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## Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in Dead Man's Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization if Preferable to Legalization

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## COMMENTS

### **ACES AND EIGHTS: WHY THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT RESIDES IN “DEAD MAN’S” LAND IN ATTEMPTING TO FURTHER CURB ONLINE GAMBLING AND WHY EXPANDED CRIMINALIZATION IS PREFERABLE TO LEGALIZATION**

Jonathan Conon\*

*The legalization of Internet gambling is a hotly contested issue among its various supporters and detractors, despite the topic remaining in relative obscurity within criminal law scholarship. Advocates for online poker are particularly vocal in the belief that their activity should be exempt from any form of a gambling ban. Recent academic articles, as well as current legislative proposals, have in fact advocated for an environment where Internet gambling is regulated and taxed by the federal government. This Comment is intended to balance the Internet gambling debate by presenting economic and social arguments against a legalization regime. It also seriously questions whether Internet poker is deserving of an exemption from a gambling ban. Before reaching these issues, this Comment surveys the current focal point of Internet gambling law, the Unlawful Internet Gambling Enforcement Act, as well as other existing and proposed gambling legislation. Ultimately, this Comment concludes that clearly defining “unlawful Internet gambling” and then broadening the criminalization of the activity to reach both operators and participants is a preferable approach to proposals that call for regulation and taxation.*

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## I. INTRODUCTION

Is the ability of the citizenry to gamble legally on the Internet a right that must be protected? Since the enactment of the Unlawful Internet Gambling Enforcement Act<sup>1</sup> in October of 2006, the answer is no. But Representative Barney Frank, along with at least fifty House cosponsors, hopes to change this reality through the passage of H.R. 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act.<sup>2</sup> This Comment attempts to distill the arguments both for and against using the criminal law to control Internet gambling and ultimately concludes that a stronger law, which reaches both operators and individual gamblers, is necessary to address the serious concerns associated with the activity.

## II. THE CURRENT STATE OF THE LAW: UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was passed into law in an attempt to combat online gaming.<sup>3</sup> The drafters of the UIGEA cited a growing concern that debts stemming from Internet gambling would be uncollectable as a main reason for the Act's passage.<sup>4</sup> In addition to the issues surrounding uncollectible debts, concerns over fraud, money laundering, and pathological and underage gaming were also advanced as valid reasons for the law.<sup>5</sup> The alleged inadequacy of current law enforcement mechanisms to prohibit an activity that, by its nature, crosses both national and state borders was also proffered as justification for the UIGEA's passage.<sup>6</sup>

Despite the efforts of the drafters to address these evils, the UIGEA fails to fully accomplish its objectives because of a lack of serious

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<sup>1</sup> 31 U.S.C. §§ 5361-5367 (2006).

<sup>2</sup> H.R. 2267, 111th Cong. (2009).

<sup>3</sup> 31 U.S.C. §§ 5361-5367.

<sup>4</sup> *Id.* at § 5361(a)(3). This fear grows out of the finding that states that chose to legalize casino gambling saw a subsequent increase in the number of personal bankruptcy filings. Kiran S. Raj, Comment, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 793 (2006).

<sup>5</sup> See Michael Blankenship, Note, *The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!*, 60 RUTGERS L. REV. 485, 500 (2008).

<sup>6</sup> 31 U.S.C. § 5361(a)(4). Those with a less sanguine view of the law claim that the U.S. government is trying to paternalistically control the morality of its citizens. See, e.g., Michael A. Tselnik, Note, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1622 (2007). Others posit that the government only acted when it realized the magnitude of the tax receipts it failed to capture from the online activity. See, e.g., Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34, 64 (2006).

enforcement.<sup>7</sup> This result is not surprising considering that key terms of the law, such as “unlawful internet gambling,” are not clearly defined.<sup>8</sup> Additionally, the UIGEA includes numerous explicit exemptions that suggest a comprehensive online gambling ban was not intended.<sup>9</sup> Lastly, the absence of a prohibition on individual gamblers leaves the supply of online players virtually unaffected.<sup>10</sup> These problems are briefly considered below.

The UIGEA functions by prohibiting monetary transfers from individuals involved in Internet gambling.<sup>11</sup> However, the law does not subject the individual bettor to criminal penalties,<sup>12</sup> nor does it explicitly prohibit all forms of Internet gambling.<sup>13</sup> Thus, one substantive problem with the UIGEA is that a vague definition of “unlawful internet gambling” has caused some to believe that particular areas of online gambling are still legal.<sup>14</sup> The Act defines unlawful Internet gambling as “plac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable federal or state law . . . .”<sup>15</sup> Instead of defining what constitutes illegal gambling, the UIGEA relies on pre-existing state and Federal law, which it previously describes as inadequate to handle the problem,<sup>16</sup> as the source of a vital component of the legislation.<sup>17</sup> For this reason, proponents of online gambling, particularly poker, continue to advance the position that some forms of Internet gambling are still legal.<sup>18</sup>

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<sup>7</sup> See Mark Aubuchon, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: A Parlay of Ambiguities and Uncertainties Surrounding the Laws of the Internet Gambling Industry*, 7 APPALACHIAN J.L. 305, 312 (2008).

<sup>8</sup> See Blankenship, *supra* note 5, at 496.

<sup>9</sup> See *infra* text accompanying notes 19-25.

<sup>10</sup> See *infra* text accompanying notes 104-120.

<sup>11</sup> Blankenship, *supra* note 5, at 486.

<sup>12</sup> See *id.* at 496 (contending UIGEA “does not specifically aim at criminalizing Internet gamblers”).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 31 U.S.C. § 5362(10)(A) (2006).

<sup>16</sup> See *supra* text and accompanying note 6.

<sup>17</sup> Aubuchon, *supra* note 7, at 306.

<sup>18</sup> See, e.g., Poker Players Alliance FAQ #4, <http://pokerplayersalliance.org/about/faq/#faq7> (last visited Sept. 25, 2009) (“There is currently no federal law that prohibits anyone from playing poker online. The Unlawful Internet Gambling Enforcement Act of 2006, does not change any federal gambling [law] and does not make it illegal for people to play on the Internet.”).

A second substantive problem with the UIGEA is the number of explicit exemptions it grants,<sup>19</sup> which again reinforces the notion that some forms of Internet gambling are legal. In particular, § 5362(1)(E)(ix) excludes participation in a fantasy sports game or contest from the definition of “bet” or “wager” so as to place these activities outside the UIGEA’s reach.<sup>20</sup> Fantasy sports proponents believe their games rest on the skill of the competitors, rather than on pure luck or chance, and thus are deserving of an explicit exemption.<sup>21</sup> The problem with this exemption and others like it arises when advocates for borderline games like poker contend that they, too, are deserving of a skill-based exemption.<sup>22</sup>

Another explicit exemption under the UIGEA that makes the status of other types of Internet gambling unclear is the exemption for any activity legal under the Interstate Horseracing Act (IHA).<sup>23</sup> In 2000, an amendment to the IHA allowed for the placing of interstate wagers “via telephone or other electronic media” where lawful in both states involved.<sup>24</sup> Although the Department of Justice maintains that this amendment does not make the placement of horseracing bets on the Internet legal, their position seems to be at odds with the language in the IHA.<sup>25</sup> If Internet gambling on horseracing is excluded from the confines of the UIGEA, proponents of other forms of gambling have a stronger argument that further exceptions, particularly for games with elements of skill like poker, are warranted.

As a result of these ambiguities and exemptions, recent Congressional proposals have attempted to amend and clarify the UIGEA.<sup>26</sup> Most relevant to this discussion are the Skill Game Protection Act, introduced by Representative Robert Wexler in 2007,<sup>27</sup> the Internet Skill Game Licensing and Control Act of 2008, introduced by Senator Robert Menendez,<sup>28</sup> and

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<sup>19</sup> 31 U.S.C. §§ 5362(1)(E), 5362(10)(C)-(E).

<sup>20</sup> *Id.* § 5362(1)(E)(ix).

<sup>21</sup> See, e.g., Jon Boswell, Note, *Fantasy Sports: A Game of Skill that Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1265 (2008).

<sup>22</sup> See Tselnik, *supra* note 6, at 1619.

<sup>23</sup> 31 U.S.C. § 5362(10)(D).

<sup>24</sup> 15 U.S.C. § 3002(3) (2006).

<sup>25</sup> See I. Nelson Rose, *The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006) (explaining how the Department of Justice continues to argue its belief that the IHA does not legalize interstate gambling on horseracing).

<sup>26</sup> See Charles Doyle, *Congressional Research Service Report for Congress: Unlawful Internet Gambling Enforcement Act and Regulations Proposed for Its Implementation*, 1, 6 (2007), available at [http://assets.opencrs.com/rpts/RS22749\\_20071101.pdf](http://assets.opencrs.com/rpts/RS22749_20071101.pdf).

<sup>27</sup> H.R. 2610, 110th Cong. (2007).

<sup>28</sup> S. 3616, 110th Cong. (2008).

the recently introduced Internet Gambling Regulation, Consumer Protection, and Enforcement Act.<sup>29</sup> This last bill, introduced by Representative Frank, calls for the regulation and licensing of Internet gaming, including online poker, as opposed to outright bans.<sup>30</sup> Instead of resorting to these options, Congress should choose to resolve the uncertainties in the UIGEA by enacting a strengthening amendment that specifically defines unlawful Internet gambling and criminalizes facilitation as well as participation in the activity.

### III. BACKGROUND

#### A. EVOLUTION OF THE MARKET

Measuring the size of the online gambling market is difficult, but it is believed that the United States represents at least half of a market with total revenues estimated to be between \$7 billion and \$10 billion in 2004.<sup>31</sup> Market revenues have been projected to reach over \$24 billion by 2010.<sup>32</sup> The growth in online gambling was caused, in part, by the rapid increase in online poker play.<sup>33</sup> From 2003 to 2005, online poker site revenue increased from approximately \$34 million per month to nearly \$200 million.<sup>34</sup>

The popularity of online poker can be attributed to two main causes: the explosion of televised live poker on numerous national networks, including ESPN, NBC, and the Travel Channel, and the 2003 World Series of Poker victory by “every-man” Chris Moneymaker, who won his entry to the event through an online qualification.<sup>35</sup> With the advent of downloadable poker programs facilitating poker play through the Internet,<sup>36</sup> experienced and novice gamblers were able to join in poker’s popularity without having to drive to often distant casinos.

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<sup>29</sup> H.R. 2267, 111th Cong. (2009).

<sup>30</sup> Tony Batt, *Senate Bill Calls for Regulating, Not Banning, Online Poker*, LAS VEGAS REV.-J., Oct. 1, 2008, at 3D, available at <http://www.lvrj.com/business/29991249.html>.

<sup>31</sup> *Id.*; see David O. Stewart, *An Analysis of Internet Gambling and Its Policy Implications*, in AGA 10TH ANNIVERSARY WHITE PAPER SERIES, at 2 (Am. Gaming Ass’n 2006), available at [http://www.americangaming.org/publications/10th\\_anniversary\\_series.cfm](http://www.americangaming.org/publications/10th_anniversary_series.cfm).

<sup>32</sup> Lorraine Harrington, Note, *Loaded Dice: Do National Internet Gaming Statutes Violate World Trade Organization Fair Trade Access Standards?*, 24 ARIZ. J. INT’L & COMP. L. 769, 769 (2007).

<sup>33</sup> See Grohman, *supra* note 6, at 37.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 36.

<sup>36</sup> *Id.* at 37.

## B. LEGALITY OF POKER

Despite its appeal, poker is still against the law in most states.<sup>37</sup> Those who favor legalization advance arguments that the game is one of skill and not of chance.<sup>38</sup> At least one poker authority has claimed that the game demands a greater skill set than that required for contract bridge or chess.<sup>39</sup> Some of these advanced skills include:

- (1) Ability to calculate precise mathematical odds of a needed card(s) coming on a Turn or River . . . (4) Ability to read opponents['] behavior and body language to accurately estimate the cards opponent was dealt . . . (6) Ability to understand and apply advanced strategic concepts such as semi-bluffing and playing for implied odds.<sup>40</sup>

One study attempted to quantify these skills and claimed that, at least statistically, the amount of skill in poker dominates the amount of chance.<sup>41</sup>

Not surprisingly, the case law surrounding the treatment of poker as a game of skill is not as straightforward.<sup>42</sup> Courts attempting to define poker as a game of skill as opposed to a game of chance typically rely on either the pure chance doctrine or the dominant factor test, with the latter being preferred in most jurisdictions.<sup>43</sup> A court will not find an activity to be a game of skill under the dominant factor test “when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.”<sup>44</sup> Put another way, the dominant factor doctrine requires a court to determine where, on a spectrum bookended by chance and skill, a particular activity falls.<sup>45</sup>

Modern courts applying this doctrine have often declined to classify poker as a game of skill.<sup>46</sup> For example, in *People v. Mitchell*, the Illinois Appellate Court upheld a jury’s conclusion that a skill-based exception did not apply to poker games.<sup>47</sup> Likewise, the Colorado Supreme Court found in *Charnes v. Central City Opera House Ass’n* that poker “constitutes a

<sup>37</sup> See Bennett M. Liebman, *Poker Flops Under New York Law*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 1-2 (2006).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3.

<sup>40</sup> Roman V. Yampolskiy, *Game Skill Measure for Mixed Games*, 27 PROC. WORLD ACAD. SCI. ENGINEERING & TECH. 308, 309-10 (2007).

<sup>41</sup> *Id.* at 311.

<sup>42</sup> Tselnik, *supra* note 6, at 1662.

<sup>43</sup> *Id.* at 1662-63.

<sup>44</sup> *In re Advisory Opinion to the Governor*, 856 A.2d 320 (R.I. 2004) (quoting *Roberts v. Commc’ns Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 (R.I. 1981)).

<sup>45</sup> Tselnik, *supra* note 6, at 1663.

<sup>46</sup> See *id.* at 1664.

<sup>47</sup> 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983).

form of ‘gambling’ in its commonly understood sense” because of its reliance on elements of chance.<sup>48</sup> Even states that have legalized poker, such as California and Montana, have done so through specific statutory language, not by finding that poker constitutes a game of skill.<sup>49</sup> Judiciaries in both states have routinely found that poker was a gambling game containing elements of chance.<sup>50</sup> A recent case from Pennsylvania, however, took the opposite position.<sup>51</sup> The court in *Commonwealth v. Watkins* used the predominance test to find that Texas Hold’em poker was not “unlawful gambling” because it was a game dominated by elements of skill.<sup>52</sup>

In spite of, or perhaps because of, this uncertainty in the state courts regarding the legality of casino-style poker, gamblers flocked to the Internet in droves to participate in the activity.<sup>53</sup> One 2005 estimate placed nearly 100,000 people playing online poker for money during peak hours, with nearly an equal number participating in free games.<sup>54</sup> Although no single reason motivated Congress to curb online gambling by passing the UIGEA, the massive participation in online poker since 2000 was certainly not an insignificant factor.

### C. FEDERALISM CONCERNS

A logical question in the aftermath of the UIGEA’s passage concerns the right of the federal government to intervene at all, as gambling regulation has traditionally been an area reserved for state supervision.<sup>55</sup> The Supreme Court indicated a view in support of states’ rights in *United States v. Edge Broadcasting Co.* when it stated that gambling fails to implicate a right that is constitutionally protected.<sup>56</sup> Rather, it is a vice activity that states have a right to ban.<sup>57</sup> In fact, under its police power, a

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<sup>48</sup> 773 P.2d 546 (Colo. 1989).

<sup>49</sup> Liebman, *supra* note 37, at 22.

<sup>50</sup> *Id.*

<sup>51</sup> *Commonwealth v. Watkins*, No. CP-19-CR-0000746-2008 (Pa. Ct. Com. Pl. Jan. 14, 2009), available at <http://www.scribd.com/doc/10915146/PA-Judge-Thomas-A-James-Jr-Opinion-on-Commonwealth-of-PA-vs-Walter-Watkins-Texas-Holdem>.

<sup>52</sup> *Id.* at \*14.

<sup>53</sup> See Grohman, *supra* note 6, at 37.

<sup>54</sup> *Id.*

<sup>55</sup> Gerd Alexander, iBrief, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 DUKE L. & TECH. REV. 6, ¶ 7 <http://www.law.duke.edu/journals/dltr/articles/2008DLTR0006.html>.

<sup>56</sup> 509 U.S. 418, 426 (1993).

<sup>57</sup> *Id.*



state's authority to regulate gambling is nearly unchecked.<sup>58</sup> These federalism concerns, while certainly valid in the context of traditional casino gambling within an individual state's borders, dissipate when applied to Internet gambling.<sup>59</sup>

Taking the unique position of advocating *for* federal intervention, the National Association of Attorneys General (NAAG) supported federal regulation of Internet gambling.<sup>60</sup> NAAG recognized the need for a national response to an activity that easily evaded regulation by any one state.<sup>61</sup> As one author noted, "[t]he jurisdictional uniqueness of the Internet called for a national answer to online gambling."<sup>62</sup> Proponents of federalism can take solace from the fact that the UIGEA does not prohibit intrastate Internet gambling, provided a state establishes mechanisms to verify age and location.<sup>63</sup> This exception poses dangers of its own, which are discussed at the end of Part VI.

#### D. PRECURSORS TO THE UIGEA

While arguably the furthest reaching federal response to Internet gambling, the UIGEA is only the most recent Congressional attempt to restrict the activity.<sup>64</sup> Precursors to the UIGEA included the Internet Gambling Prohibition Act of 1997 (IGPA)<sup>65</sup> and the Unlawful Internet Gambling Funding Prohibition Act.<sup>66</sup> Proposed by Senator Jon Kyl, the IGPA attempted to impose penalties on individual bettors and would have required Internet service providers (ISPs) to regulate online gambling.<sup>67</sup> The bill died after a companion measure in the House received no action.<sup>68</sup> A toned-down version of the IGPA<sup>69</sup> again passed in the Senate during the next Congressional session but also failed to find support in the House.<sup>70</sup>

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<sup>58</sup> I. Nelson Rose, *Gambling and the Law®: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, 1173 (2007).

<sup>59</sup> See NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION: FINAL REPORT 3-17, 5-9 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter *NGISC Final Report*].

<sup>60</sup> *Id.* at 5-9.

<sup>61</sup> *Id.*

<sup>62</sup> Kraig P. Grahmann, *Betting on Prohibition: The Federal Government's Approach to Internet Gambling*, 7 NW. J. TECH. & INTELL. PROP. 162, 167 (2009).

<sup>63</sup> *Id.* at 172.

<sup>64</sup> See Tselnik, *supra* note 6, at 1622.

<sup>65</sup> S. 474, 105th Cong. (1997).

<sup>66</sup> H.R. 2143, 108th Cong. (2003).

<sup>67</sup> Stewart, *supra* note 31, at 18.

<sup>68</sup> *Id.*

<sup>69</sup> S. 692, 106th Cong. (1999).

<sup>70</sup> *Id.*

An approach to regulating online gambling that focused on restricting its funding finally achieved a modicum of success late in 2002.<sup>71</sup>

Representative Jim Leach, who originally proposed a prohibition on the use of credit cards in Internet gambling transactions in 2000,<sup>72</sup> reintroduced the Unlawful Internet Gambling Funding Prohibition Act at the beginning of the 108th Congress.<sup>73</sup> H.R. 21 failed to make it out of the House Judiciary Committee without substantial alteration, and a replacement measure, H.R. 2143, was proposed that removed Judiciary jurisdiction.<sup>74</sup> The new bill eventually passed in the full House of Representatives by a vote of 319-104.<sup>75</sup> However, companion legislation S. 627, introduced by Senator Kyl, never reached a vote as certain exceptions were amended to the bill.<sup>76</sup>

Although many believed that an Internet gambling ban was not in the cards after the Senate's failure to pass S. 627, two bills to this effect were nonetheless introduced in the 109th Congressional session.<sup>77</sup> One measure, H.R. 4777, reflected Senator Kyl's late 1990s ideas on ISP regulation.<sup>78</sup> A second bill, H.R. 4411, was again introduced by Representative Leach and was similar to his previous legislative attempts, with the exception of carve-outs for fantasy sports and horse racing.<sup>79</sup> Although H.R. 4411 passed the House in July 2006, it was not put up for a final vote until the last week of the legislative session.<sup>80</sup> Ostensibly left for dead again, the Republican Congressional leadership managed to squeeze the Internet gambling legislation into the Safe Port Act as the UIGEA in the final three days of the legislative session.<sup>81</sup> Accusations circled among Democrats that they never even saw the final language of the gambling bill and were forced to vote for it because of its inclusion with an essential national security measure.<sup>82</sup>

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<sup>71</sup> See Grohman, *supra* note 6, at 56.

<sup>72</sup> *Id.* at 55.

<sup>73</sup> H.R. 21, 108th Cong. (2003).

<sup>74</sup> Stewart, *supra* note 31, at 19.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Grohman, *supra* note 6, at 57-58.

<sup>78</sup> Grohman, *supra* note 6, at 58 (citing H.R. 4777, 109th Cong. (2006)).

<sup>79</sup> Grohman, *supra* note 6, at 58 (citing H.R. 4411, 109th Cong. (2005)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The SAFE Port Act enhanced overall port security, improved security at port facilities, and established a container security program. Jonathan K. Waldron, *Implementation of Safe Port Act Requirements*, MAINBRACE, Dec. 2007, at 1, available at <http://www.blankrome.com/siteFiles/Publications/0F160D115C5E584B8EC553ED137B3A1A.pdf>.

<sup>82</sup> *Id.* at 58-59.

## E. IMPACT OF THE UIGEA

Despite its circuitous route into law, the UIGEA has had an impact on the online gaming market. One of its most immediate effects was the destruction in market value of many publicly traded companies in the United Kingdom and Europe that serviced the U.S. market.<sup>83</sup> PartyGaming, which operated the Party Poker site and generated 80% of its revenues from the United States, lost \$5 billion in market value as its stock plummeted 58%.<sup>84</sup> Similarly, Sportingbet, the operator of sportsbook.com and ParadisePoker.com, dropped 60%, and The 888 Group, operator of gambling site 888.com, fell 33%.<sup>85</sup> Within one month of the UIGEA's passage, Sportingbet sold its entire operation for one dollar.<sup>86</sup> Another online gambling provider, Pinnacle Sports, took three months to abandon the U.S. market, leaving behind 60% of its customer base.<sup>87</sup>

Online operators were not the only casualties of the UIGEA. Fearing prosecution by the Justice Department, many financial providers abandoned the U.S. market as well.<sup>88</sup> Neteller and PayPal, two of the leading financial intermediaries used by online gamblers to fund their Internet accounts, have stopped providing this service in the United States.<sup>89</sup> They had been able to generate profits because most credit card operators restricted individuals from directly using their cards at online gambling sites.<sup>90</sup> Companies like Neteller allowed individuals to avoid this restriction by permitting the transfer of money from credit cards to a company-operated holding account.<sup>91</sup> This account could then be used to fund a gambling site.<sup>92</sup> Neteller made money by charging a nominal fee whenever a user withdrew funds from the holding account back to a personal account.<sup>93</sup> Neteller chose to stop serving U.S. clients after two of its retired founders were arrested in the Virgin Islands on money laundering charges stemming from their company's role as a facilitator of online gambling.<sup>94</sup>

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<sup>83</sup> See Alexander, *supra* note 55, ¶ 34; Mattia V. Corsiglia Murawski, Comment, *The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006*, 48 SANTA CLARA L. REV. 441, 443 (2008).

<sup>84</sup> Grohman, *supra* note 6, at 60.

<sup>85</sup> Alexander, *supra* note 55, ¶ 34.

<sup>86</sup> Aubuchon, *supra* note 7, at 311.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 310.

<sup>89</sup> *Id.*

<sup>90</sup> Grohman, *supra* note 6, at 37-38.

<sup>91</sup> *Id.* at 38.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Alexander, *supra* note 55, ¶ 35.

Despite these departures, U.S. players continue to find outlets for their gambling dollars from online operators who pay little notice to the UIGEA.<sup>95</sup> One such operator, Bodog, continues to accept wagers from U.S. players for all its services, including poker and sports betting.<sup>96</sup> Another company, Fulltilt, claims to have experienced a profit increase of 600% by remaining open to the U.S. market.<sup>97</sup> In addition to these recognized names, other privately held e-casinos and electronic financial intermediaries, known colloquially as e-wallets, have filled the void left in the U.S. market after the departure of the aforementioned public companies.<sup>98</sup> Their presence, free from shareholder oversight, may actually be more harmful to players than the environment the UIGEA attempted to regulate.<sup>99</sup> Moreover, it is likely that some operators who left the U.S. online market will resume their operations if the UIGEA is not strongly enforced.<sup>100</sup> As U.S. players continue to gamble online,<sup>101</sup> a strengthening amendment to the UIGEA that formally criminalizes all participation in the activity appears necessary.

#### IV. LEGAL PRINCIPLES

Justifying an expansion of the UIGEA under the criminal law requires one to understand what the law does and does not say about Internet gambling. First, the UIGEA specifically states that:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling (1) credit or the proceeds of credit, . . . (2) an electronic funds transfer, . . . (3) any check, draft, or similar instrument; . . . or (4) the proceeds of any other form of financial transaction.<sup>102</sup>

In essence, the UIGEA acts as a prohibition on monetary transfers from individuals involved in Internet gambling.<sup>103</sup>

##### A. INDIVIDUAL CRIMINAL LIABILITY

One initial result of this language is that the UIGEA was not intended to “make[] it a federal crime to merely place a bet on the Internet.”<sup>104</sup> The

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<sup>95</sup> See Aubuchon, *supra* note 7, at 312.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Alexander, *supra* note 55, ¶¶ 34-35.

<sup>99</sup> See *id.* ¶¶ 38-39.

<sup>100</sup> See Aubuchon, *supra* note 7, at 312.

<sup>101</sup> Alexander, *supra* note 55, ¶ 44.

<sup>102</sup> 31 U.S.C. § 5363 (2006).

<sup>103</sup> Blankenship, *supra* note 5, at 486.

phrase person “engaged in the business of betting or wagering” also appears in the Wire Act<sup>105</sup> and has been viewed as a high prosecutorial hurdle to clear.<sup>106</sup> In *United States v. Baborian*, the defendant allegedly wagered up to one thousand dollars per day several days per week and also offered his own betting lines on games.<sup>107</sup> Nevertheless, the court found him not to be engaged in the business of wagering or betting, and he therefore remained outside of the criminal jurisdiction of the Wire Act.<sup>108</sup>

As various commentators have stated, the purpose of the UIGEA is to greatly reduce the revenue flowing to illicit Internet gambling operations.<sup>109</sup> The government was allegedly not interested in prosecuting every five-dollar bettor,<sup>110</sup> notwithstanding the repeated position of the Department of Justice that Internet gambling is illegal.<sup>111</sup> Efforts to prosecute individual online gamblers are considered futile because of the difficulty of tracking people in cyberspace.<sup>112</sup> Additionally, the focus of traditional law enforcement has never been on the individual gambler.<sup>113</sup> The UIGEA attempts to follow this path by targeting the intermediaries that facilitate the transfer of money to and from those engaged in the business of wagering or betting.<sup>114</sup> Section 5366 imposes criminal penalties upon those institutions that violate § 5363,<sup>115</sup> which in turn defines the prohibited activity as the

<sup>104</sup> Michael Grunfeld, Comment, *Don't Bet on the United States's Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 459 (quoting I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMING LAW 4 (2005)).

<sup>105</sup> See 18 U.S.C. § 1084(a) (2006). For more thorough treatment of the Wire Act, see *infra* text accompanying notes 127-133.

<sup>106</sup> See *United States v. Baborian*, 528 F. Supp. 324, 331 (D.R.I. 1981) (explaining that a defendant would need to be more than a gambling customer to qualify as engaged in the business of betting; he would need to be involved in a financial arrangement with a bookmaker, provide betting line information on a regular basis, and have this information be relied upon by the bookmaker, all traits that Baborian failed to exhibit).

<sup>107</sup> *Id.* at 326.

<sup>108</sup> *Id.* at 331.

<sup>109</sup> See, e.g., Doyle, *supra* note 26, at 1.

<sup>110</sup> Grunfeld, *supra* note 104, at 459 (quoting I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMING LAW 4 (2005)).

<sup>111</sup> *The Internet Gambling Prohibition Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. ¶ 10 (2006) [hereinafter *DOJ Hearing*] (statement of Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice).

<sup>112</sup> Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1593 (1999).

<sup>113</sup> *Id.*

<sup>114</sup> Tselnik, *supra* note 66, at 1617.

<sup>115</sup> 31 U.S.C. § 5366(a) (2006).

“acceptance of any financial instrument for unlawful internet gambling.”<sup>116</sup> The § 5366 penalties include fines and/or imprisonment for not more than five years.<sup>117</sup>

Pursuing the individual gambler at the expense of targeting an operator or payment facilitator is undoubtedly a flawed approach.<sup>118</sup> Yet, constructing a broader criminal law that reaches both gamblers and operators and intermediaries may be necessary if targeting only the latter proves ineffective.<sup>119</sup> Depending on the balance of the social benefits and downside costs that result from a broader rule, this approach may be warranted in spite of a social consensus against targeting the individual offender.<sup>120</sup> In Part VIII, I will argue that online gambling presents such a situation.

#### B. FEDERAL GAMBLING LAWS

A second issue arising from the UIGEA is that it does not define “unlawful internet gambling.”<sup>121</sup> The text of the law expressly states its intention not to “alter[], limit[], or extend[] any Federal or State Law . . . prohibiting, permitting, or regulating gambling within the United States.”<sup>122</sup> In a recent case challenging the UIGEA’s validity, the Third Circuit affirmed a lower court’s dismissal of the claim that the phrase “unlawful internet gambling” was unconstitutionally vague.<sup>123</sup> Appellant, Interactive Media, needed to show that the law was “impermissibly vague in all of its applications.”<sup>124</sup> The court acknowledged that the UIGEA did not, itself, make any gambling illegal, but rather relied on the incorporation of existing federal and state law.<sup>125</sup> Applying the Supreme Court’s standard for vagueness—“provid[ing] a person of ordinary intelligence fair notice of

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<sup>116</sup> *Id.* § 5363.

<sup>117</sup> *Id.* § 5366(a).

<sup>118</sup> See Keller, *supra* note 112, at 1593 (noting the difficulty of tracking individual gamblers in cyberspace and advocating for controlling online gambling in the same manner as its land-based counterpart: “at the source”).

<sup>119</sup> Cf. Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1494 (2008) (explaining how in the case of heroin distribution, a state may choose a broader criminal rule that punishes low levels of possession when it is unlikely that a narrower rule would be able to sanction a well-organized dealer network).

<sup>120</sup> *Id.* at 1506.

<sup>121</sup> See Grunfeld, *supra* note 104, at 463.

<sup>122</sup> 31 U.S.C. § 5361(b) (2006).

<sup>123</sup> Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of the U.S., No. 08-1981, 2009 U.S. App. LEXIS 19591, at \*15 (3d Cir. Sept. 1., 2009).

<sup>124</sup> *Id.* at \*7 (emphasis omitted) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)).

<sup>125</sup> *Id.* at \*8.

what is prohibited”—the court had little trouble accepting the fact that a reasonable person of ordinary intelligence could consult existing state and federal provisions to understand which gambling activity was illegal.<sup>126</sup> A review of some of the federal and state provisions that would trigger the UIGEA’s criminal provisions follows.

The Wire Act<sup>127</sup> is generally considered to be the federal law most applicable to online gambling.<sup>128</sup> Passed in 1961, well before the advent of the Internet, the Wire Act prescribes fines and penalties for those who, engaged in the business of wagering or betting, “knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . .”<sup>129</sup> An initial problem with prosecutions under the Wire Act is that it, like the UIGEA, is limited to persons “engaged in the business of betting or wagering.”<sup>130</sup> Assuming this hurdle can be cleared, authority is also split over whether all online gambling—as opposed to just sports betting—is illegal under the Wire Act.<sup>131</sup> The government maintains the position that the act governs all Internet gambling and continues to prosecute violators under its provisions.<sup>132</sup> Gambling proponents, such as the Poker Players Alliance, interpret the Wire Act as limited to sports wagering and continue to lobby against its extension.<sup>133</sup> Two cases, *United States v. Cohen*<sup>134</sup> and *In re MasterCard, International Inc. (MasterCard)*<sup>135</sup> highlight this tension.

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<sup>126</sup> *Id.* at \*7-9. The Third Circuit also refused to find fault with the fact that gambling activity could be permitted in some states but illegal in others. *Id.* at \*9. Nor was the court concerned with the potential difficulty in determining the origin of a bet for purposes of its legality, explaining that “[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what the fact is.” *Id.* at \*10 (quoting *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008)).

<sup>127</sup> 18 U.S.C. § 1084(a) (2006).

<sup>128</sup> Blankenship, *supra* note 5, at 487; Rose, *supra* note 58, at 1166.

<sup>129</sup> 18 U.S.C. § 1084(a).

<sup>130</sup> See *supra* text accompanying notes 105-108.

<sup>131</sup> See Aubuchon, *supra* note 7, at 307.

<sup>132</sup> Blankenship, *supra* note 5, at 488.

<sup>133</sup> See Poker Players Alliance, Updated Message to Members on SDNY Enforcement (June 11, 2009), <http://theppa.org/press-releases/2009/06/09/message-to-members-on-sdny-enforcement-ppa-060909/> (stating that the Wire Act does not restrict any form of online gambling other than sports betting).

<sup>134</sup> 260 F.3d 68 (2d Cir. 2001).

<sup>135</sup> 313 F.3d 257 (5th Cir. 2002).

*Cohen* was one of the most publicized criminal prosecutions of an online gambling operator under the Wire Act.<sup>136</sup> The defendant operated a bookmaking business in Antigua known as the World Sports Exchange (WSE).<sup>137</sup> WSE solicited customers from New York and other states who would then wire money to the offshore location before placing sports bets through the phone and Internet.<sup>138</sup> The Second Circuit upheld the trial court's conviction of the defendant for violating the Wire Act.<sup>139</sup> The court reasoned that his intent to violate the statute was irrelevant considering that he "knowingly transmitted information assisting in the placing of bets."<sup>140</sup> Despite this victory, government attempts to use the Wire Act to reach Internet gambling operators would incur a serious setback in the *MasterCard* decision.<sup>141</sup>

In *MasterCard*, the plaintiffs sought damages and tried to avoid gambling debts they incurred through purchasing chips at online casinos with their credit cards.<sup>142</sup> The plaintiffs alleged that the credit card companies, including Visa and MasterCard, had engaged in violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) by facilitating illegal Internet gambling in concert with certain online casinos.<sup>143</sup> To win on their RICO claim, the plaintiffs needed to prove that two or more predicate acts, either state or federal crimes, had occurred.<sup>144</sup> A Wire Act violation was one such predicate offense presented.<sup>145</sup> The Fifth Circuit agreed with the lower court's finding that "the Wire Act concerns gambling on sporting events or contests."<sup>146</sup> As the plaintiffs failed to allege participation in Internet sports gambling, they could not use the Wire Act as a predicate offense.<sup>147</sup> This omission led the court to affirm the dismissal of their RICO claim,<sup>148</sup> and it also had broader implications for the Wire Act's future use in prosecuting online gambling operators.

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<sup>136</sup> Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 431 (2006).

<sup>137</sup> *Cohen*, 260 F.3d at 70.

<sup>138</sup> *Id.* at 70-71.

<sup>139</sup> *Id.* at 76.

<sup>140</sup> *Id.*

<sup>141</sup> See Tselnik, *supra* note 66, at 1627 (explaining how the *MasterCard* decision contravened long-standing positions of the Department of Justice that the Wire Act banned all forms of Internet gambling).

<sup>142</sup> *In re MasterCard Int'l Inc.*, 313 F.3d 257, 259-61 (5th Cir. 2002).

<sup>143</sup> *Id.* at 259-60.

<sup>144</sup> *Id.* at 261-62.

<sup>145</sup> *Id.* at 262.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 262-63.

<sup>148</sup> *Id.* at 264.



Online gambling proponents cite the *MasterCard* decision as evidence that the Wire Act, and by extension the UIGEA, does not reach non-sports related online gambling, especially poker.<sup>149</sup> No other circuit court has ruled on this issue, but commentators generally agree that the Wire Act represents insufficient authority for Internet gambling prosecutions beyond sports betting.<sup>150</sup> Notwithstanding these judicial and academic positions, the government continues to rely on the Wire Act in attempting to curtail gambling.<sup>151</sup> Because the UIGEA fails to clarify any existing federal gambling law,<sup>152</sup> the future application of the Wire Act to this area remains uncertain.

Because of potentially limited applicability of the Wire Act, prosecutors have also turned to the Travel Act<sup>153</sup> to restrict online gambling. The Travel Act imposes criminal sanctions on “whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to (1) distribute the proceeds of any unlawful activity . . . .”<sup>154</sup> Unlawful activity encompasses “any business enterprise involving gambling.”<sup>155</sup> Prosecutions under the Travel Act require the government to clear a two-part hurdle, showing: (1) a violation of a state’s anti-gambling laws and (2) that the “mail or any facility” was used to carry on a gambling activity.<sup>156</sup>

The recent decision in *United States v. Nader*<sup>157</sup> may have important implications for the second prong of this standard. The Ninth Circuit in *Nader* held that not only was a telephone a facility in interstate commerce for the purposes of the Travel Act, but also that wholly intrastate calls undertaken to further an unlawful activity violate the Act.<sup>158</sup> *Nader* equates

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<sup>149</sup> See Grohman, *supra* note 6, at 45 (stating that the theory that the Wire Act applies to gambling beyond sporting events is unlikely to win in court).

<sup>150</sup> See, e.g., Grahmann, *supra* note 62, at 168; Rose, *supra* note 58, at 1167.

<sup>151</sup> Dan Cypra, *United States Federal Government Freezes \$30 Million in Online Poker Funds*, POKER NEWS DAILY, June 9, 2009, <http://www.pokernewsdaily.com/united-states-federal-government-freezes-30-million-in-online-poker-funds-2830/> (explaining that in early June 2009, the U.S. Attorney for the Southern District of New York froze nearly \$30 million in banking assets that belonged to online poker players, citing violations of the Wire Act and Illegal Gambling Business Act).

<sup>152</sup> 31 U.S.C. § 5361(b) (2006).

<sup>153</sup> 18 U.S.C. § 1952 (2006).

<sup>154</sup> *Id.* § 1952(a).

<sup>155</sup> *Id.* § 1952(b).

<sup>156</sup> Grohman, *supra* note 6, at 46.

<sup>157</sup> 542 F.3d 713 (9th Cir. 2008).

<sup>158</sup> *Id.* at 722. The court construed the statutory phrase “in interstate or foreign commerce” as plainly modifying the word “facility” and not “use.” *Id.* at 717-18. As the telephone is a facility in interstate commerce, the court attached no significance to whether the “use” was entirely intrastate. *Id.* at 719-20.

intrastate and interstate transmissions so long as they are done to advance an unlawful activity.<sup>159</sup> Assuming a subsequent court applies this holding to the Internet,<sup>160</sup> the issue of where an online transmission occurs would be irrelevant. The government would then only need to prove a violation of a state anti-gambling law to win a conviction under the Travel Act.<sup>161</sup>

A third federal law generally cited as applicable to Internet gambling is the Illegal Gambling Business Act.<sup>162</sup> The law mandates fines or imprisonment for those who “conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business.”<sup>163</sup> A key element of a prosecution under the Illegal Gambling Business Act is proving that an operator violates an existing state law by running his gambling business.<sup>164</sup> While this law only reaches gambling operators and not individuals, it does implicate online gaming should a violation of an existing state law be shown.<sup>165</sup>

### C. STATE GAMBLING LAWS

As the Illegal Gambling Business Act highlights, most federal gaming laws were enacted to support existing state law on the subject. A search of these laws reveals a range of regulations that are as varied as the states themselves.<sup>166</sup> Some states, like Utah and Hawaii, prohibit gambling altogether while others, such as New York and Wisconsin, limit gambling to certain types of activities operated by the state.<sup>167</sup> Eight states have made gambling through the Internet or the use of a computer illegal.<sup>168</sup> Although the Third Circuit believes a person of reasonable intelligence can readily ascertain from these laws which gambling activity is illegal,<sup>169</sup> others rightly disagree.<sup>170</sup> As one author has pointed out, the uncertain nature of

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<sup>159</sup> See 542 F.3d at 722.

<sup>160</sup> See Grohman, *supra* note 6, at 46.

<sup>161</sup> *Id.*

<sup>162</sup> 18 U.S.C. § 1955 (2006).

<sup>163</sup> *Id.* § 1955(a).

<sup>164</sup> Grohman, *supra* note 6, at 47.

<sup>165</sup> Blankenship, *supra* note 5, at 491.

<sup>166</sup> See, e.g., Aubuchon, *supra* note 7, at 315 (noting the varying approaches to gambling regulation that exist among the fifty states); Grunfeld, *supra* note 104, at 468 (explaining that “the legal status of gambling varies widely from state to state”).

<sup>167</sup> Aubuchon, *supra* note 7, at 316-17.

<sup>168</sup> *Id.*

<sup>169</sup> See Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of the U.S., No. 08-1981, 2009 U.S. App. LEXIS 19591, at \*8-9 (3d Cir. Sept. 1, 2009).

<sup>170</sup> See, e.g., Dan Cypra, *Internet Gambling Law Expert Reacts to UIGEA Decision*, POKER NEWS DAILY, Sept. 3, 2009, <http://www.pokernewsdaily.com/internet-gambling-law->

state gambling laws and the absence of a uniform prohibition may allow the re-entry of those online gambling operators that left the U.S. market after the UIGEA's passage.<sup>171</sup>

Beyond the concern of disparate laws, the application of the "dormant" Commerce Clause provides a constitutional argument against leaving Internet gambling regulation in the hands of the states.<sup>172</sup> This jurisprudence prevents states from passing laws that interfere with the flow of interstate commerce.<sup>173</sup> A key element of dormant Commerce Clause analysis is that the affected commerce needs to be of a sufficiently national nature.<sup>174</sup> The concern is that states in their legislative capacities will be able to have a disproportionate extraterritorial effect beyond their fixed boundaries.<sup>175</sup>

Professor Dan Burk argues that the Internet, as a conduit for transporting information, is similar to "previous interstate 'instruments of commerce' such as railroads or trucks" covered under this analysis.<sup>176</sup> Other commentators believe that recent dormant Commerce Clause jurisprudence, particularly *American Libraries Ass'n v. Pataki*,<sup>177</sup> demonstrates that Internet gambling falls under this doctrine.<sup>178</sup> In striking down New York's Internet Indecency Act, the court in *American Libraries* equated the Internet with a highway or railroad because of its ability to act "as a conduit for transporting digitized goods."<sup>179</sup> It finished its analysis with the far-reaching statement that "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether."<sup>180</sup> Online gambling regulation by individual states presents a model situation for this type of "inconsistent

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expert-reacts-to-uigea-decision-4664/ (explaining that relying on state law "may not be a straightforward endeavor").

<sup>171</sup> Aubuchon, *supra* note 7, at 317.

<sup>172</sup> See Keller, *supra* note 112, at 1593-94.

<sup>173</sup> Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-24 (1996).

<sup>174</sup> See Keller, *supra* note 112, at 1593-94. States can derive an incidental local benefit from an unequal treatment of domestic and out-of-state commerce if legitimate local purposes are served by a regulation. Burk, *supra* note 173, at 1124.

<sup>175</sup> See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 343 (2002).

<sup>176</sup> Burk, *supra* note 173, at 1125-26.

<sup>177</sup> 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

<sup>178</sup> Keller, *supra* note 112, at 1594. *But see* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001) (disagreeing with the conventional wisdom that the dormant commerce clause should invalidate state Internet regulation).

<sup>179</sup> 969 F. Supp. at 173.

<sup>180</sup> *Id.* at 169.

legislation” due to the diversity of views on the activity. Dormant Commerce Clause jurisprudence is necessary to ensure one set of rules applies to all players.

#### V. ECONOMIC AND MORAL ISSUES

Beyond preserving the development of the Internet, application of the dormant Commerce Clause to prevent a myriad of state Internet gambling laws also stops a single state from imposing its moral viewpoint on the entire landscape.<sup>181</sup> As much as Internet gambling proponents would likely prefer for the will of North Dakota to shape cyberspace,<sup>182</sup> their opponents would almost as surely opt for the more conservative legislation adopted in Utah or Hawaii.<sup>183</sup> The social and moral questions raised by the spread of gambling include potential increases in personal bankruptcies, pathological and underage gambling, and state endorsement. An additional concern that typifies the debate over legalized gambling is the amount of economic harm that gambling inflicts on society.<sup>184</sup>

#### A. ECONOMIC MULTIPLIER EFFECT OF GAMBLING DOLLARS

Economists posit that typical recreational dollars have a multiplier effect once they enter the economy.<sup>185</sup> Stated in different terms, “normal consumer spending benefits the economy by more than just the amount spent.”<sup>186</sup> Gambling proponents contend that money spent on gambling is no different than recreational dollars spent at the theater or at a concert;<sup>187</sup> however, studies do not support this assertion.<sup>188</sup> For example, a 1998 analysis of Illinois casinos by the Regional Economics Application Laboratory showed that the multiplier effect for casino dollars in the state was 1.72.<sup>189</sup> In other words, each dollar expended at a casino resulted in an

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<sup>181</sup> Keller, *supra* note 112, at 1594.

<sup>182</sup> See Blankenship, *supra* note 5, at 512-13 (detailing North Dakota’s attempt to legislate the licensing and regulation of Internet poker and advocating it as a model for a federal solution to the issue).

<sup>183</sup> See Aubuchon, *supra* note 7, at 316.

<sup>184</sup> See Blankenship, *supra* note 5, at 494.

<sup>185</sup> John Warren Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling: Should a Negative Socio-Economic “Crime Multiplier” Be Included in Gambling Cost/Benefit Analyses?*, 2003 MICH. ST. L. REV. 281, 282.

<sup>186</sup> *Id.*

<sup>187</sup> See John Warren Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 MANAGERIAL & DECISION ECON. 17, 19 (2001).

<sup>188</sup> See *id.*

<sup>189</sup> Kindt, *supra* note 185, at 293.

additional \$0.72 worth of activity elsewhere in the state.<sup>190</sup> As a point of comparison, “most consumer dollars would have generated a dollar multiplier effect of ‘2’ to ‘3.’”<sup>191</sup> Moreover, the financial benefits that do accrue to society from traditional, land-based gaming cannot be replicated in the context of Internet gambling.<sup>192</sup>

## B. RISE IN GAMBLING-RELATED BANKRUPTCIES

An increase in uncollectable consumer debts<sup>193</sup> and the costs associated with a rise in bankruptcies<sup>194</sup> are additional social concerns linked to the spread of gambling. One study ranked legalized gambling as “the third leading cause of individual bankruptcies in the United States.”<sup>195</sup> Bankruptcy costs from legalized gambling resulted in a cost of \$40 per U.S. household in 1997, and this figure is only expected to rise.<sup>196</sup> Moreover, credit card use is a critical factor in the link between bankruptcy and gambling.<sup>197</sup> As nearly all Internet gambling is facilitated either directly or indirectly through credit cards,<sup>198</sup> the legalization of online gambling would likely exacerbate the problems of bankruptcy.<sup>199</sup> Lastly, the incidence of personal bankruptcy due to gambling may suffer from underreporting<sup>200</sup> as few people admit publicly that gambling losses forced them to file.<sup>201</sup> The

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* A similar study in Missouri produced nearly identical results and “seemed to confirm the concerns of economists that legalized gambling activities constituted a net drain on the consumer economy.” *Id.* at 305.

<sup>192</sup> See Grahmann, *supra* note 62, at 166. Even Representative Barney Frank, a noted Internet gambling proponent, did not directly dispute the notion that the activity adds nothing to gross domestic product. See Barney Frank, *With Gambling, Personal Freedom Is Always the Best Bet, Says Barney Frank*, U.S. NEWS & WORLD REP., June 1, 2009, <http://www.usnews.com/articles/opinion/2009/06/01/with-gambling-personal-freedom-is-always-the-best-bet-says-barney-frank.html>.

<sup>193</sup> See 31 U.S.C. § 5361(a)(3) (2006).

<sup>194</sup> See *NGISC Final Report*, *supra* note 59, at 7-14 to -16.

<sup>195</sup> John Warren Kindt & John K. Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 19 BANKR. DEV. J. 21, 29 (2002). According to the same study, legalized gambling is also the fastest growing cause of consumer bankruptcy filings. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See *id.* at 32.

<sup>198</sup> See *supra* text accompanying notes 89-93.

<sup>199</sup> See Kindt & Palchak, *supra* note 195, at 30-31 (explaining that online gambling through the use of credit cards falls into a category considered “the ‘crack cocaine’ of the gambling industry because of its addictiveness and destructiveness.”).

<sup>200</sup> See Mary McCarty, *Gambling's Critics Say Benefits Not Worth Cost*, DAYTON DAILY NEWS, Oct. 26, 2008, at A8.

<sup>201</sup> *Id.*

privacy and instant gratification afforded by Internet gambling<sup>202</sup> would only further contribute to this problem.

### C. PATHOLOGICAL GAMBLING

Beyond the harmful effects associated with a rise in bankruptcies, pathological gambling is an area of social concern that, while not unique to the online environment, can be heightened by it.<sup>203</sup> Countries, including the United States and United Kingdom, have found that the immediacy of gratification and high level of privacy afforded by the Internet can exacerbate problem gaming.<sup>204</sup> This result is not surprising considering the speed at which online gaming takes place.<sup>205</sup> For example, where a poker player typically sees thirty hands per hour at a live game, he can average sixty to eighty hands per hour online, at one table.<sup>206</sup> This rapid play can result in the magnification of losses, especially where players have little to no time to pause and assess their performance.<sup>207</sup>

Currently, little research examining the behavior of Internet gamblers exists.<sup>208</sup> Two recent studies led by Harvard Medical School researchers were among the first to analyze the actual gambling activities of Internet users, as opposed to self-reported activities.<sup>209</sup> The study led by Richard LaBrie (LaBrie Study) concerned online casino-style gambling while the study led by Debi LaPlante (LaPlante Study) focused on Internet poker.<sup>210</sup> Relevant to this discussion is the researchers' confirmation of the existence of a group of "most involved gamblers" representing 5% of total participants.<sup>211</sup> In the LaBrie Study, this group wagered, on average, approximately 8.5 times more per bet than the other 95% of participants while making nearly 3 times as many daily bets.<sup>212</sup> Similarly, in the LaPlante Study, the most involved group wagered, in total, "at least 75 times more than the majority of the sample," although data on amount

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<sup>202</sup> Blankenship, *supra* note 5, at 501.

<sup>203</sup> See *NGISC Final Report*, *supra* note 59, at 5-5.

<sup>204</sup> Blankenship, *supra* note 5, at 501.

<sup>205</sup> See Michael Smeaton & Mark Griffiths, *Internet Gambling and Social Responsibility: An Exploratory Study*, 7 *CYBERPSYCHOLOGY & BEHAV.* 49, 54-55 (2004).

<sup>206</sup> Grohman, *supra* note 6, at 38-39.

<sup>207</sup> Smeaton & Griffiths, *supra* note 205, at 54.

<sup>208</sup> Richard A. LaBrie et al., *Inside the Virtual Casino: A Prospective Longitudinal Study of Actual Internet Casino Gambling*, 18 *EUR. J. PUB. HEALTH* 410, 410 (2008).

<sup>209</sup> *Id.*; Debi A. LaPlante et al., *Sitting at the Virtual Poker Table: A Prospective Epidemiological Study of Actual Internet Poker Gambling Behavior*, 25 *COMPUTERS IN HUM. BEHAV.* 711 (2009).

<sup>210</sup> LaBrie et al., *supra* note 208, at 411; LaPlante et al., *supra* note 209, at 712.

<sup>211</sup> LaBrie et al., *supra* note 208, at 413; LaPlante et al., *supra* note 209, at 713.

<sup>212</sup> LaBrie et al., *supra* note 208, at 413 tbl.3.

wagered per bet was not provided.<sup>213</sup> While both groups of involved gamblers had an average percentage loss that was less than the non-involved group, the LaBrie group of most involved gamblers had an average total loss of €8,746 (versus only €422 for the non-involved group) and the LaPlante group had average net losses of €1,941 (versus only €587 for the non-involved group).<sup>214</sup>

Neither study concludes that the Internet is creating more pathological gamblers than the traditional casino, and the LaPlante Study makes a further point, noting that it “does not include information about rates of clinical or subclinical gambling pathology.”<sup>215</sup> Another researcher, however, suggests that the potential for “problem gambling” is higher among online participants than on-site gamblers, explaining that “the rate of problem gambling among internet gamblers may be [ten] times higher than the rate among the general population.”<sup>216</sup> At a minimum, the combined studies show the significant costs—in both dollars and the potential for pathology—associated with online gambling.<sup>217</sup>

#### D. UNDERAGE GAMBLING

A related social concern raised by lawmakers in the context of Internet gambling is the inability of operators to restrict access to minor children and young adults.<sup>218</sup> Age-verification technology has improved in recent years, but it is still imperfect.<sup>219</sup> Lawmakers should be especially concerned about the group of young adults, ages eighteen to twenty, who recently have moved away from home. This group represents a key demographic for online operators.<sup>220</sup> And even proponents of online gambling concede that

<sup>213</sup> LaPlante et al., *supra* note 209, at 714. The absence of data on the amount wagered per bet is not surprising as poker players do not participate to the same degree in every hand they are dealt.

<sup>214</sup> LaBrie et al., *supra* note 208, at 413 tbl.3; LaPlante et al., *supra* note 209, at 714 tbl.1.

<sup>215</sup> LaPlante et al., *supra* note 209, at 716.

<sup>216</sup> Robert T. Wood & Robert J. Williams, *Problem Gambling on the Internet: Implications for Internet Gambling Policy in North America*, 9 NEW MEDIA & SOC'Y 520, 537 (2007).

<sup>217</sup> See, e.g., LaBrie et al., *supra* note 208, at 414 (suggesting that interventions for problem gamblers “need to target a range of behaviours and that identification of disordered gambling behaviour needs to move beyond financially related consequences”).

<sup>218</sup> Hurt, *supra* note 136, at 423. Should a minor gain access to a gambling site, the issue of financing may limit any resulting consequences. Teenagers often must share control over a personal credit card or bank account with a supervising parent. Additionally, parents may stand a better chance of discovering the illegal actions of their children when their children live, and choose to gamble, at home. See *id.* at 424-25.

<sup>219</sup> Blankenship, *supra* note 5, at 504.

<sup>220</sup> See Grohman, *supra* note 6, at 37, 39.

the arguments concerning the welfare of minors are more persuasive in the context of this subset.<sup>221</sup>

Young adults, especially college students, are a vulnerable group because they often possess access to credit cards with no parental supervision.<sup>222</sup> These individuals tend to be unaware of the consequences of abusing and mismanaging credit,<sup>223</sup> while also lacking the impulse control necessary to handle addictive behaviors, including gambling.<sup>224</sup> Internet gambling opponents are justified in raising social welfare concerns regarding all underage gambling, in particular their focus on the participation in the activity by this group of young adults.<sup>225</sup>

#### E. PROBLEM OF GOVERNMENT ENDORSEMENT

Lastly, by refusing to explicitly ban Internet gambling, the United States sets a social norm that condones the activity.<sup>226</sup> If, however, the federal government enacted an outright ban, a strong counter-signal would be sent. Imposing a strict criminal ban on Internet gambling, even with minor or no sanctions, likely would cause individuals to change their behavior.<sup>227</sup> People generally follow the law out of respect for the signal it sends.<sup>228</sup> The importance of the social norm set by the government is seemingly ignored by those who argue that criminalizing individual gambling activities would be a futile approach.<sup>229</sup> Yet, the current tacit endorsement of Internet gambling by the federal government in the absence

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<sup>221</sup> Hurt, *supra* note 136, at 425.

<sup>222</sup> See Daniel G. Habib, *Online and Obsessed*, SPORTS ILLUSTRATED, May 30, 2005, at 66.

<sup>223</sup> See So-hyun Joo et al., *Credit Card Attitudes and Behaviors of College Students*, 37 C. STUDENT J. 405, 416-18 (2003).

<sup>224</sup> Pearson Liddell, Jr. et al., *Internet Gambling: On a Roll?*, 28 SETON HALL LEGIS. J. 315, 334 (2004).

<sup>225</sup> The story of Greg Hogan presents just one troubling example of the harm that online gambling can inflict on minors. Hogan, president of the 2008 Lehigh University undergraduate class and son of a Baptist minister, was charged with bank robbery after holding up a Wachovia branch for \$3000. See Grohman, *supra* note 6, at 60-61. He claimed that he had lost \$5000 in online poker play and that his addiction caused him to rob the bank. *Id.* at 61.

<sup>226</sup> See Kindt & Palchak, *supra* note 195, at 32 (explaining that state endorsement of an activity can have a significant effect on individual decision-making). This position would align with the multitude of pro-gambling legislation that has occurred since the 1970s. *Id.* at 34.

<sup>227</sup> See *id.* at 33-34 (detailing how new regulations can alter the existing social norm associated with an activity).

<sup>228</sup> *Id.* at 33. As one example, most people obey traffic laws even if minimal punishment exists for violations. *Id.*

<sup>229</sup> See Keller, *supra* note 112, at 1593.



of a direct ban sends a disturbing signal considering the social problems attached to the activity.

## VI. PROPOSAL

An effective response to the problems of Internet gambling in general, and the UIGEA in specific, should include the enactment of more stringent legislation that makes online gaming illegal on an individual as well as on an operator basis. This outcome would directly contradict several recent Congressional proposals to modify the UIGEA, but would align with the Justice Department's longstanding position that all Internet gambling is against the law. An outright ban would also be a superior approach to gambling legislation than what currently exists in Canada, one of the few countries whose national criminal code contains specific provisions against gambling by both individuals and operators.<sup>230</sup>

### A. EXISTING PROPOSALS TO MODIFY THE UIGEA

While several bills to modify the UIGEA have been proposed in recent congressional sessions,<sup>231</sup> none of them adequately address the flaws of the existing legislation. Both the Internet Gambling Regulation and Enforcement Act<sup>232</sup> and the Internet Gambling Regulation and Tax Enforcement Act<sup>233</sup> seek to federally license online gambling operators. Each bill also attempts to increase the amount of federal tax revenues that are collected.<sup>234</sup> The underlying motivation of the bills is sharing in the billions of dollars of tax revenues that countries who license Internet gambling collect.<sup>235</sup> However, neither bill reduces the amount of online gambling, although at least the Internet Gambling Regulation and Enforcement Act promises to install safeguards to combat money laundering and fraud, protect minors, and assist compulsive gamblers.<sup>236</sup>

A third measure, the Skill Game Protection Act (SGPA)<sup>237</sup> would seek further exemptions within the UIGEA and Wire Act for games of skill, a term the drafters believe encompasses poker. The SGPA was influenced by federal court decisions that interpreted the Wire Act "as applying only to

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<sup>230</sup> See Canada Criminal Code, R.S.C., ch. C-46, § 206 (1985).

<sup>231</sup> Doyle, *supra* note 26, at 1.

<sup>232</sup> H.R. 2046, 110th Cong. (2007).

<sup>233</sup> H.R. 2607, 110th Cong. (2007).

<sup>234</sup> H.R. 2046, § 5381(a)(6); H.R. 2607, § 4491(7)(B).

<sup>235</sup> H.R. 2046, § 5381(a)(4).

<sup>236</sup> *Id.* § 5383(g).

<sup>237</sup> H.R. 2610, 110th Cong. § 3(f) (2007).

betting on sports.”<sup>238</sup> Perhaps in anticipation of those in law enforcement who would interpret the SGPA otherwise, Section 3 would exclude from the definition of “bets or wagers” in the Wire Act “participation in poker . . . or any other game where success is predominantly determined by a player’s skill . . . .”<sup>239</sup> The SGPA would then amend § 5362(1)(E) of the UIGEA to reflect in the definition of “bet or wager” the exclusion for participation in games of skill now granted in the Wire Act.<sup>240</sup> Again, despite its inclusion of an array of potential safeguards against Internet gambling harms, this proposal would do little to curb the amount of online play.<sup>241</sup>

The Unlawful Internet Gambling Enforcement Clarification and Implementation Act of 2008 (2008 Act)<sup>242</sup> is one of the most informed proposed amendments to the UIGEA. Initially, the 2008 Act recognizes the lack of clarity in federal law as applied to non-sports related Internet gambling, including poker.<sup>243</sup> The 2008 Act also seeks to rectify the legal uncertainty the UIGEA created for non-U.S. based entities.<sup>244</sup> It specifically disclaims criminal liability for people who offered Internet gambling services, excluding sports betting, before the UIGEA’s enactment but who ceased operations thereafter.<sup>245</sup> The 2008 Act then explicitly reaffirms criminal liability for those who offered illegal wagers to or accepted them from individuals within the United States after the passage of the UIGEA.<sup>246</sup>

Where the 2008 Act falls short is in its failure to clarify which bets or wagers are illegal under federal law. In fact, the 2008 Act concludes by stating that nothing in its contents should be read to imply that Internet bets or wagers, other than sports bets or wagers, made after October 13, 2006 are illegal under federal law.<sup>247</sup> After openly acknowledging confusion over this subject in its findings section,<sup>248</sup> the 2008 Act fails to further define which bets are illegal under federal law. Therefore, its clarifications as to criminal liability for Internet gambling are of questionable value, and

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<sup>238</sup> *Id.* § 2(5).

<sup>239</sup> *Id.* § 3(f).

<sup>240</sup> *Id.* § 5.

<sup>241</sup> *Id.* § 4 (promising safeguards to combat money laundering and prevent fraud as well as to protect minors and problem gamblers).

<sup>242</sup> H.R. 6663, 110th Cong. (2008).

<sup>243</sup> *Id.* § 2(a)(2).

<sup>244</sup> *Id.* § 2(a)(5).

<sup>245</sup> *Id.* § 2(a)(6).

<sup>246</sup> *Id.* § 3(a).

<sup>247</sup> *Id.* § 4.

<sup>248</sup> *See id.* § 2.

individuals are still left wondering which activities can be excluded under the UIGEA.

H.R. 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, is the most recent attempt at reforming the UIGEA.<sup>249</sup> Proposed by Representative Barney Frank, the bill would authorize the Secretary of the Treasury to grant licenses to Internet gambling operators.<sup>250</sup> Licenses would be conditioned on the satisfaction of the usual list of safeguards against fraud, compulsive gambling, and underage wagering.<sup>251</sup> All licensees would also be required to comply with any taxes imposed on their operations.<sup>252</sup>

#### B. A MODEL FOR A STRICTER GAMBLING LAW

Instead of granting further exemptions from the UIGEA for games of skill or legalizing online play through a licensing regime, Congress should expressly prohibit all forms of online gambling, a position that would also clarify any existing uncertainty over prosecutorial actions of the Justice Department. Since the Clinton administration, the United States Justice Department has consistently maintained that all Internet gambling is prohibited.<sup>253</sup> It supports this view based on its interpretation of the Wire Act and continues to prosecute violators under it.<sup>254</sup> The Justice Department cites concerns over underage and compulsive gambling, fraud, and money laundering as reasons for its seemingly hard-line position against online gambling.<sup>255</sup> These issues are undoubtedly similar to the safeguards that potential amendments to the UIGEA seek to address.<sup>256</sup> The

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<sup>249</sup> H.R. 2267, 111th Cong. (2009).

<sup>250</sup> *Id.* § 5383(a)(1)(B).

<sup>251</sup> *Id.* § 5383(g).

<sup>252</sup> *Id.* § 5383(g)(4). Opponents of the bill note that jurisdictions where gambling is legal, such as Atlantic City and Las Vegas, have spent years developing and enforcing effective regulations, whereas this bill would “direct the Treasury Department to set up a new regulatory regime . . . in a mere matter of months.” Spencer Bachus, *Online Gambling Leads to Crime and Hurts Young, So Why Encourage It? Asks Spencer Bachus*, U.S. NEWS & WORLD REP., June 1, 2009, <http://www.usnews.com/articles/opinion/2009/06/01/online-gambling-leads-to-crime-and-hurts-young-so-why-encourage-it-asks-spencer-bachus.html>. This criticism is particularly salient considering the immense responsibilities already placed on Treasury in the wake of the nation’s financial crisis.

<sup>253</sup> Tselnik, *supra* note 6, at 1627; *see also DOJ Hearing, supra* note 111, ¶ 9.

<sup>254</sup> Blankenship, *supra* note 5, at 489. In a 2006 case that pre-dated the UIGEA, the Justice Department announced a \$7.2 million settlement with the *Sporting News* over claims that the company promoted illegal gambling. *DOJ Hearing, supra* note 111, ¶ 2. The *Sporting News* was accused of advertising gambling in exchange for fees over a three-year period. *Id.*

<sup>255</sup> *DOJ Hearing, supra* note 111, ¶ 9.

<sup>256</sup> *See supra* text accompanying notes 236, 241.

Department of Justice nevertheless maintains the position that total prohibition of Internet gambling, and not industry regulation, is necessary to protect consumers from these ills.<sup>257</sup> Likewise, many state attorneys general support an effective national Internet gambling law to combat the activity in their respective jurisdictions.<sup>258</sup>

Congress should empower these parties with a strengthening amendment that provides criminal sanctions on both online gambling operators and players. As a baseline for this sea change,<sup>259</sup> Congress can look to the prevailing interpretation of Internet gambling law set out in the Canadian Criminal Code.<sup>260</sup> In Canada, operators can be imprisoned for up to two years for “sell[ing], barter[ing], exchang[ing] or otherwise dispos[ing] of . . . any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever.”<sup>261</sup> While this Criminal Code provision contains no explicit reference to online gambling,<sup>262</sup> at least one Canadian court has stated in dicta that online gambling is illegal in the country.<sup>263</sup> Many observers are also in agreement that individuals are likewise prohibited from gambling online if the website is located in another country.<sup>264</sup> According to the Criminal Code, any person who “buys, takes or receives a lot, ticket or other device . . . is guilty of an offence punishable on summary conviction.”<sup>265</sup> The United States should improve upon Canada’s approach of criminal liability for Internet gambling and not adopt the exemption existing in Canadian law that still allows their citizens to wager, on average, \$447 per person.<sup>266</sup>

Because legal authority over gambling regulation in Canada is split between the federal and provincial governments, if a provincial government conducts or manages a gambling activity “operated on or through a computer, video device or slot machine,” then that government exercises authority over any criminal penalties resulting from the activity.<sup>267</sup> Two conditions need to be met for Internet gambling to be legal in Canada: the

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<sup>257</sup> See Hurt, *supra* note 136, at 433-34.

<sup>258</sup> See Bachus, *supra* note 252, at 2.

<sup>259</sup> Over fifty nations have legalized and regulated Internet gambling. H.R. 2046, 110th Cong. § 5381(a)(3) (2007).

<sup>260</sup> See Canada Criminal Code, R.S.C., ch. C-46, § 206 (1985).

<sup>261</sup> *Id.* § 206(1)(b).

<sup>262</sup> Wood & Williams, *supra* note 216, at 521.

<sup>263</sup> UniNet Techs. Inc. v. Comm’n Servs Inc., [2005] B.C.C.A., 114, ¶ 1 (Can.).

<sup>264</sup> Wood & Williams, *supra* note 216, at 521.

<sup>265</sup> Canada Criminal Code, R.S.C., ch. C-46, § 206(4).

<sup>266</sup> Harrington, *supra* note 32, at 769.

<sup>267</sup> *Id.* at 784 (quoting Canada Criminal Code, R.S.C., ch. C-46, § 207(1)).

service must be (1) “operated by the provincial government” and (2) “restricted to the residents of the province offering the service.”<sup>268</sup> These requirements have proven difficult to implement.

In *Earth Future Lottery*,<sup>269</sup> the Supreme Court of Canada affirmed a lower court ruling that found the Province of Prince Edward Island to be in violation of the Criminal Code by planning to conduct an Internet lottery. The proposed lottery was open and marketed to individuals beyond the confines of the province, including citizens of the United States, through the use of computers and the Internet.<sup>270</sup> The court saw this as a fatal flaw under the Criminal Code even though the transactions related to the lottery, as well as the server on which the site operated, were alleged to be housed entirely within the province.<sup>271</sup> While the precedential value of this decision is likely limited to the operation of an Internet lottery, the court noted that the provisions of the Criminal Code “clearly demonstrate that Parliament does not happily abide gaming activities of any sort in Canada . . . . The purpose of Parliament . . . was generally to outlaw gaming and lotteries, not just to ensure they would be run honestly.”<sup>272</sup>

The U.S. Congress should adopt a similar posture in criminalizing online gambling at the federal level without allowing for exemptions for individual states.<sup>273</sup> The National Gambling Impact Study Commission cited the ease with which online patrons could conceal their location within the United States in order to gamble with a foreign-based operator.<sup>274</sup> The approaches to country concealment that the Commission highlighted, including a process where a patron first dials into a remote ISP to give the appearance of being located in a jurisdiction where online wagering is legal,<sup>275</sup> seem readily applicable to intra-U.S. gambling as most ISPs are local carriers. A similar problem would arise if states differed in the legal gambling age they set for their operations. Even legalization proponents admit that existing technology cannot yet accurately verify age online.<sup>276</sup> These logistical hurdles offer few assurances that virtual state boundaries or regulations could be respected.

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<sup>268</sup> *Id.*

<sup>269</sup> *Reference re Earth Future Lottery*, [2002] 633 A.P.R. 311, *aff'd*, [2003] 1 S.C.R. 123 (Can.).

<sup>270</sup> *Id.* ¶ 13.

<sup>271</sup> *Id.* ¶ 13-14.

<sup>272</sup> *Id.* ¶ 7.

<sup>273</sup> See *supra* text accompanying notes 266-267.

<sup>274</sup> *NGISC Final Report*, *supra* note 59, at 5-10.

<sup>275</sup> *Id.* at 5-10 to -11.

<sup>276</sup> Blankenship, *supra* note 5, at 504.

But beyond the burdens on a state to prohibit non-residents from partaking in state-authorized Internet gambling, there is the added question of whether these desires would even exist. The authority to operate Internet gambling sites may cause some states to “race to the bottom” in an effort to capture a larger share of the tax revenues claimed to accompany legalized gambling.<sup>277</sup> A similar result occurred in the late 1980s and early 1990s when states began authorizing riverboat casino gambling.<sup>278</sup> Initially, strict restrictions were in place: boats could not be stationary and were limited in their hours of operation.<sup>279</sup> In some instances, players’ losses were also capped.<sup>280</sup> But once additional states started competing for gambling patrons by authorizing their own riverboats, these restrictions were gradually lifted.<sup>281</sup> Moving boats begat stationary casinos and eventually riverfront properties were established.<sup>282</sup> A similar rush to maximize potential online tax revenue suggests some states have the incentive to offer minimal regulation of age and location, or at least provide less stringent enforcement mechanisms.

## VII. POLICY DEFENSES

### A. PRESENCE OF NEGATIVE GAMBLING EXTERNALITIES

The arguments justifying an outright federal ban on Internet gambling include a reduced economic multiplier effect from expended consumer dollars, a potential rise in bankruptcies and pathological gaming, and a heightened risk of underage gambling.<sup>283</sup> Internet gambling also poses a risk that various forms of fraud will be perpetrated against individual players.<sup>284</sup> A chief concern of the federal government is that online operators may unfairly take a player’s money or wrongly disseminate his or her personal information.<sup>285</sup> This issue is particularly salient in light of the

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<sup>277</sup> See, e.g., H.R. 2046, 110th Cong. § 5381(a)(6) (2007) (claiming that licensing and regulation would provide additional tax revenues to the United States); Blankenship, *supra* note 5, at 506 (“Taxing the Internet gambling industry is a great opportunity for a significant growth in tax revenues.”).

<sup>278</sup> See Barbara T. Dreyfuss, *Politicians Bet the Farm*, AM. PROSPECT, Mar. 2008, at 31.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> See generally discussion *supra* Part V.

<sup>284</sup> Blankenship, *supra* note 5, at 500-01.

<sup>285</sup> *Id.* at 501.

discovery of the two largest cheating scandals in the history of Internet gambling, both of which occurred on poker sites.<sup>286</sup>

Players on web sites AbsolutePoker.com and UltimateBet.com were victims of scandals where cheaters hacked the companies' software and defrauded players out of \$1.6 million and \$20 million, respectively.<sup>287</sup> The cheaters had manipulated the system so that they could see the face-down cards of their online opponents, which is a virtually unbeatable advantage.<sup>288</sup> The scandals were only discovered upon the concerted effort of individual players acting as analytical detectives as the companies were either unable or unwilling to respond to allegations of a scam.<sup>289</sup> While the sites are now refunding money to the victimized players, the scandal raises legitimate questions as to the integrity of the online gambling system, particularly poker.<sup>290</sup> A comprehensive online gambling ban would remove from participants' minds any tacit endorsement of the legitimacy of Internet gambling sites by the U.S. government.<sup>291</sup> It would also put players on sufficient notice that they are participating in an illegal activity that the government believes is pervaded by fraud.

A related concern is the ability of criminals to use online gambling sites to launder money. An individual with an ill-gotten gain can deposit the money into an online account, gamble a de minimus amount, and then request a withdrawal of a now legitimate "winning."<sup>292</sup> Proponents of online gambling claim that this situation is not unique to the operation of betting web sites and in fact pervades electronic commerce.<sup>293</sup> While there is truth to this statement, an Internet gambling site does provide an easy mechanism by which money can be moved electronically.<sup>294</sup> Simply making a criminal's nefarious intentions harder to execute should serve as a sufficient justification for restricting an economic activity that otherwise acts as a societal drain.<sup>295</sup>

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<sup>286</sup> Gilbert M. Gaul, *Players Gamble on Honesty, Security of Internet Betting*, WASH. POST, Nov. 30, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/29/AR2008112901679.html>.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* Internet poker also subjects participants to a further risk of collusion among the other players at the virtual table—a form of fraud absent from other variants of Internet gambling. Grahmann, *supra* note 62, at 177.

<sup>291</sup> See *supra* text accompanying notes 226-229.

<sup>292</sup> Hurt, *supra* note 136, at 427.

<sup>293</sup> *Id.* at 428.

<sup>294</sup> Blankenship, *supra* note 5, at 503.

<sup>295</sup> See *supra* text accompanying notes 185-192.

## B. IMPROPRIETY OF EXEMPTING ONLINE POKER FROM A COMPREHENSIVE GAMBLING BAN

Supporters of exempting online poker from the confines of the UIGEA downplay all these externalities and claim that regulation is still a preferred solution.<sup>296</sup> They contend that poker is a game of skill deserving of an exclusion from any outright gambling ban.<sup>297</sup> Proponents also point to the tremendous financial windfall to the United States from a decision to regulate and tax Internet gambling.<sup>298</sup> These advocates are misguided for three reasons. First, online poker should not qualify as a game of skill deserving of an exemption. Major skill elements of the activity in its traditional form, including the ability to read one's opponent, precisely calculate mathematical probabilities, and implement complex stratagems,<sup>299</sup> are diminished in the online context. As these skill elements diminish, the relative importance of chance increases. Second, while the activity may not be as dependent on chance as other forms of online gambling, one can easily imagine how the twenty-four hour, seven day a week nature of the Internet casino makes poker a "gateway activity" to other, more pathological games. Lastly, as few economic revitalizations have actually occurred in cities that opened commercial casinos,<sup>300</sup> one needs to strictly scrutinize the claims of online gambling proponents concerning the financial benefits of regulating and taxing the activity.<sup>301</sup>

The argument that poker constitutes a game of skill has yet to find wide support in the legal system.<sup>302</sup> Moreover, major skill elements of the game are diminished in the online context. One critical skill element present in poker occurs in the context of reading the opponents against whom you are playing.<sup>303</sup> In an analysis of the elements of chance and skill present in various gambling activities, Professor Christine Hurt places

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<sup>296</sup> Grohman, *supra* note 6, at 66-67.

<sup>297</sup> Tselnik, *supra* note 6, at 1619.

<sup>298</sup> Grohman, *supra* note 6, at 68.

<sup>299</sup> See *supra* text accompanying notes 39-41.

<sup>300</sup> Dreyfuss, *supra* note 278, at 31-32.

<sup>301</sup> See Grohman, *supra* note 6, at 68 (discussing the "massive windfall from tax revenue" that the United States could generate by taxing Internet gambling while also describing that other countries have recognized similar results). However, it is unclear whether these financial projections include the full cost, both economic and social, of legalizing and taxing Internet gambling. See generally discussion *supra* Part V.

<sup>302</sup> See *supra* text accompanying notes 46-52.

<sup>303</sup> Hurt, *supra* note 136, at 382; Liebman, *supra* note 37, at 4 (quoting professional poker player Mike Caro as stating that "psychology becomes the key ingredient in separating break-even players from players who win consistently. The most profitable kind of poker psychology is the ability to read your opponents." MIKE CARO, CARO'S BOOK OF POKER TELLS 11 (2003)).



poker to the right of blackjack on the chance/skill spectrum for this reason, noting the importance of being able to effectively bluff one's opponents as well as not divulging one's own strategy.<sup>304</sup> Two-time World Series of Poker champion Doyle Brunson notes that "[m]ore than any other game, poker depends on your understanding your opponent."<sup>305</sup>

The ability to gather psychological and social information from one's opponents is greatly reduced in the online environment.<sup>306</sup> There are far fewer visible clues, or tells, that an experienced player can ascertain from a weaker player's table demeanor.<sup>307</sup> Online poker players are forced to resort to tracking software that records a particular player's betting history and displays wagering tendencies.<sup>308</sup> Although this resource can provide information otherwise unavailable to a traditional poker player, it can be largely unhelpful because of the ease with which online players exit and enter games.<sup>309</sup>

The speed at which online poker occurs also inhibits players' abilities to accurately respond to complex table decisions.<sup>310</sup> In an online poker game, one simply has far less time to play a given hand.<sup>311</sup> Online operator PokerStars quantifies this time allotment on its website as follows:

At PokerStars, a player in a ring (non-tournament) game is allotted 25 seconds to act on their hand if it is a fixed limit poker game, and 35 seconds in a pot limit or no limit poker game. A warning message is displayed in the chat box when there are 15 seconds left to act.<sup>312</sup>

This compressed decision making schedule compares to the virtually unlimited time one has to act in a traditional poker game. The ability to

<sup>304</sup> Hurt, *supra* note 136, at 382.

<sup>305</sup> Scott A. Golder & Judith Donath, *Hiding and Revealing in Online Poker Games*, in PROCEEDINGS OF ACM CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK 370, 370 (2004) (quoting DOYLE BRUNSON, *SUPER SYSTEM: A COURSE IN POWER POKER* (3d ed. 2003 [sic])).

<sup>306</sup> *Id.*

<sup>307</sup> *See id.* at 373.

<sup>308</sup> *See, e.g.*, Poker-Edge.com, *Dramatically Increase Your Poker Profits By Stalking Your Opponents' Play*, <http://www.poker-edge.com/index.php> (last visited Sept. 25, 2009).

<sup>309</sup> *See* Golder & Donath, *supra* note 305, at 372 (describing how players can enter and exit an online poker game "virtually instantly" during times when there is a wait to join the game).

<sup>310</sup> *See* Arthur S. Reber, *One for the Old Guys: Reaction Times, Decision Times and Memory*, <http://www.pokerlistings.com/poker-strategy/one-for-the-old-guys-reaction-times-decision-times-and-memory> (last visited Oct. 5, 2009) (detailing the speed of online poker and describing the increased time pressure players face in this environment).

<sup>311</sup> *See, e.g.*, Top15Poker.com, *Play Poker Online to Improve Your Game*, <http://www.top15poker.com/Online-poker.html> (last visited Oct. 5, 2009).

<sup>312</sup> PokerStars.com, *Poker Games Frequently Asked Questions*, <http://www.pokerstars.com/poker/room/faq/> (last visited Oct. 5, 2009).

patiently think through a decision can be a valuable resource in a highly involved hand, although the casino can implement a maximum time limit for taking action.<sup>313</sup> Players do attempt to use the speed of the online game in combination with the opportunity to simultaneously play at multiple games to maximize their profit potential.<sup>314</sup> However, in doing so they usually must sacrifice the ability to “respond to moves against them in a thoughtful manner.”<sup>315</sup> Even after considering these differences between online and traditional poker, the contention that online poker still deserves a UIGEA exemption is further assailable when one evaluates the potential “gateway” nature of the activity.

The term “gateway” is regularly found in the context of narcotics and applies to a relatively less dangerous drug, like marijuana, that leads users to more invidious substances, such as PCP.<sup>316</sup> By analogy, participation in the relatively non-speculative nature of online poker may lead to more pathological gambling due to the nature of the online casino.<sup>317</sup>

Because a typical Internet casino offers games ranging from poker to blackjack to slot machines,<sup>318</sup> a dedicated poker player could easily encounter and participate in another gambling activity simultaneously with his or her poker experience. This temptation does exist at a traditional casino, but the physical impracticalities of running between the roulette wheel and the poker table, for example, severely limit this occurrence. Online, a regulatory body would need to incur considerable monitoring costs to allow a site to provide poker capabilities, but restrict a player from other forms of gambling. The difficulty of ensuring that online sites only offer poker, coupled with the earlier discussion on the potential for

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<sup>313</sup> See PlayWinningPoker.com, Clock—Call for the Clock, <http://www.playwinningpoker.com/poker/terms/clock.html> (last visited Oct. 5, 2009) (stating that “[i]n both casino tournament poker and ring games, players normally have no set time in which they must act on their hand”). Some online operators, including PokerStars, do have a “time bank” that players can access if they need additional time to make a difficult decision. However, these “time banks” are typically only for tournament play and cannot be replenished during the event once they are depleted. See, e.g., PokerStars.com, *supra* note 312. Moreover, it is questionable whether a player gets sufficient time to act even when using a “time bank.” See Reber, *supra* note 310.

<sup>314</sup> Ashley Adams, *Jiu-jitsu Against the Multi-Tabling Online Poker Player*, POKER MAG., Oct. 18, 2005, [http://www.pokermagazine.com/Online-Poker/jiu-jitsu\\_online\\_poker\\_multiple\\_tables.html](http://www.pokermagazine.com/Online-Poker/jiu-jitsu_online_poker_multiple_tables.html).

<sup>315</sup> *Id.*

<sup>316</sup> See, e.g., *Mayfield v. Woodford*, 270 F.3d 915, 931 (9th Cir. 2001).

<sup>317</sup> See Hurt, *supra* note 136, at 417 (citing others’ concerns over the harm to players presented by the “virtually unfettered access” to gambling that online casinos offer).

<sup>318</sup> Stewart, *supra* note 31, at 2.

pathological gaming in the online context,<sup>319</sup> should give pause to those in a position to grant online poker a UIGEA exemption.

Lastly, proponents of legalizing Internet gambling cite impressive estimates for the tax revenues that would result from regulating the activity.<sup>320</sup> One estimate claims that a flat Internet gambling tax of 6.25% could produce over \$750 million in annual revenue.<sup>321</sup> Even legislators are quick to point out the potential for the United States to share in the billions of dollars in global tax receipts that the industry produces.<sup>322</sup> These claims share a striking resemblance to the justifications many states proffered for initiating or expanding land-based gambling activities within their borders in recent years.<sup>323</sup> Afraid to raise taxes, many legislatures looked to gambling taxation as a way to overcome budget deficits and pay for important services.<sup>324</sup> Gambling taxation became a politically expedient way to raise money, notwithstanding opposition from business leaders and citizens.<sup>325</sup>

Unfortunately, economic revitalizations tend not to materialize.<sup>326</sup> One study that analyzed nineteen years of gambling data found that the opening of a large-scale casino resulted in a decrease in sales tax revenues in eight of twelve analyzed states.<sup>327</sup> This result is not surprising considering the reduced economic multiplier effect observed in states with legalized gambling.<sup>328</sup> Forecasting a similar result should legalized online gambling begin to compete for consumers' disposable income dollars seems reasonable.

The issue of tax collection presents a final obstacle to overcome. Proponents of regulation admit that the government would face substantial monitoring and compliance costs,<sup>329</sup> and these costs need to include an effective collection system. Receiving all gambling taxes owed by

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<sup>319</sup> See discussion *supra* Part V.

<sup>320</sup> See, e.g., Gaul, *supra* note 286, at A1 (explaining how advocates for overturning the UIGEA see regulation resulting in millions of dollars of tax revenues).

<sup>321</sup> Grohman, *supra* note 6, at 68.

<sup>322</sup> See H.R. 2046, 110th Cong. § 5381(a)(3) (2007).

<sup>323</sup> Dreyfuss, *supra* note 278, at 28.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 32.

<sup>327</sup> *Id.* at 31-32. Four of the eight states that lost sales tax revenues did offset this loss through "sufficiently high wagering taxes on [the] casinos." *Id.* at 32. However, the problems of collecting high taxes, especially in the Internet context, need to be thoughtfully considered. See *infra* text accompanying note 329.

<sup>328</sup> See *supra* text accompanying notes 185-192.

<sup>329</sup> Grohman, *supra* note 6, at 69-70.

commercial casinos has at times proven difficult,<sup>330</sup> and the complexities of the Internet would only magnify this collection problem. In view of these concerns, the rose-colored claims of Internet gambling proponents on the massive tax potential of the industry need to be more seriously scrutinized.

#### VIII. CONCLUSION

Online gambling, once left for dead, has the strong potential to resurface in the United States.<sup>331</sup> Key provisions of the UIGEA, such as “unlawful internet gambling,” remain vague,<sup>332</sup> and the number of explicit exemptions the law grants suggests that more could be forthcoming.<sup>333</sup> The introduction of H.R. 2267 by Representative Frank further portends the onset of licensed Internet gambling. This Comment urges Congress to turn away from the idea of legalization and taxation and instead proposes a two-step solution to address the problems of the UIGEA in its attempt to combat Internet gambling.

First, Congress needs to amend the UIGEA with a comprehensive definition of “unlawful internet gambling” and explicitly limit the exemptions granted under the law. In this way, the legislature can make most forms of Internet gambling illegal on an operator level.<sup>334</sup> A strengthening amendment would provide law enforcement officials the unambiguous tool they need to combat Internet gambling,<sup>335</sup> while also avoiding many of the pitfalls associated with prosecuting operators under the Wire Act.<sup>336</sup> Lastly, a clear federal ban on Internet gambling would remove much of the uncertainty currently existing in state law on the subject.<sup>337</sup>

Second, Congress should take the broader step of amending § 5363 of the UIGEA to excise language that requires a person to be “engaged in the business of betting or wagering” for criminal liability to attach. Making Internet gambling illegal on an individual basis should not be viewed as an unprecedented step when one looks to the prevailing interpretation of the

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<sup>330</sup> Dreyfuss, *supra* note 278, at 31.

<sup>331</sup> See Aubuchon, *supra* note 7, at 312-13.

<sup>332</sup> See *supra* text accompanying notes 14-17. *But see supra* text accompanying notes 123-126 for the Third Circuit’s view on the constitutional vagueness of “unlawful Internet gambling.”

<sup>333</sup> See *supra* text accompanying notes 19-25.

<sup>334</sup> A broad ban on Internet gambling would harmonize with the strict restrictions established for the online purchase of alcohol and cigarettes—two other vice activities long associated with gambling. See Grahmann, *supra* note 62, at 163.

<sup>335</sup> DOJ Hearing, *supra* note 111, ¶ 1.

<sup>336</sup> NGISC Final Report, *supra* note 59, at 5-7; see *supra* text accompanying notes 149-152.

<sup>337</sup> See *supra* text accompanying notes 166-171.

Canadian Criminal Code,<sup>338</sup> assuming that no state-based exceptions were also included. Adding another criminal sanction will undoubtedly trigger discussion of the over-criminalization that purportedly exists in the United States.<sup>339</sup> However, when the criminal law cannot otherwise reach an activity deserving of punishment, a broader extension of liability may be warranted.<sup>340</sup>

Internet gambling is the paradigmatic example of this type of activity. Efforts targeting the operators of online sites will only go so far as long as the potential to earn millions of dollars from recreational and problem gamblers exists to counteract the threat of prosecution.<sup>341</sup> Additionally, the ability to enforce criminal penalties on international operators and intermediaries is severely constrained when few of them ever set foot on U.S. soil.<sup>342</sup> In evaluating this type of situation, the benefits of an overly broad law, in this case one that reaches individual gamblers, should be weighed against its attendant costs.<sup>343</sup>

This Comment demonstrates that online gambling provides, at most, minimal benefit to society. Pathological and problem gaming can be heightened in the online context, bankruptcies and uncollectible debts may rise, and the potential for fraud, money laundering, and underage gambling are at least as great as in the traditional gambling context. The alleged tax revenues that will flow to society can readily be called into question, and the demonstrated multiplier effect on the economy from gambling dollars is considerably less than from other forms of recreational spending. Furthermore, despite the claims of scholars who criticize any attempt to target individual bettors, circumstantial evidence exists that criminalizing the activities of the “five-dollar bettor” may increase the percentage of otherwise law-abiding citizens who stop gambling online. According to the estimate of former U.S. Federal Reserve advisor Edward Kane, 30% of online gamblers were law abiding citizens who stopped gambling after the UIGEA was passed.<sup>344</sup> By extending the prohibition under the UIGEA to the individual level, a larger percentage of the citizenry is likely to withdraw from the online gambling community. Of course, no level of prohibition or sanction will ever stop those with a determined mind to gamble. Yet, criminalizing both the supply and the demand of Internet

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<sup>338</sup> See *supra* text accompanying notes 259-266.

<sup>339</sup> Buell, *supra* note 119, at 1492.

<sup>340</sup> *Id.* at 1493-94.

<sup>341</sup> See Aubuchon, *supra* note 7, at 312.

<sup>342</sup> See Grohman, *supra* note 6, at 51-52.

<sup>343</sup> Buell, *supra* note 119, at 1506.

<sup>344</sup> Dominic Walsh & Tom Bawden, *Bankers and Players in America Hedge Their Bets on Internet Law*, *TIMES* (London), Oct. 3, 2006, at 44.

gambling by making most forms illegal on an operator as well as on an individual basis is the surest way to achieve the desired results of the UIGEA.

