. The principle is that because courts will leave parties as they find them, individual losing bettors could refuse to pay their credit card debts to web casinos. Nelson Rose, one of the foremost scholars of gambling law in America, writes:

Anyone who lends anybody money, knowing the money will be used for gambling, is making a gambling contract that is probably unenforceable. If you get a loan from a friend, a bank or even a credit card and the lender knows you are going to use the money to gamble, the lender cannot use the courts to collect, should you decide not to repay the loan.²⁰⁶

Internet casinos for the most part rely on credit cards to transfer debits and credits between the player and the house. If Rose is correct, a player willing to sacrifice his credit rating could refuse to pay a credit card debt spent at an Internet casino, so long as the credit card company lent the money knowing it was being used for a gambling transaction. Unable to find any cases in support or in opposition to this line of reasoning, it would be a matter of first impression for a court. The fact that there are credit card cash advance machines in most casinos is not dispositive of the issue. There are plenty of places to spend money in a casino other than for gambling, and a credit card company could use that fact in its own defense by stating that it could not know whether the cash would be used for gambling. The case is different when the casino is online. Presumably, the credit card transaction is used to set up an account that can only be used for gambling. This presents a stronger case that the credit card company knew that the money would be used for gambling. The fact that credit card cash advance machines are omnipresent in real-life casinos does not mean that a court would enforce that credit card debt. Credit card companies and real-life casinos might be taking the gamble that even if a court will not enforce the

203. Electronic mail from the sports-book@teleport.com listserv (on file with author).

204. In recognition of this, several interested parties have formed the Interactive Gaming Council in an attempt to adopt and approve a code of conduct and statement of principles and ethics for the online gaming industry. See Barbara A. Hogan, *Virtually There*, INTERNATIONAL GAMING & WAGERING BUS., Apr. 1997, at 53.

205. Electronic mail from the sports-book@teleport.com listserv (on file with author).

206. ROSE, *supra* note 45, at 143.

debt, the amount of money lost because of people willing to sacrifice their credit rating and refusing to pay will be less than the profits gained from the extra gambling facilitated by these machines.

It is unclear whether the courts would allow a losing gambler to escape his debt to a credit card company. If the courts did support this proposition, web casinos would be less likely to accept credit cards as a means of transferring funds. This would make web gambling more costly and therefore less salient. The DOJ should seek an advisory opinion on this issue. If the result is favorable, it should widely publicize the opinion through mass media and gambling trade press to deter web casinos from offering gambling to Americans.

9. Laws Restricting Casino Advertising

Imposing liability or criminal punishment on the vendor and purchaser of gambling services and the funds-transfer providers are not the only options available to an Internet gambling regulator. The chain of links that makes Internet gambling particularly salient includes the many web sites that carry advertising for the web casinos in question.

The federal government's ability to regulate casino advertising is well established. Civil libertarians and supporters of an unregulated Internet frequently articulate the need for First Amendment principles, through which "the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."²⁰⁷ However, there are a number of recognized exceptions to the principle that speech cannot be regulated by the Government.²⁰⁸ Illegal commercial speech is one exception to the general rule. As discussed earlier, web casino and sports gambling violates a number of federal statutes. Thus, the inquiry is simplified in the case of advertising illegal casino gambling. Whether web-based or not, illegal casino gambling fails the first prong of the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY* test requiring that commercial speech concern a legal activity in order to obtain even limited protection against Government regulation.²⁰⁹ As Justice Powell said in *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, "[w]e have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."²¹⁰ It follows that no constitutional difficulties arise in prohibiting advertising for web gambling.

Even if the ads were located in a situs where the gambling transaction was legal, this speech would still not be afforded constitutional protection. Advertising that merely proposes a commercial transaction has been judged to be commercial speech.²¹¹ An advertisement inducing web-surfers to visit a site where Internet

207. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

208. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 382 (1973).

209. The test outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) calls for an analysis of (1) whether the activity being proposed is lawful and not misleading, (2) whether the Government interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4), whether it is not more extensive than is necessary to serve that interest.

210. *Pittsburgh Press*, 413 U.S. at 388.

211. See *Edge Broad.*, 509 U.S. 418 (1993); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), *Pittsburgh Press*, 413 U.S. at 384.

gambling is conducted would, without question, be deemed commercial in nature. In most cases, whether a state is permitted to regulate commercial speech is subject to the *Central Hudson* test. As a matter of constitutional law, the liberty interest in advertising legal casino services is subsumed by the state's substantial interest in proscribing or restricting such speech, as long as the restrictions are narrowly tailored and directly advance the governmental interest.²¹² Thus, even where web casino and sports gambling is legal, the federal government would have a substantial interest in restricting gambling and would not find itself constrained by constitutional issues in proscribing web advertising.

There is no statute in the U.S. Code that prohibits advertising a web gambling service via the Internet. The Lotteries Act has been read to encompass a broadcast ban on not just lottery advertising, but casinos and sports gambling as well.²¹³ The problem with applying this statute to web sites is that the statute's plain language limits the statute to radio and television broadcasting.²¹⁴ The solution is to amend the statute to expressly prohibit advertising via the web.²¹⁵ This would not invite any constitutional problems, nor would there be political obstacles.

B. Constitutional and Practical Obstacles to an "Eradication" Strategy Against Operators of Casino and Sports Gambling web Sites

Although there are several statutes that can be used to proscribe Internet gambling,²¹⁶ the Fifth and Fourteenth Amendments' guarantee of due process makes life difficult for a law enforcement body looking to use criminal and civil penalties to prevent the owner of a web gambling site from offering gambling services. Assuming the corporation and its officers are all located offshore, the personal jurisdiction and comity problems make it extremely costly to hale the wrongdoers into an American court. Even if the operator is located in the United States, the jurisdictional issues are far from settled.

1. Personal Jurisdiction

a. Civil Cases

In the civil context, personal jurisdiction can be asserted over persons with certain connections with the forum state who are given formal notice through service of process.²¹⁷ In cases where the operator of the web site is located in the same state as the attorney general or United States Attorney looking to bring charges, no significant jurisdictional issues are raised. If the vendor of the Internet gambling

212. See *Central Hudson*, 447 U.S. at 566.

213. See, e.g., *Posadas*, 478 U.S. 328; *Valley Broad. Co. v. U.S.* 107 F. 3d 1328 (9th Cir. 1997).

214. Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States . . . knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme . . . shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C.A. § 1304 (West 1997).

215. Cf. *Id.* § 2252 (b)(1), amending the child pornography statutes to expressly prohibit transmission by computer network.

216. See *supra* Part IV.A.

217. See Henry H. Perritt Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 13 (1996).

services is located in a foreign jurisdiction, which will almost certainly be the case, personal jurisdiction becomes an issue.

Under a line of cases beginning with *International Shoe v. Washington*,²¹⁸ jurisdiction over a foreign person or corporation is permissible only when the defendant has minimum contacts with the forum state.²¹⁹ Of particular importance in this line of cases is *Burger King Corp. v. Rudzewicz*, which held that entering into a contract with someone in the forum state satisfies the constitutional requirements for minimum contacts if the contract calls for a series of transactions with a person in the forum state.²²⁰

Assuming the evidence shows the existence of a contract, expressed or implied, and a series of transactions between a foreign web site and residents of the forum state, these contracts and transactions will support a finding of jurisdiction under the *Rudzewicz* test. This test has already been applied once in the context of the Internet. In *Compuserve, Inc. v. Patterson*,²²¹ the court held that the defendant's contracts with the plaintiff, an Ohio-based corporation, as well as his placement of products into the stream of commerce (selling to Ohio residents), supported a finding of jurisdiction.²²² In the case of a web casino (or any other web application where business can be transacted), it will be trivial to show that the product, the gambling service, was placed in the stream of commerce. If the plaintiff can also show that business had, in fact, been transacted between the defendant and residents of the forum state, the minimum contacts requirement will be satisfied.

If, however, a court was to decide there were insufficient transactions between the web casino and the forum state to enable the court to hold jurisdiction over the defendant, civil claims can also be brought under the theory of *in personam* jurisdiction. In *Minnesota v. Granite Gate Resorts, Inc.*,²²³ the court found personal jurisdiction because the defendant aimed an "advertisement" at Minnesota residents. Relying on *Inset Sys., Inc., v. Instruction Set, Inc.*,²²⁴ the court held the creation of a web page in Nevada was equivalent to broadcasting an advertisement at Minnesota residents twenty-four hours a day, seven days a week, 365 days a year.²²⁵ This act in conjunction with telephone records showing that some Minnesota residents called Granite Gate's 1-900 number was deemed to have comprised minimum contacts. In *Inset*, the contacts between the defendant and the forum state (Connecticut) were even more remote. The defendant, a Massachusetts corporation, had no offices or employees in Connecticut and did not conduct business in Connecticut on a regular basis.²²⁶ The court held that the defendant's web page containing information about the company and its toll-free number satisfied the minimum contacts requirement.²²⁷

218. 326 U.S. 310 (1945).

219. Perritt, *supra* note 217, at 15.

220. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985).

221. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

222. *Id.* at 1265. A court, however, could read *Patterson* so narrowly as to find that a defendant would have to use a corporation in the forum state as a distributor "hub" to satisfy minimum contacts.

223. *Minnesota v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431 (D. Minn. Dec. 11, 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997).

224. *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

225. *Granite Gate*, 1996 WL 767431, at *6.

226. *Inset Sys.*, 937 F. Supp. at 162-63.

227. *Id.* at 164.

One commentator describes *Inset* and its progeny as “extreme.”²²⁸ James Nicklaus of Hale & Dorr writes, “the court there either misunderstood the operation of the Internet . . . or gave puzzling weight to the fact that 10,000 users in Connecticut could access a Massachusetts-based site.”²²⁹ Notwithstanding Nicklaus, courts may follow the *Inset-Granite Gate* line of reasoning in holding that the placement of a file on a Web server in state A, accessible to residents in state B, satisfies minimum contacts, as well as long-arm jurisdiction statutes.²³⁰

However in *Bensusan Restaurant Corp. v. King*,²³¹ the court held that a Missouri restaurant’s web site did not satisfy the requirements of New York’s long-arm statute, nor were there minimum contacts sufficient to satisfy the Due Process clause. The “advertising” did not mean that King had submitted to the jurisdiction of New York courts. Similarly, in *McDonough v. Fallon McElligott, Inc.*,²³² the placement of a photograph on a web server in Minnesota, viewable by residents of California, did not give California courts jurisdiction.²³³ The Supreme Court may be required to resolve the conflict of whether mere operation of a web site/advertisement constitutes minimum contacts. Whether or not this avenue of jurisdiction is available, the theory of contractual relationship will likely be sufficient for U.S. Attorneys and state attorneys general to obtain jurisdiction over foreign web casino operators in any state.

b. The Criminal Context

As discussed in Part IV.A., *supra*, most of the tools available to construct a web gambling policy are federal criminal statutes. In criminal cases, physical custody is required to satisfy the constitutional requirements. Rule 43 of the Federal Rules of Criminal Procedure mandates the defendant be physically present at trial.²³⁴ To obtain jurisdiction over a defendant in an international computer crime then becomes a question of securing the individual defendant through extradition or extra-legal means.²³⁵ Aside from the expense and the practical difficulties of doing so, legal constraints prevent extraditing a suspect from most Caribbean countries. Most extradition treaties limit the practice to occasions where the suspect has violated criminal laws of the state in which the suspect resides.²³⁶ Due to the availability of interstate extradition within the United States, it is predictable that all web casino operators will locate in foreign countries rather than attempting to hide behind Nevada, New Jersey, Puerto Rico, or other friendly state law. The legal and practical

228. See James J. Nicklaus, *Long-Arm Jurisdiction on the Internet* (visited Mar. 20, 1997) <http://web.haledorr.com/publications/Internet/1996_12_Internet.htm>.

229. *Id.*

230. Every Internet jurisdiction case thus far has been litigated in a state where the long-arm statute reaches to the full extent permitted by the United States Constitution: thus where the courts have found minimum contacts, the requirements of the state’s long-arm statute have necessarily been satisfied. In states whose long-arm statutes do not extend to the fullest reach allowed by the Constitution, prosecutors will have yet another hurdle to climb. See generally DAVID W. LOUISELL ET AL., *PLEADING AND PROCEDURE STATE AND FEDERAL CASES AND MATERIALS* 402-15 (6th ed. 1989) (explaining general principles of long-arm statutes).

231. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

232. *McDonough v. Fallon McElligott, Inc.*, No. CIV. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996).

233. *Id.* at *3.

234. FED. R. CRIM. P. 43(a).

235. Perritt, *supra* note 217, at 35.

236. *Id.* at 37.

difficulties of extraditing suspects from foreign countries make criminal penalties against web casino operators an unrealistic option to the extent that the operators do not have ties that will cause them to physically return to the United States.

2. International Sovereignty and Comity

Even though American civil courts will likely be able to assert jurisdiction over foreign defendants in civil cases and may be able to call for the extradition of suspects in criminal cases,²³⁷ the principles of comity and sovereignty must influence policy judgment over whether to hold foreign individuals and corporations liable for breaking United States laws.

Most web casino operators will probably locate to countries where the laws about gambling's legality conflict with the laws of the United States. The doctrine of comity helps determine "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience"²³⁸ Traditionally, courts have followed the executive branch in enforcing United States law abroad. The President's control over foreign policy has influenced this practice of advancing the interests of American foreign policy.²³⁹

The President can authorize the judicial branch to hale foreign defendants into United States courts to the fullest extent possible. Deference to a foreign sovereign's laws is critical, however, to prevent the destabilization of international relations.²⁴⁰ Assuming the existence of a finite number of times in which the United States can attempt to enforce its laws abroad before upsetting the geo-political equilibrium, it is well advised for the United States to "save" its extraditions for issues more important than web gambling, such as drug rings and money laundering operations. As long as Internet crimes are treated under the existing legal regime, international sovereignty and comity form obstacles to traditional means of enforcing an "eradication" policy against web gambling.

3. First Amendment

Heretofore, the discussion has assumed that the most effective restraints will be those placed upon operators of Internet gambling sites. Some proposals, however, suggest that ISPs, OLSs, index providers, and sites that accept gambling advertisements should also be held liable.²⁴¹ The First Amendment issues involving sites accepting gambling advertisements have been discussed, *supra*, Part IV.A.9. This section will focus on the issues involved in subjecting ISPs to liability as suggested by the IGPA and the Gorman and Loo proposal.²⁴² Additionally, indices and search engine operators may also be subjected to liability.

237. Conceivably, the United States could forcibly remove suspects from their homeland and bring them to the United States to stand trial. As a matter of policy, however, other nations would become most upset at making this a regular practice—putting web gambling operators in prison is not worth upsetting the international balance of power.

238. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

239. *Gorman & Loo*, *supra* note 133, at 688-89.

240. *Id.* at 689.

241. See Internet Gambling Prohibition Act, S. 474, 105th Cong. §§ 3(a)(2), 3(d) (1997).

242. See *supra* Part III.A-B.

a. Internet Service Provider Liability

ISP liability has been examined in various realms, such as copyright infringement²⁴³ and defamation.²⁴⁴ Courts analyzing the issue have framed ISP liability along the speaker/publisher continuum. Congress has attempted to remove the issue from the courts by implementing section 230 of the Communications Decency Act (CDA), which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²⁴⁵ Court cases and the CDA, however, are not directly on point. The identification of “speaker” or “direct or contributory infringer” in defamation and copyright infringement actions does not map onto a theory of accomplice liability or of aiding and abetting, which would be used to penalize ISPs. Nevertheless, the courts and Congress have implied that holding ISPs liable for civil or criminal penalties might violate First Amendment principles. For instance, some ISPs might find it too costly to perform functions (such as screening) and might close their business. First Amendment principles are similarly jeopardized in policies subjecting indices and search engine operators to liability for providing users with the URLs of illegal web gambling sites.

Despite this threat to First Amendment principles, the Interstate Wire Act maintains that common carriers can be compelled to discontinue service to any facility that uses its service “for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of [f]ederal, [s]tate, or local law”²⁴⁶ This provision has withstood all constitutional challenges since its inception in 1961.²⁴⁷ The IGPA would extend the reach of the Wire Act to encompass the “interactive computer service provider” industry. In the media, the IGPA has been characterized as forcing ISPs to act as law enforcement officials.²⁴⁸ Further, the ACLU has compared the use of ISPs as regulatory mechanisms to the totalitarian Internet policies of China and Singapore.²⁴⁹

The provision in the IGPA that enables law enforcement officials to obtain injunctive relief against ISPs servicing outlets that facilitate illegal Internet gambling does not raise any First Amendment issues beyond those already contested and upheld under section 1084(d) of the Wire Act. Nothing about ISPs should entitle them to greater First Amendment protection than telephone companies or other common carriers. The Wire Act’s notice provision satisfies the requirements of scienter, and

243. See *Religious Tech. Ctr. v. Netcom On-line Communications Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (holding computer network operators liable for copyright infringement provided the operator has knowledge of the infringing use while it can still remedy the situation).

244. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding summary judgment for CompuServe because the complaint did not allege that CompuServe knew or had reason to know about the defamatory statements made about the plaintiffs); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 63 U.S.L.W. 2765 (N.Y. Sup. Ct. May 25, 1995) (holding Prodigy liable for content placed on its bulletin boards, thus treating an ISP as a publisher).

245. Communications Decency Act, 47 U.S.C.A. § 230(c)(1) (West 1996).

246. 18 U.S.C.A. § 1084(d) (West 1997).

247. See *Telephone News Sys., Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (1963), *aff’d*, 376 U.S. 782 (1964).

248. See Ashley Craddock, *ACLU: Gambling Bill Would Turn ISPs Into Cops* (last modified Mar. 20, 1997) <<http://web.wired.com/news/politics/story/2691.html>>.

249. See *id.*

the IGPA maintains those safeguards. If such a provision is not unconstitutional as applied to common carriers under the Interstate Wire Act, it should not and will not be held unconstitutional as applied to ISPs.

b. Search Engines, Indices, and Internet Databases

The IGPA does not propose to subject search engines and indices to liability for facilitating illegal web gambling. If legislation criminalizing the inclusion of URLs of web gambling sites in Internet databases were passed, it would raise significant First Amendment questions. Most of these questions concern whether these Internet services should be viewed as commercial speech. If Yahoo and Alta Vista's links to web casinos are deemed commercial speech, the illegal nature of the gambling activity would allow states to proscribe the activity under *Pittsburgh Press*.²⁵⁰ The issue as to whether the contents of Internet databases and search engines are commercial would thus be a matter of first impression for the courts.

The test for whether speech is commercial has been fleshed out since Justice Roberts first coined the term in *Valentine v. Chrestensen*.²⁵¹ Of particular relevance is *New York Times v. Sullivan*, in which the court held that not all advertisements were commercial speech.²⁵² The fact that the newspaper was paid to carry the advertisement was not dispositive of the issue, nor was the fact that it was selling its newspapers in commerce.²⁵³ If the advertisement in *Sullivan* is not commercial speech, despite its status as an article of commerce, it is unlikely that the content of Internet databases, indices, and search engines provided as free services will be considered commercial speech.

Similarly, in *Posadas*, the Puerto Rico statute under First Amendment attack prohibited "use of the word 'casino' in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, . . . or in any hotel dependency or object which may be accessible to the public in Puerto Rico."²⁵⁴ To save the constitutionality of the statute, the Superior Court of Puerto Rico "issued a narrowing construction of the statute, declaring that the only advertisement prohibited by the law originally is that which is contracted with an advertising agency for consideration"²⁵⁵ The Puerto Rico court believed that matchbooks containing the name and address of a casino distributed for free across the island were not commercial in nature. This scenario is analogous to an Internet database providing a web user with the "address" of an Internet casino. Under *Posadas* and *Sullivan*, it seems unlikely that a statute holding search engines and index providers liable could be defended on regulation of commercial speech grounds. As a prior restraint of ordinary, non-commercial speech, it will not survive a First Amendment challenge.

4. Practical Enforcement

In addition to the constitutional difficulties, practical issues preclude law enforcement officials from applying traditional eradication tactics to combat unwanted

250. See *Pittsburgh Press Co.*, 413 U.S. at 388, discussed *supra* Part IV.A.9.

251. 316 U.S. 52, 54-55 (1942).

252. 376 U.S. 254, 266 (1964).

253. See *id.*

254. *Posadas*, 478 U.S. at 333.

255. *Id.* at 334-35.

forms of web gambling. Police departments make fighting illegal gambling a low priority. Where attempts are made to close down gambling operations, the judiciary imposes fines instead of prison sentences, and these costs do not adequately deter the participants.²⁵⁶ This ineffectiveness produces police malaise, and little hope remains for reversing the situation.²⁵⁷ The apathy of law enforcement towards even the most taboo forms of illegal gambling extends to the federal level.²⁵⁸

It is reasonable that, as a matter of policy, law enforcement officials should make the eradication of Internet gambling a higher priority than other forms of illegal gambling.²⁵⁹ However, the practical problems that law enforcement officials face in assessing criminal or civil penalties on the operators of Internet gambling sites are numerous. First, law enforcement departments are many steps behind the criminals in terms of expertise and resources, even at the federal level.²⁶⁰ There are fewer than 50 computer crime experts in the entire FBI.²⁶¹ At the local level, the problem is much worse.²⁶² Sixty percent of police professionals receive two or fewer hours of computer training.²⁶³ As one LAPD sergeant said: "Most cops want to drive fast and shoot."²⁶⁴ Exacerbating the situation is the fact that voters presently do not care about computer crime. Responding to community pressure, police departments are devoting an overwhelming portion of their resources to fighting violent crime and to community-based policing initiatives.²⁶⁵

Many steps are required to obtain a conviction of or civil judgment against a foreign operator of a web casino. Obtaining evidence regarding actual gambling is relatively easy. Evidence regarding the size and scope of the gambling operation, however, is difficult to obtain. Tracking a paper trail without the cooperation of a foreign government would be virtually impossible. This difficulty will be greatly increased when encryption technology enables complete anonymity. Even identifying the individuals behind a company incorporated in a third world country is problematic. Police departments, therefore, will have extreme difficulty accumulating proof sufficient to obtain a conviction against an operator of a web casino.

Even if police departments were adequately equipped with expertise, manpower, and technology to eradicate Internet crime, gambling is still a lesser priority than child

256. See DOMBRINK & THOMPSON, *supra* note 22, at 13.

257. See *id.*

258. See Glenn Barry, *The Evil Empire Version 2.0?* (last visited Apr. 26, 1996) <<http://web.rgtonline.com/thebigstory2.html>>.

259. The argument is that real-life illegal gambling is conducted by criminals for criminals, and the marginal costs of permitting this activity are low. The costs of physically going to a site of an illegal gambling game limits the number of people who can and will participate. Internet gambling is much more costly for two reasons: first, it is likely to introduce first-time gamblers and minors to a highly addictive activity; this will end up costing society greatly. Cf. Goodman, *supra* note 21, at 47-55. Furthermore, Internet gambling will, if unchecked, be done in the workplace on a very large scale; this will harm industrial efficiency.

260. See Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 478 (1997).

261. Stephen P. Heymann, *Legislating Computer Crime*, 34 HARV. J. ON LEGIS. 373, 391 (1997).

262. Goodman, *supra* note 260, at 478-80.

263. See *id.* at 480.

264. See Marc Goodman, Los Angeles Police Dept. Sr. Police Sgt., Computer Crimes, Address at the *Harvard Journal of Law and Technology* symposium on Technology and the Law (Mar. 15, 1997) (notes on file with author).

265. Goodman, *supra* note 260, at 479.

pornography and consumer fraud. If web gambling were a top priority of an "Internet naughty bits" division, the expense of fighting jurisdiction, notice, and venue/forum non conveniens battles in every civil web gambling case would make the imposition of civil penalties unfeasible. A criminal charge against an overseas web operator would necessarily involve either legal extradition hearings or extra-legal attempts to bring suspects into the country. But, the costs involved make these options even more untenable. The use of civil or criminal penalties against the owners and operators of foreign web gambling operations to eradicate this type of activity is not currently feasible.

In conclusion, the constitutional and practical obstacles raised here demonstrate that traditional legal methods of eradicating an unwanted activity — the imposition of civil and criminal penalties against the wrongdoers — will be ineffective. Making web gambling less salient demands a creative solution.

V. SPECIFIC REGULATORY PROPOSALS

There are six distinct groups involved in providing web gambling to the American public: (1) operators of Internet gambling sites, (2) Internet Service Providers (ISPs) and Online Services (OLSs), (3) operators of indices and search engines, (4) sites that accept gambling advertising, (5) funds-transfer providers, and (6) purchasers of gambling services.²⁶⁶ This section will outline specific proposals to impose costs and disincentives upon each of these groups in order to reduce the amount of Internet gambling.

One need is for an organization to identify web casinos, their geographic location, their ISP or OLS, and the list of their "hits" on search engines and indices. To avoid duplication of resources, it will be useful to have one federal unit responsible for building and maintaining a "Master List" of all private enterprise web gambling sites, with priority going to those offering casino games.²⁶⁷ It is irrelevant which administrative agency or federal department has jurisdiction over this department, though the FBI, DOJ, or ATF are logical possibilities. The compilation of a Master List will not require a great drain on resources and will be highly useful in coordinating different facets of the regulatory policy. The Master List can help efforts to break or weaken individual links in the chain connecting the vendor and the user of web gambling services.

A. Operators of Internet Gambling Sites

It will be very difficult to directly induce operators of web gambling sites to eliminate service to American customers. Just because one cannot arrest the operators of the undesired web sites, however, does not mean that one is powerless to reduce the number of web sites. Presuming that the organization responsible for compiling the Master List can also discern the names of the individuals behind offshore corporations that own and operate web sites, there are ways regulators can influence the supply of web gambling. The first tactic should be to issue warrants for the arrest of the owners and managers of the web casino. The Travel Act, the Lotteries Act, the Professional

266. CABOT, *supra* note 4, at 17.

267. There is historical precedent for this type of blacklist. For example, Nevada's regulatory agency, the Gaming Control Board, has always maintained a "black book" of individuals not allowed to be affiliated with the legal gambling industry. See SKOLNICK, *supra* note 13, at 121.

Sports Act, and the Federal Antigambling Statute are all criminal statutes that can be used, unamended, against operators of web gambling sites. In addition, the Wire Act should be amended according to the provisions of the Internet Gambling Prohibition Act to remove the "sports-only" language and to expressly proscribe the transmission of bets, wagers, or relevant information over computer networks.²⁶⁸ Although, as a practical matter, this will not result in many arrests, the practice of obtaining arrest warrants will effectively preclude operators of gambling sites from returning to the United States. Perhaps this will provide enough disincentive to potential web gambling operators with ties to the United States that they will elect to choose a different line of business.

A second tactic that can be used against private enterprises offering undesired forms of web gambling is to determine whether they have assets in the United States. If so, U.S. Attorneys or private citizens could file consumer fraud claims²⁶⁹ or claims to recover money wagered and lost under the Statute of Anne.²⁷⁰ If the defendants do not show up to contest the claims, the plaintiffs can enforce the judgment under principles of full faith and credit in the state in which the defendant's assets are located. Any "profits" collected from these civil suits can be put into a fund to treat gambling addiction. The civil suit should not be discounted as a key tactic in devising regulatory policy.

The third technique one could use to deter operators of web gambling sites is to publicize the fact, through an advisory opinion, that because the court system will not help operators of illegal web gambling sites collect on debts, users playing on credit can refuse to pay debts owed. The expected fallout of this tactic is that operators of web sites will refuse to accept credit cards as a means of funds-transfer. This would make web gambling less convenient for the operators and the users. This inconvenience will, therefore, translate into less web gambling.

In drafting antigambling statutes, one must be careful not to prohibit desirable legalized state-run forms of gambling from extending their operations to the Internet. The Lotteries Act should be amended to expressly permit states to run lottery games 1-2 times per week over the Internet. Daily lottery drawings should be permitted with a showing of special need. Games that occur with any greater frequency should be classified as casino/slots/keno games and proscribed on the Internet as a matter of policy. State horse racing is already permitted on the web. States should be encouraged to bring their OTB operations into the twenty-first century.

B. ISPs, OLSs, and Web Browsers

The IGPA and Gorman and Loo's proposal recommend the use of injunctive relief against ISPs and OLSs to eliminate the supply of unwanted web gambling games in the United States. This article wholeheartedly supports that endeavor. Section 3(d)(2) of the IGPA is well drafted and should enable whichever agency is granted jurisdiction over web gambling the ability to obtain injunctive relief.

268. This article recommends the adoption of the IGPA in its entirety, with the caveat that legal state lotteries and pari-mutuel betting on horse and dog racing be expressly exempted from penalty, and that the extraterritorial jurisdiction section and the imposition of liability on individual social gamblers be used for their *in terrorem* value only.

269. See, e.g., *Minnesota v. Granite Gate Resorts, Inc.*, 65 U.S.L.W. 2440, 1996 WL 767431 (D. Minn. 1996), *aff'd*, 568 N.W.2d 715 (Minn. Ct. App. 1997). Most web casinos misrepresent the legality of the activity on their sites.

270. See *supra* note 191 and accompanying text.

The costs to a web casino of changing ISPs, or even opening up new accounts with the same ISP under a different name and URL, will be much lower than the costs to the Government of obtaining the injunction. Thus, ISPs and OLSs cannot be the sole or primary medium through which web gambling is discouraged. To keep costs down, a Master List should be the primary source of information. Once a site is added to the Master List, the ISP or OLS should be notified to discontinue service to the site pursuant to the Wire Act's notice requirement. Notice may be given as soon as the Master List's compilers become aware of the existence of the web casino, because the name of the ISP is, if not embedded in the URL, much easier to discover than the names of the operators of the site or its geographic location.

Regulatory agencies should be wary of web casinos that frequently change URLs to evade detection. In recognition of this likelihood, the regulatory agency should use two techniques. First, it should vigilantly monitor the alt.gambling hierarchy of Usenet newsgroups, where web casinos advertise their existence. Digital's Alta Vista search engine enables searching of Usenet newsgroups. Few resources would be required to run a search on each site on the Master List every day, as well as certain obvious key words,²⁷¹ to keep abreast of the efforts of Master-Listed sites to remain a step ahead of the law enforcement.

Second, regulators should use the anonymity of the Internet to their advantage. It is likely that web casinos on the Master List will use listservs instead of Usenet groups to reach customers and notify them of changes to their URL. Before taking any proscriptive action, therefore, federal agents should set up "tracking" accounts with targeted web casinos. This will enable the agents to follow the trail of web casinos that jump from ISP to ISP. So long as the dummy accounts are set up through private ISPs and used frequently enough to avoid suspicion, the web casinos will have no way to relocate and keep their existing customers without informing law enforcement.

The biggest problem with the ISP approach to cutting off the supply of web gambling is that some ISPs servicing offshore web casinos will be beyond the reach of federal, state, or local law enforcement officials. The amended Wire Act should contain a provision enabling the Government to obtain injunctive relief over the leading web browser software operators. Instead of notifying the ISP, federal regulators could contact the officials responsible for maintaining the database of URLs recognized by Netscape's and Microsoft's web browsers. As a practical matter, it may be possible for the browser operators to make a forbidden URL "unrecognizable" to its client browsers. The problem lies in securing the cooperation of these software titans. If Netscape and Microsoft successfully raise a First Amendment defense against the practice of obtaining an injunction compelling them to blind their browser software to the existence of Master-Listed web sites, a contractual solution might be available, as discussed in section C, *infra*.

There are strong equitable arguments in favor of enlisting the services of the browser operators. Web browsers should not be permitted to profit on the basis of facilitating the commission of federal crimes. Cutting off browser recognition of certain web sites is less preferable than going after the web casinos' ISP because of the large number of web browsers and the erosion of First Amendment principles. However, when web casinos are located offshore and their ISPs are beyond American jurisdiction, shutting off the browser is the next best alternative.

271. *E.g.*, blackjack, keno, craps, casino.

C. Operators of Indices and Search Engines

The First Amendment restrictions on restraint of speech make subjecting the operators of free Internet databases to civil and criminal liability untenable.²⁷² This does not mean, however, that the Yahoos and Alta Vistas of the world cannot play a role in eradicating or reducing the amount of unwanted Internet gambling. Instead of a stick, a regulatory agency could use a carrot. Recognizing that the Government has an interest in making private enterprise web gambling less salient, the Congressional Budget Office could allow appropriate federal government agencies to contract with the major search engines and Internet databases to not carry links to web casinos or sports bookies. To facilitate enforcement, contracts with the operators of the Internet databases could require them to not list the URLs of any organization mentioned on the Master List. Updates to the Master List could be e-mailed to the Internet search engines on a daily basis.

Although would-be gamblers with any resourcefulness will still be able to find sites that contain links to web casinos, “bribing” operators of Internet search engines and databases would make gambling on the Net less salient.

D. Sites Accepting Gambling Advertising

The Lotteries Act makes it a federal crime to broadcast radio and television lottery and casino advertisements. It would not be politically or constitutionally problematic to amend the Lotteries Act to include web sites. The following language should be introduced into the Lotteries Act:

Internet Lotteries Advertising Prohibition Act of 1997
To amend sections 1304 and 1307 of title 18, United States Code

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,

SECTION 1. PROSCRIPTION OF ADVERTISING

Section 1304 of title 18, United States Code, is amended

by adding the phrase “places an advertisement on a web site or other file that is accessible by world wide web browser software, file transfer protocol, or other Internet or online computer service tool, or” before the word “broadcasts” in the first sentence;

by adding the phrase “including any gambling activity conducted entirely over the Internet or other computer network,” after the words “similar scheme;” and

by adding the phrase “or display of advertising on a web site or other file that is accessible by world wide web browser software, file transfer protocol, or other Internet or online

272. See discussion *supra* Part IV.B.3.b.

computer service tool," after the word "broadcasting" in the final sentence.

SEC. 2. EXCEPTION FOR STATE LOTTERIES AND PARI-MUTUEL

Section 1307 (a)(1) of title 18, United States Code, is amended by adding the following section:

"(C) located on a web site or other file that is accessible by world wide web browser software, file transfer protocol, or other Internet or online computer service tool, or."

If passed, this language would effectively cut off private web casinos from their source of advertising. The proposed language would subject any web site containing advertising for another site that offers private lotteries, gambling games, or sports wagering to fines and imprisonment.²⁷³ Every day of "broadcasting" or display of an ad on a web site would constitute a separate offense. Because web casinos' access to Internet databases and indices will also be reduced, the total number of existing links to their URL will be greatly reduced. This will make it more difficult for consumers of web gambling services to find casinos' URLs, thus reducing the overall amount of web gambling.

E. Funds Transfer Providers

Electronic funds transfer providers and credit card companies greatly facilitate the transfer of funds between buyers and sellers of web gambling services. Although new funds transfer systems such as e-cash and digicash are experiencing rapid growth,²⁷⁴ traditional modes of funds transfer will dominate Internet commerce in the short term. If regulatory policy can eliminate the use of credit cards and Western Union moneygrams for opening "accounts" with web casinos or settling gambling debts, gamblers and casinos will be compelled to use more time consuming and costly forms of fund transfer.

As discussed in Part IV.A., *supra*, several of the RICO statutes could be applied to providers of electronic funds transfer and credit services. Instead of trying a test case under the Interstate Wire Act, the following amendment is proposed which, if introduced, would clearly subject funds transfer facilitators to liability:

Internet Gambling Payment Prohibition Act of 1997
To amend the Interstate Wire Act of title 18, United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

The following shall be codified as 18 U.S.C. § 1085

273. Although the language of the act only specifies lotteries, this has been interpreted by the courts to apply to casino and sports gambling. See *Greater New Orleans Broad. Assoc. v. United States*, 69 F.3d 1296 (5th Cir. 1995).

274. See, e.g., Joshua B. Konvisser, Note, *Coins, Notes, and Bits: The Case for Legal Tender on the Internet*, 10 HARV. J.L. & TECH. 321 (1997).

(a) Any person in the business of electronic funds transfer or credit authorization, who sends, facilitates or authorizes an electronic funds transfer, credit authorization or other transmission to or from a person in the business of gambling, for the purpose of establishing credit which can be used for purchasing lottery tickets or making bets or wagers or settling a contract for a gambling debt shall, upon receiving notice under paragraph (b) of this Act, discontinue service to the person in the business of gambling.

(b) When any person in the business of electronic funds transfer or credit authorization is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that one of its account-holders is using its facilities for the purpose of enabling illegal gambling transactions to occur over the Internet in violation of Federal, State or local law, it shall discontinue or refuse to offer electronic funds transfer or credit services to the account holder, after reasonable notice. Failure to promptly discontinue service shall be punishable by a fine not more than \$10,000 for each transmission in violation of this Act.

EXCEPTIONS

(c) No person shall be liable under paragraphs (a) and (b) if the electronic funds transfer or credit authorization is transmitted to facilitate or settle a gambling contract which is legal in the states where the parties to the contract are located at the time the account is established or contract is made.

Paragraph (a) of this language makes it a federal offense for a credit card or electronic funds transfer company to supply a casino with credit or funds transfer services. Paragraph (b) describes the process for obtaining injunctive relief after notifying the funds transfer company that it services illegal gambling. Paragraph (c) lays out an exception for the use of electronic funds transfer for legal gambling contracts, including state lotteries and pari-mutuel betting.

Making funds transfer less salient for criminal Internet activity will retard the growth of the web gambling industry. This language can be applied to other undesirable aspects of Internet commerce, namely child pornography and obscenity. Criminalizing the transfer of funds is particularly attractive because it clearly falls within the federal government's domain of regulating interstate commerce, and avoids the infringement of First Amendment rights that most Internet regulatory proposals cannot avoid.

VI. CONCLUSION

Gambling policy in the United States has reached an equilibrium in balancing the economic interests of permitting legalized gambling with the criminal, moral, and economic harms that accompany that vice. The Internet has the potential to infinitely increase the availability of gambling to consumers. A sound regulatory policy should

attempt to maintain the gambling equilibrium. Permitting state use of the Internet as a sales channel for lotteries and horse racing will lead to lower transaction costs, higher amounts of gambling activity, and increased revenues for the states. At the same time, regulatory policy must work to reduce the more pervasive and insidious forms of gambling. Internet gambling should not cause regulators to overthrow existing paradigms of gambling policy. Accordingly, states should look to extend existing policies to a new medium.

The lessons learned from building a regulatory structure to combat Internet gambling can be applied to every area of Internet crime. Traditional methods of eradicating an activity through criminalization on a local or even national level will be ineffective because any purely legal regime will be quickly trumped by the technological sophistication of the wrongdoers. Practical enforcement challenges and to a lesser extent, constitutional restrictions on restraint of speech and jurisdiction, make a criminal regime, by itself, ineffective.

Regulators must, therefore, be creative in promoting or deterring certain types of activity. A regulatory strategy can include drafting new criminal statutes or amending existing criminal statutes as long as these amendments are made with an eye toward particular constitutional and practical enforcement difficulties. If regulators are realistic about the role criminal statutes can play in making Internet crime less salient, these statutes can be an effective part of the solution.

The proposals contained in this article would be rendered largely ineffective if anonymous electronic payment systems emerge as the dominant medium of Internet commerce because anonymous payment systems are currently more theoretical than real. The solutions in this article will be valuable in the short term. To the extent that consumer behavior can be shaped during this formative period when the American public's Internet behavioral modes are being molded, the policy of discouraging Internet gambling will have positive long term effects. Internet crime will, however, continue to challenge law enforcement officials worldwide. To that end, new international legal regimes are needed to effectively police all Internet crimes, including gambling. The day will soon come when international treaties propose a set of standards with which governments must comply. These treaties will contain lists of criminal activities prohibited on the Internet. Countries not complying with the treaties may face Internet embargoes—law abiding countries could cut off the supply of information to ISP addresses registered to non-compliant countries, and worse, could order the manufacturers of its client browsers to “boycott” URLs that come from a country under an Internet embargo. Foreign governments will be compelled to prosecute violators in their countries or face Internet isolation. Until such a legal regime arrives, it will be impossible to completely prohibit unwanted Internet activity, including web gambling, leaving only the solution of a policy of deterrence proposed herein.