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I. Introduction

In America, sports are a massive business; one study

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Mr. Cabot is the co-editor of *Gaming Law Review* and is on the editorial board for *Gaming Research & Review Journal* and *Cyberlawyer*. He was a monthly columnist on "Gaming Law" for *Casino Journal* from 1991 to 1998. He also authored *Federal Gambling Law* (1999) and *Casino Gaming: Public Policy, Economics and Regulation* (1996), covering all aspects of casino gaming. He is the co-editor and contributing author of *International Casino Law* (3d ed. 1999). He also is the editor and principal author of *Nevada Gaming Law* (3d ed. 2000), and the co-author of *Practical Casino Math* (2002).

** Robert D. Faiss is a senior partner with Lionel Sawyer & Collins, Las Vegas, Nevada, Chairman of its Administrative and Gaming Law Department, and a member of the firm for more than twenty-five years. In 1997, Faiss was named the "premier gaming attorney" in the United States and one of "The 100 Most Influential Lawyers in America" by the *National Law Journal*. He also received the "Life Time Achievement Award" in gaming law from the Nevada Gaming Attorneys and the UNLV International Gaming Institute.

In 1998, Mr. Faiss was appointed to the Bank Secrecy Act Advisory Group of the U.S. Department of Treasury as the representative of the casino industry. The Advisory Group provides a forum for law enforcement and financial regulators to explore with private sector representatives new mechanisms to improve and bolster federal anti-money laundering programs, while identifying measures to reduce the financial service industry's costs and burdens of regulatory compliance. In 2000, Mr. Faiss was named one of "10 attorneys who changed the legal industry in Southern Nevada" and one of the forty-three "Most Influential Men in Southern Nevada Business." In 1999, he was chairman of the advisory commit-

estimates they comprise a $212 billion industry.[1] Although this is a staggering figure, it may be exceeded by the amount of money wagered, both legally and illegally, on sporting contests. Legal sports wagering in Nevada amounts to more than two billion dollars annually; illegal sports wagering elsewhere in the country may total up to $380 billion per year.[2] By any standard, sports wagering is quite popular from the nation's factories to its boardrooms.

Sports wagering has posed particular problems for American government for quite some time. Federal and state governments have long struggled to maintain the validity of laws regulating this industry. Public opinion and advances in communications technology have created unique challenges for governmental enforcement of these laws.

In the new Internet era, government again faces a challenge to its sports gaming laws. The rise of Internet sports wagering has rendered these laws virtually unenforceable. As the gaming industry struggles to integrate new technologies, government also must deal with the realities of the Internet and the new global marketplace. In particular, jurisdictional issues question the government's ability to enforce its gaming laws against Internet gaming operators.

This article primarily addresses governmental problems and options in the era of Internet sports wagering. Part II traces the history of sports gambling in America, and the congressional response. Part II also addresses the current lack of enforcement of American sports gaming laws, and the Internet's contribution to

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tee for selection of "The 10 Most Important Events in the History of the U.S. Gaming Industry. "

Mr. Faiss has devoted much of his practice to gaming law and has represented the Nevada gaming industry in state and federal administrative, legislative, and judicial forums on major issues affecting that industry. He has represented the gaming industry in the Nevada State Legislature for the past twenty-six years. Mr. Faiss teaches gaming law policy at the William S. Boyd School of Law, UNLV. He was selected by the Detroit City Council to serve as its special gaming counsel in the creation of that city's casino regulations. Mr. Faiss lectures regularly for the Nevada State Bar Association on gaming law. He is a charter trustee and past president of the International Association of Gaming Attorneys, and past chairman of the Gaming Law Committee, General Practice Section, American Bar Association. He is a co-author of *Legalized Gaming in Nevada - Its History, Economics and Control*, *Nevada Gaming License Guide*, *Nevada Gaming Law* (lst, 2d, and 3d eds.), *International Casino Law,* and *Casino Credit and Collection Law*.

Positions held by Mr. Faiss prior to entering private law practice include: City Editor of the *Las Vegas SUN*; Assistant Executive Secretary of the first Nevada Gaming Commission; Executive Assistant to Nevada Governor Grant Sawyer, under whose direction Nevada's present system of gaming control was created; and Staff Assistant to President Lyndon B. Johnson in the White House.

1 Los Angeles Sports & Entertainment Commission, *Economic Impact of Major Sporting and Entertainment Events*, *at* http://www.lasec.net/econimpact.htm (last visited Jan. 9, 2002).

2 Robert Macy, *Ban on College Sports Betting Could Cost State Books Millions*, LAS VEGAS REV.-J., May 18, 1999, at 4A, *available at* 1999 WL 9284014.

this trend. Part III details the challenges that Internet gaming presents to federal and state governments. Part IV turns to the specific challenge of obtaining jurisdiction over Internet gaming operators. Finally, Part V discusses possible government responses to these challenges, and the reality of sports wagering in the Internet era.

II. The History of Sports Gambling

A. The Relationship Between Sports and Gambling

Sports wagering does not always operate independently of the events upon which the wagers are placed. For example, Major League Baseball has had a long and colorful, albeit regrettable, connection between its personnel and illegal gamblers. The first and most extensive scandal surfaced in 1920, when eight members of the Chicago White Sox, including the team's star, "Shoeless Joe" Jackson, were accused of intentionally losing the 1919 World Series.[3] The story ultimately became known as the "Black Sox Scandal."[4] Although all eight players were subsequently acquitted of criminal charges, Commissioner Kenesaw Mountain Landis banned the entire group from professional baseball for life.[5] Throughout his twenty-five-year career as Commissioner, Landis publicly fought the influence of illegal gamblers on the sport. In fact, during his tenure, he issued four additional lifetime suspensions relating to illegal gambling or the bribing of players.

Subsequent scandals would not rock professional baseball to the degree of the Black Sox Scandal; nevertheless, the connection with gambling-related events continued. In 1970, two-time Cy Young Award-winning pitcher Denny McLain was suspended for three months for his alleged connection with illegal bookmakers.[6] Pete Rose, baseball's all-time leader in hits, was suspended for life in 1989, due to allegations that Rose bet on baseball, including games in which he was involved.[7]

Professional sports are not alone in recording gambling scandals; collegiate sports also suffer from the influence of illegal gam-

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3 *E.g.*, *Eight White Sox Players Are Indicted on Charge of Fixing 1919 World Series*, N.Y. Times, Sept. 29, 1920, at A1.

4 *E.g.*, Roger I. Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 Marq. Sports L.J. 307, 309 (1999); Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball,* 5 Seton Hall J. Sport L. 5, 26 (1995); Ed Sherman, *Sox OK, But Networks Would Have Loved Cubs*, Chi. Trib., Oct. 2, 2000, at 4, *available at* 2000 WL 3715820.

5 Eliot Asinof, Eight Men Out: The Black Sox and the 1919 World Series 273 (1963).

6 *E.g.*, BaseballLibrary.com, *Denny McLain*, *at* http://www.pubdim.net/baseballlibrary/ballplayers/M/McLain_Denny.stm (last visited Mar. 16, 2002).

7 *E.g.*, Matthew Bird, *Gambling and Sports Scandals*, *at* http://www.usatoday.com/2000/century/sports/008.htm (last updated Nov. 25, 1999).

bling. In the 1990s, college athletes at Northwestern University and Arizona State University were charged with accepting money from illegal gambling operations to alter the outcome of games in which they participated.[8] Each preceding decade had its own scandals as well, beginning with incidents at City College of New York and University of Kentucky in the 1950s, St. Joseph's University in the 1960s, Boston College in the 1970s, and Tulane University in the 1980s.[9]

To protect themselves from any direct relation to sports wagering and potential scandal, most professional sports leagues adopted stringent rules against gambling and associating with gamblers.[10] These rules included banning wagering by players, owners, and other personnel, prohibiting dual ownership of baseball clubs and legal gambling operations, and restricting professional teams from advertising or associating with legal gambling enterprises.[11]

Typical of these prohibitions is Major League Baseball Rule 21, which imposes a one-year suspension on players or league personnel who bet on a game in which the gambler had no responsibility to perform, and a permanent suspension on players or league personnel who bet on a game in which the gambler had a duty to perform.[12] Likewise, the National Collegiate Athletic Association (NCAA) has long had rules that prohibit student athletes, coaches, and other athletic department members from wagering on sporting events.[13] Current penalties for violating these rules include suspension from games, loss of scholarship, and permanent ineligibility from collegiate athletics.[14]

Despite enactment of these rules, the illegal gambling problem did not end, leading to another challenge for amateur and professional sports in the 1970s. This time the promoters were not illegal gamblers, but state governments seeking to tie their lottery products to professional sports. The most innovative state in this context was Delaware. In 1976, it introduced a "Scoreboard" lottery, a form of "parlay" card wagering.[15] For example, to win one

8 *E.g.*, Ante Z. Udovicic, *Special Report: Sports and Gambling a Good Mix? I Wouldn't Bet on It,* 8 MARQ. SPORTS L.J. 401 app. A at 427 (1998); Rick Morrissey, *Crossing The Line; NCAA Fights Problem with One-Man Gang*, CHI. TRIB., Mar. 11, 1999, *available at* 1999 WL 2851899.

9 *E.g.*, Morrissey, *supra* note 8.

10 *See* Robert M. Tufts, *Guest Letter: Rose, With or Without Thorns*, *at* http://www.sportslawnews.com/Letters/Letters7.html (last visited Mar. 16, 2002).

11 *Id.*

12 *Id*.

13 NCAA Bylaws § 10.3, *available at* http://www.ncaa.org/library/membership/division_i_manual/2001-02/A10.pdf.

14 *Id*. § 10.3.1; *see also* NCAA, DON'T BET ON IT: DON'T GAMBLE ON YOUR FUTURE ONLINE BROCHURE, *at* http://www.ncaa.org/gambling/dontbetonit/ncaarules2.html (last visited Mar. 16, 2002).

15 NFL v. Governor of Del., 435 F. Supp. 1372, 1376 (D. Del. 1977).

type of game, the player had to pick the seven winners in seven selected National Football League (NFL) games.[16]

The NFL responded to the Scoreboard lottery by bringing suit against the State, claiming that the football lottery violated various federal and state trademark and unfair competition laws.[17] The federal district court found in favor of the State on most issues, but required the Delaware lottery to add a disclaimer that no affiliation existed between the NFL and the lottery tickets.[18] The court held that if the lottery obtained the information necessary to conduct the games from public sources after the NFL distributed it to the public, the lottery could use the information on its parlay cards.[19]

Although Delaware eventually discontinued its football lottery game, Oregon initiated a similar game in 1989.[20] As the 1980s came to an end, a sizable minority of other states considered legalizing some form of sports wagering. Because the sudden proliferation of sports-based lotteries posed a significant threat to their industries, the major sports sanctioning organizations sought congressional assistance.

B. The Professional and Amateur Sports Protection Act

In response to the sports organizations' concerns, U.S. Senator Dennis DeConcini (D-Arizona) introduced the Professional and Amateur Sports Protection Act (Sports Protection Act) on February 22, 1991.[21] Because of the number of states considering state-sponsored sports lotteries, the bill focused on this type of wagering. According to the Senate Judiciary Committee Report, the "bill serves an important public purpose, to stop the spread of State-sponsored sports gambling."[22]

Through the Sports Protection Act, Congress acknowledged various problems with sports wagering. The first concern addressed was the potential impact on youth. According to U.S. Senator Bill Bradley (D-New Jersey), a former NBA star, "Legalized sports betting would teach young people how to gamble."[23] Senator Bradley believed that children attracted to sports would soon

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16 *Id*.

17 *Id*.

18 *Id*. at 1391.

19 *Id.* at 1378.

20 The first such game appeared in Oregon on September 6, 1989. *E.g.*, Oregon Lottery, Game History, Sports Action, *at* http://www.oregonlottery.org/general/g_hist.htm (last updated June 5, 2001); *see also* North American Association of State and Provincial Lotteries, Lottery History, *at* http://www.naspl.org/history.html (last visited Mar. 17, 2002).

21 137 CONG. REC. S2256-04 (1991).

22 S. REP. NO. 102-248, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553.

23 Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 7 (1992).

associate sports with gambling, rather than with personal achievement or sportsmanship.[24]

Senator Bradley and others were also concerned that the proliferation of sports wagering might harm both the integrity of sports through game-fixing, as well as the fans' perception of that integrity.[25] For example, a player might miss an easy opportunity to score at the end of a game. Even if this did not affect the game's outcome, it could impact who won certain wagers because of the point spread.[26] Fans might then question whether the player was rigging the game, instead of taking fatigue or other legitimate factors into account. Senator Bradley deemed legal, state-sponsored sports wagering to be the most objectionable form of sports wagering because it created the perception that the government approved of wagering on sporting events. As Senator Bradley stated, sports wagering puts the "imprimatur of the state on this activity."[27]

The proposed Sports Protection Act was subsequently passed into law,[28] the heart of which is codified in 28 U.S.C. § 3702 and reads:

> It shall be unlawful for—
> (1) a government entity[29] to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[30]

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24 *Id*.

25 Donald L. Barlett & James B. Steele, *Throwing The Game, Why Congress Isn't Closing a Loophole That Fosters Gambling on College Sports—and Corrupts Them*, TIME, Sept. 25, 2000, *available at* 2000 WL 25227074.

26 A point spread is the amount of points that one team is favored over another. With a point spread, a gambler who bets on team X may still win his wager so long as team X does not lose by more points than the spread.

27 Bradley, *supra* note 23, at 5.

28 28 U.S.C. §§ 3701-04 (2001).

29 A governmental entity means any state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Palau, any Native American tribe, any other U.S. territory, and any subdivision of these entities. *Id*. § 3701(2).

30 *Id*. § 3702. The law creates an unusual anomaly. A person violates federal law if he operates a sports book pursuant to state law, but not if he violates state law. Moreover, the Act is ambiguous as to whether it is unlawful for a private person to operate a sports book or contest that is not authorized by state law, but does not violate any state law. The most obvious example is sports fantasy leagues, which decide results based on the performance of athletes. Based on the legislative history, these activities would not appear to violate the Act.

Because some states had pre-existing, state-authorized sports wagering, exceptions were crafted to allow them to continue;[31] however, by 1999, only Oregon and Nevada had any form of legal sports wagering. The Oregon lottery conducts a game called "Sports Action," based on the outcome of professional football games,[32] and Nevada has legal sports books that accept wagers on many categories of amateur and professional sports.[33] According to Nevada Gaming Control Board figures, as of November 30, 2001, there were 147 licensed sports books in Nevada.[34] During the twelve-month period from December 1, 2000, to November 30, 2001, the total revenue realized by these operations was $126.4 million, excluding wagering on horse racing.[35]

In 1999, the National Gambling Impact Study Commission (NGISC) recommended that Nevada, Oregon, Delaware, and Montana lose their exemption for collegiate and amateur sporting events.[36] The NCAA has since been lobbying Congress to pass legislation banning all betting on college and amateur sporting events.[37] Principally, the NCAA argues that several factors make sports wagering on amateur events more problematic than wagering on professional sports. First, it asserts that student athletes are more susceptible to Internet sports wagering because they

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31 *Id*. § 3704. Section 3704(1) provides that § 3702 does not apply to: "[A] lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." *Id.* As a result, Oregon, Nevada, Delaware, and Montana are exempt from the federal prohibition against state-sponsored sports wagering.

A special and peculiar exception to the Sports Protection Act was crafted for Atlantic City, New Jersey. This exception was peculiar because New Jersey law did not authorize the Atlantic City casinos to offer sports wagering. Dan Caesar, *Sports Books in St. Louis? No Chance, Says a 1992 Law,* ST. LOUIS POST-DISPATCH, July 12, 2001, at 36, *available at* 2001 WL 4471413. Nevertheless, to retain the exception, New Jersey had to authorize such sports wagering within one year after passage of the Sports Protection Act. 28 U.S.C. § 3704(a)(3)(A). New Jersey decided not to authorize sports wagering and lost the exemption. Caesar, *supra* note 31.

32 Oregon Lottery, Sports Action, *at* http://www.oregonlottery.org/sports/ (last visited Mar. 17, 2002).

33 The most popular sports on which bets are wagered include football, basketball, and baseball. Wagers are also accepted on hockey, golf, auto racing, soccer, and other sports and athletic events. The most popular wagers are straight wagers, futures, and parlay cards. Straight wagers are bets on the outcome of an individual game, usually adjusted according to an established "point spread." Futures wagers are made on various outcomes of a season so that, for example, a player may bet that his or her favorite team will win the World Series. Parlay cards allow players to bet on multiple games at one time; if the players' choices are all correct, they are paid higher odds. *See generally* ARNE K. LANG, SPORTS BETTING 101: MAKING SENSE OF THE BOOKIE BUSINESS AND THE BUSINESS OF BEATING THE BOOKIE (1992).

34 NEV. GAMING CONTROL BD., GAMING REVENUE REPORT 1 (Jan. 4, 2002).

35 *Id*.

36 *See* NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 3-18 (1999), *available at* http://govinfo.library.unt.edu/ngisc/index.html [hereinafter NGISC FINAL REPORT].

37 Tony Batt, *NCAA Works to End to Sports Betting*, LAS VEGAS REV.-J., Oct. 11, 1999, at 1D, *available at* 1999 WL 9295064.

have greater access to the Internet.[38] Second, amateur athletes are at risk because they are attracted to the aggressiveness and control that also characterize problem gambling.[39] Finally, because amateur athletes are unpaid, they are more prone to wager on the games in which they participate, and thus, undermine the integrity of the sporting contest.[40] As of yet, Congress has neither accepted these arguments, nor passed the recommended legislation.

C. The Lack of Enforcement of Sports Gambling Laws

Despite the adoption of the Sports Protection Act and the recommendations of the NGISC, law enforcement efforts to deal with illegal sports wagering have declined dramatically in the past twenty years.[41] In 1960, almost 123,000 arrests were made for illegal gambling.[42] About thirty-five years later, this number decreased to fifteen thousand.[43] In contrast, the number of illegally wagered dollars has increased dramatically. In 1983, about eight billion dollars were wagered on sports in the United States.[44] By 1997, this number was estimated to be between $80 billion and $380 billion.[45] Yet, in fiscal year 1998, only $2.3 billion was bet legally in Nevada.[46] Thus, as the need for enforcement has grown, actual enforcement has declined.

Four primary reasons appear to have caused this decline. First, law enforcement has reallocated its limited resources to more serious crimes. Second, the penalties assessed against those who violate betting laws are generally low, and do not justify the time or expense of law enforcement. Third, improvements in technology have made it more difficult to detect and prosecute offenders. Finally, illegal gambling is not perceived as a serious crime, or even a crime at all: office pools on sporting events, such as the NCAA basketball tournament and the NFL Super Bowl, flourish.

The media has also contributed to the decline in enforcement by promoting the public perception that sports gambling is an en-

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38 *The Internet Gambling Prohibition Act of 1999: Hearing Before the S. Subcomm. on Tech. Terrorism and Gov't Info. of the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Bill Saum, Director of Gambling Activities, NCAA).

39 Steve Brisendine, *NCAA Backs College Gambling Ban*, AP ONLINE, June 19, 1999, *available at* 1999 WL 17815684 (statement of Bill Saum, Director of Gambling Activities, NCAA). This statement found support in the NGISC Report. NGISC FINAL REPORT, *supra* note 36, at 3-10.

40 *See* NGISC FINAL REPORT, *supra* note 36, at 3-10.

41 Robert Dorr, *With Police Mostly Sidelined, Sports Bettors Run Up the Score*, OMAHA WORLD-HERALD, Jan. 31, 1999, at 1a, *available at* 1999 WL 4486468.

42 Dan McGraw, *The National Bet*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50.

43 *Id.*

44 *Id.*

45 *Id.*

46 Macy, *supra* note 2.

joyable and legal pastime. For example, despite the fact that Attorneys General of several states have declared Fantasy Sports contests unlawful, several major media groups, including ESPN,[47] conduct national Fantasy Sports contests.[48] Additionally, the NGISC claimed, albeit somewhat incredibly, that because point spreads are available in almost every major U.S. newspaper, many people do not know that sports wagering is illegal.[49] The fact that newspapers post point spreads is just one additional indication that the public enjoys wagering on sporting events. As a result, because most states have laws against sports wagering, law enforcement is placed in the uncomfortable position of enforcing laws that are unpopular with the public. This situation, combined with limited resources, minor penalties, and recent technological advances, has led law enforcement to radically decrease its enforcement of sports wagering laws. Thus, illegality has not proved to be a substantial barrier to sports wagering.

D. The New Model: Interactive Home Sports Wagering

Illegal sports wagering is becoming more prevalent due to its increasing availability in the homes of most Americans, made possible by the growing use and availability of the Internet. More than forty percent of American households had access to the Internet in August 2000, up from twenty-six percent in December 1998.[50] By August 2000, more than 116 million Americans were

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47 The Entertainment Sports Network (ESPN) is the nation's self-proclaimed leading radio and television sports broadcaster.

48 Fantasy Sports contests require a person to choose several athletes in a given sport to be on his or her "fantasy team." The person accumulates points based on the chosen athletes' performances over the course of a particular game or season, and the person's team competes against other fantasy teams. Major Fantasy Sports include American-style football, basketball, baseball, and soccer. *See*, *e.g.*, ESPN, Fantasy Games, *at* http://games.espn.go.com/cgi/home/Request.dll?FRONTPAGE (last visited Feb. 17, 2002); ESPN, Fantasy Football, *at* http://games.espn.go.com/cgi/ffl/Request.dll?FRONTPAGE (last visited Feb. 17, 2002); ESPN, Fantasy Basketball, *at* http://games.espn.go.com/cgi/fba/Request.dll?FRONTPAGE (last visited Feb. 17, 2002); ESPN, Fantasy Baseball, *at* http://games.espn.go.com/cgi/flb/Request.dll?FRONTPAGE (last visited Feb. 17, 2002); ESPN, Fantasy Hockey, *at* http://games.espn.go.com/cgi/fhl/Request.dll?FRONTPAGE (last visited Feb. 17, 2002); ESPN Fantasy Racing, *at* http://games.espn.go.com/cgi/frl/Request.dll?FRONTPAGE (last visited Feb. 17, 2002).

Whether Fantasy Sports contests are considered gambling is a matter of debate, which revolves around whether skill or chance predominates the contest. *See*, *e.g.*, State v. Hahn, 586 N.W.2d 5 (Wis. 1998). Fantasy Sports contests require skill to assess players and strategy to properly draft players and make trades. Nevertheless, a significant element of chance is present. A participant can draft or trade to obtain the most talented players, but the chance that a player may become injured could eliminate his opportunity to win. Also, because fantasy league operators have yet to be prosecuted under anti-gambling laws, the legality of fantasy contests remains unresolved.

49 NGISC FINAL REPORT, *supra* note 36, at 2-14.

50 NAT'L TELECOMM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 2 (2000), *available at* http://search.ntia.doc.gov/pdf/fttn00.pdf [hereinafter DIGITAL INCLUSION].

online.[51] Moreover, Department of Commerce research shows that Internet usage is growing among all Americans, regardless of income.[52] Increased Internet use has led to a comparable increase in Internet wagering. Bear, Stearns and Company, Inc., estimates the Internet gambling market will reach five billion dollars by 2003.[53] A significant portion of this market is sports and horse racing, a market expected to reach $1.8 billion by 2003.[54]

Sports and race wagering Internet sites usually take one of three main forms. First, the site may offer straight bookmaking operations where the operator accepts wagers directly from the home user. Here, the operator accepts the risk of winning or losing. Second, instead of directly accepting wagers, the operator may serve as the broker, arranging wagers between home users and a third party. Here, the operator receives a commission on the wager. Third, the operator may conduct pari-mutuel wagering. This involves placing all wagers on a particular event in a common pool. From the pool, the operator takes a commission and the remaining money is then divided pro-rata among the winners. Pari-mutuel wagering, although typical for race wagering, is uncommon for online sports wagering.

Internet gaming is nothing more than remote gambling. It is accomplished by interfacing two computers, typically one in the home and one in a jurisdiction where such gambling is legal. The significance of the Internet has less to do with the prospect that persons will merely use what is now considered their home computers to gamble, than the natural evolution of technology. The future is in the growing convergence of television and computers. The reality is that in the near future, the television may be replaced by a large monitor with a built-in computer. To the masses, this will be a new television with extra features and amazing communications potential. Hundreds, if not thousands, of television and radio broadcasts will be available at one's disposal. One could play hundreds of video games, or have access to a virtual library larger than any physical library in the world. Consumers will be able to comparison shop for any product, and have it delivered to their doors.

For sports gaming fans, this new technology will have similarly explosive results. One could place wagers on virtually every professional sporting event on the planet. The possible mergers between technology and gambling are virtually endless. For example, suppose a potential gambler is watching a football game at

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51 *Id*. at 33.

52 *Id*.

53 MARC J. FALCONE & JASON N. ADER, GAMING INDUSTRY: E-GAMING REVISITED AT ODDS WITH THE WORLD 6 (Bear, Stearns & Co., Inc. 2001).

54 *Id*. at 49.

home. Without leaving the couch, that person could call up an information bar on the bottom of the screen that displays a menu of bets being offered; all that would be required to make a wager is the touch of a button.

Before Internet gambling can reach this potential, gaming site operators must overcome the technological limitations of the Internet. Two such technical obstacles include providing an adequate system for transferring bets and winnings money between the operator and the player, and securing the gambling transactions from hackers.[55] Nevertheless, sports wagering does not have the technical problems facing some other forms of Internet gambling, namely casinos. Internet casinos generally require high bandwidth—the ability to move large amounts of data between the casino's computer and the patron's computer, necessary to create rich graphics and a multimedia experience. Because the multimedia experience is unnecessary for sports gambling, Internet sports wagering sites do not need to be as technically advanced as casino sites. Likewise, the interaction between a sports wagering site and the home user is much simpler. The site only needs to provide information about those games or events on which it will accept wagers. In turn, the player simply chooses the type and amount of the wager he wishes to place. Because of the wide availability of sports broadcasts over cable and broadcast television, Internet sites do not have to provide "live" video feeds of the sporting events, further reducing the need for sophisticated technologies.

Beyond these technical issues, two of the most substantial hurdles for the Internet sports wagering business are legality and the gambler's lack of trust. Legality may pose a hurdle because players may be concerned about breaking the law when gambling with an Internet gaming operator, potentially resulting in the loss of some patrons. The gambler's trust in the sports wagering site is somewhat bolstered due to the nature of Internet sports wagering. Because the outcome of the sporting event is outside the control of the gambling operator, patrons do not have to rely on the honesty of the operator to determine the outcome of the wagers. Conversely, with other forms of Internet gambling, such as slot machines, the outcome of the wager is decided by software created by the operator. Whether this software produces random results or

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55 Jim McGeahy, *Security Challenges to Internet Gambling*, *in* INTERNET GAMBLING REPORT III: AN EVOLVING CONFLICT BETWEEN TECHNOLOGY, POLICY & LAW 51 (Anthony N. Cabot ed., 1999). A "hacker" is an individual who breaches a website's security using a computer from a remote location. Once a hacker breaches a website's security, he or she is often able to change or destroy a website and access various confidential information pertaining to that site's operations. The results of a security breach can be catastrophic for a site operator. While some hackers are motivated by the mere desire to wreak mischief, others are motivated by pecuniary gain.

is rigged to cheat, the player is within the control of the operator's software programmer. Furthermore, fairness is also less of an issue for Internet wagering sites than for casino-style gaming because players are able to easily verify the commission charged by the operator.

Even without the potential for cheating, the gambler's trust remains an issue. A patron must be able to trust the Internet sports book operator because an unscrupulous Internet sports book operator can simply defraud the home user. For example, a site operator may take the money that the player deposits in the sports book and then close the site, with no intention of returning the deposits or paying winning wagers. Players at Internet sites can also become victims of the operator's bad luck or incompetence. In many jurisdictions where gambling is legal, the government requires sports book operators to maintain reserves to pay winning bets, or to have annuities to pay winnings that are paid over time.[56] These controls, however, are not applicable to Internet gambling operators.

Thus, the historical pattern of illegal sports gambling continues. The technology revolution and the advent of the Internet have extended legal concerns from the early problem of influence on professional and collegiate sports, to the modern problem of controlling widespread illegal Internet sports gambling. With technological advances, the government now faces an increasingly difficult challenge.

III. Challenges Interactive Wagering Poses to Government

A natural inclination is to question why Internet gambling poses any more concern to government than previous technological advances. Historically, technology has ushered in new ways to gamble. The mail system allowed the Louisiana lottery to flourish until a federal law curtailed the mailing of lottery tickets.[57] Likewise, interstate telephone bookmaking thrived until the federal Wire Act gave federal officials an effective tool to prosecute such wagering.[58] It remains unclear, however, whether new laws will effectively counteract Internet sports gambling.

Why is the government unable to pass new laws that govern, or simply prohibit, Internet gambling? The answer necessarily must recognize that the Internet transcends national borders. While other technologies—such as the telephone—have similar capabilities, the Internet has two distinct advantages. First, the

56 *E.g.*, Nev. Gaming Reg. § 22.040 (2000).
57 18 U.S.C. § 1301 (2001).
58 *Id.* § 1084.

Internet is inexpensive. The price of a telephone call between Europe and Asia may be more expensive than an entire month of unlimited Internet access.[59] In that same month, the home Internet user can contact every continent as frequently as he or she pleases. Second, the Internet is not a single medium; it is every form of media. The Internet can simplify and augment human interaction. It can be a print medium, a bulletin board, a television or radio broadcasting system, an interactive computer system, or any combination simultaneously. Thus, human activities that often take multiple media to accomplish can be accomplished simultaneously over the Internet.

Because of its borderless nature, the Internet offers services or information that the user may not be able to obtain near home. For example, if sports wagering were illegal in a particular state, a person without Internet access who wished to bet on a game would face substantial hurdles. He may be able to buy a newspaper with the daily line, but could not obtain the current odds. With this limited information, he would then have to find a bookmaker willing to accept his wager, and make arrangements to pay the bookie. On the other hand, if the person had Internet access, he could have access to wagering opportunities from his home, and could access the current odds and commissions at various sites. As a result, he could choose the site that offers the best value for the wager he wished to place. Moreover, if the game was not televised, he could follow either a live Internet broadcast of the game, or a real time Internet play-by-play scoreboard.[60]

Sports gamblers may also find the Internet to be a safer way to bet illegally because the borderless nature of the Internet makes gambling laws difficult or impossible to enforce. The operator that takes bets can be in another state or country, while the bettor places his bets in the privacy of his own home. In other words, the Internet provides a cheap, easy, fast, and safe way to break the law. The government's natural reaction to this new threat of Internet gaming is to search for a way to stop this new

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59 For example, AT&T charges $0.14 per minute for international calls to most of Europe, in addition to a monthly rate of $2.95, AT&T Global, AnyHour International Savings Plan, *at* http://www.consumer.att.com/global/english/international/int_aisp.html (last visited Mar. 29, 2002), but only $21.95 for an entire month of Internet service, AT&T, WorldNet Service, *at* http://download.att.net/wnetoffer/index.html?ATT454NET (last visited Mar. 29, 2002). Several companies now provide Internet access for less than ten dollars per month, and some even provide free access. *See*, *e.g.*, AOL Anywhere, AOL Pricing Plans, *at* http://www.aol.com/info/pricing.html (last visited Mar. 3, 2002); Earthlink, Dial-Up Internet Access, *at* http://www.earthlink.net/home/dial/ (last visited Mar. 3, 2002); Free Internet Access, Free & Cheap ISP Comparison Chart, *at* http://freeinternetaccess.home.att.net/free-internet-access-comparison.html (last visited Mar. 16, 2002).

60 Real time play-by-play scoreboards allow Internet users to track sports action and receive real time updates on the status of various sporting events as they occur. Various websites offer these services. *See*, *e.g.*, ESPN, College Football GameCast, *at* http://espn.go.com/ncf/aboutGamecast.html (last visited Mar. 16, 2002).

technology's ability to evade local laws. Only in this way can the government effectively implement its policies concerning gambling. But, unlike past technological advances, this task is harder than it seems. An important question for the future of Internet gambling is not related to the current state of the law, but rather what the future holds for both legal and law enforcement efforts. The attempt to regulate or prohibit Internet gambling ranges from the simple task of drafting legislation to the more difficult task of successful implementation.

A. Challenges Facing State Governments

Historically, in the United States, primary responsibility for deciding gambling policy has been left to the states.[61] Moreover, state governments have undertaken the majority of gambling enforcement.[62] Thus, the issue concerns what states can do about Internet gambling. This issue is not limited to Utah and Hawaii, which have banned all forms of gambling; rather, the issue will impact every state.[63] For instance, in Nevada it took many years after legalization in 1931,[64] to develop and refine an effective regulatory system that assures the honesty and fairness of the games, and keeps criminals out of the industry. Even with a strong regulatory system in place, the Nevada regulators must come to grips with the possibility that every Nevada citizen may gamble from his living room with an unlicensed person operating offshore.

Policing the Internet, however, may be an insurmountable problem for state governments because they lack funding, technical capabilities, and legal authority. While some states have tried to attack Internet gambling, their successes have been few and their efforts have become increasingly difficult. Some states have already recognized this difficulty. For instance, Florida's Attorney General conceded that, "evolving technology appears to be far outstripping the ability of government to regulate gambling activities on the Internet and of law enforcement to enforce such regulations. Thus, resolution of these matters must be addressed at the national, if not international, level."[65]

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61 James H. Frey, *Introduction* to ANTHONY N. CABOT ET AL., FEDERAL GAMBLING LAW 1 (1998).

62 *Id*.

63 *Internet Gambling: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 105th Cong. (1998) (opening statement of Bill McCollum, Chairman, House Subcomm. on Crime), *available at* 1998 WL 44779.

64 LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 10-11 (3d ed. 2000).

65 Gambling—Wire Communications—Lotteries—Use of Internet or Wire Communications to Conduct Gambling; Cruises to Nowhere, Op. Fla. Att'y Gen. 95-70 (1995), *available at* 1995 WL 698073.

B. Challenges Facing the Federal Government

1. Pending Federal Legislation to Outlaw Internet and Sports Wagering

Some courts have already interpreted the federal Wire Act as a prohibition on Internet sports wagering.[66] In addition, legislation has been introduced in the last few sessions of Congress that would prohibit all forms of interactive gambling, as well as all gambling on amateur sports.[67] Much of the proposed legislation has been designed to prevent the means by which individuals participate in Internet gambling by targeting the use of financial instruments that allow gamblers to make payments to Internet casinos.[68] There has also been a NCAA-backed movement underway in Congress in recent years to make all collegiate sports wagering illegal.[69]

In 2001, the 107th Congress introduced several bills that would prohibit Internet wagering using the new financial instrument strategy. House Bill 2579, the "Internet Gambling Payments Prohibition Act," prevents the use of certain banking instruments, such as credit cards, for purposes of Internet gambling. The bill prohibits any "person engaged in a gambling business"[70] from knowingly accepting "in connection with the participation of another person in Internet gambling"[71] a variety of banking instruments such as credit cards, checks, or electronic funds transfers.[72] House Bill 3215, the "Combating Illegal Gambling Reform and Modernization Act," would amend the federal Wire Act to create a much more comprehensive definition of illegal wagering, and make it illegal for gambling businesses to accept financial instruments in connection with Internet wagering.[73]

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66 United States v. Cohen, 260 F.3d 68, 75 (2d Cir. 2001), *petition for cert. filed*, 70 USLA 3562 (U.S. Feb. 22, 2002) (No. 01-1234).

67 *E.g.*, Internet Gambling Payments Prohibition Act, H.R. 2579, 107th Cong. (2001).

68 *Id.*

69 Jeff Simpson, *Lobbyist Wary of Bet Ban Plan Making Return*, LAS VEGAS REV.-J., Dec. 12, 2001, at 1D, *available at* 2001 WL 9544432.

70 H.R. 2579. A gambling business is defined as:

> (A) a business that is conducted at a gambling establishment;
> (B) a business that—
> (i) involves—
> (I) the placing, receiving, or otherwise making of bets or wagers; or
> (II) the offering to engage in the placing, receiving, or otherwise making of bets or wagers;
> (ii) involves 1 or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
> (iii) has been or remains in substantially continuous operation for a period in excess of 10 days or has a gross revenue of $2,000 or more from such business during any 24-hour period.

Id.

71 *Id.*

72 *Id.*

73 H.R. 3215, 107th Cong. (2001). The Wire Act provides:

Legislation targeting Internet gambling even became a part of the flurry of congressional measures passed in the aftermath of the September 11, 2001, terrorist attacks. Attempting to cut off the ways in which terrorist organizations launder money, Congress initially included provisions in its anti-terrorism package that would have prevented credit card payments to online casinos.[74] The provisions were removed from the bill hours before passage as a result of pleas from credit card companies.[75]

Related to, but distinct from the Internet gambling ban, is a proposed prohibition on all wagering on amateur sports.[76] Because such wagering is effectively prohibited in forty-eight U.S. states, this legislation is really directed at eliminating Nevada's exception to the Sports Protection Act. The Amateur Sports Integrity Act would make any betting on amateur sports illegal, including college athletics and the Olympics.[77] It would also prohibit

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(a) Except as otherwise provided in this section, whoever, being engaged in a gambling business, knowingly uses a communication facility—

(1) for the transmission in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States, of bets or wagers, or information assisting in the placing of bets or wagers; or

(2) for the transmission of a communication in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States, which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers;

shall be fined under this title or imprisoned not more than five years, or both.

(b)(1) Except as provided in paragraph (2), whoever, being engaged in a gambling business, knowingly accepts, in connection with the transmission of a communication in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States of bets or wagers or information assisting in the placing of bets or wagers—

(A) credit, or the proceeds of credit, extended to or on behalf of another (including credit extended through the use of a credit card);

(B) an electronic fund transfer or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of the other person;

(C) any check, draft, or similar instrument which is drawn by or on behalf of the other person and is drawn on or payable through any financial institution; or

(D) the proceeds of any other form of financial transaction as the Secretary of the Treasury may prescribe by regulation which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person,

shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1084 (2001).

74 Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. (2001).

75 Peter Edmonston, *Web Gambling Gets a Break in Congress*, WALL ST. J. ONLINE, Oct. 19, 2001.

76 Amateur Sports Integrity Act, S. 718, 107th Cong. (2001).

77 *Id*. S. 718 § 201.

financial institutions from accepting bank instruments connected with "unlawful Internet gambling."[78]

It is unclear why some members of Congress and the NCAA have been such vocal advocates for legislation that would criminalize wagering that takes place in Nevada's highly regulated sports books. Unlike the rest of the nation, there is no evidence of campus bookies or the involvement of organized crime in Nevada sports wagering.[79] In fact, the Nevada experience has demonstrated just the opposite: that sports wagering, when it is highly regulated and scrutinized, forecloses the ability of criminal elements to expand their nefarious operations through bookmaking profits.[80] Because the Internet has rendered it even more difficult for federal and state authorities to eradicate sports wagering, now, more than ever, Nevada's model of regulation and taxation should be emulated, not discarded.

The two reasons generally offered to support a ban on sports betting in Nevada are baseless.[81] The first is that Nevada casinos somehow create demand for sports wagering nationwide by publishing point spreads.[82] Yet anyone with even a limited knowledge of sports wagering is aware that numerous sources, completely unrelated to Nevada, publish point spreads and wagering information. The other commonly offered reason is that legal sports wagering in Nevada causes citizens of other states to believe that sports wagering is legal in their own states, which, in turn, contributes to the spread of illegal wagering. No evidence has been offered to support this assertion. In fact, it is arguably the inaction of law enforcement in other states that has permitted the growth of illegal wagering.[83]

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78 *Id.* S. 718 § 303. Unlawful Internet gambling is defined as follows:

> The term "unlawful Internet gambling" means to place, receive, or otherwise make 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 in the State in which the bet or wager is initiated, received, or otherwise made.

Id. S. 718 § 303(b)(3)(A).

79 The NGISC was informed that every college campus has student bookies, and that there is an increase in organized crime's involvement with sports wagering. NGISC FINAL REPORT, *supra* note 36, at 2-14 to 2-15.

80 *See* AM. GAMING ASS'N, STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT (2001), *at* http://www.americangaming.org/survey2001/summary/summary.html (last visited Mar. 16, 2002), for information about the benefits of a legalized and regulated gaming industry nationwide, and Nevada Resort Association, *The Gaming Industry in Nevada Employee Profiles*, *at* http://www.nevadaresorts.org/industry.html (last visited Mar. 16, 2001), for information regarding gaming's benefits to Nevada.

81 *See generally* NCAA, *Written Testimony of Bill Saum, Director of Agent and Gambling Activities, National Collegiate Athletic Association, before the National Gambling Impact Study Commission, November 10, 1998, Las Vegas, Nevada*, *at* http://www.ncaa.org/gambling/19981110_testimony.html (last visited Mar. 16, 2002) (discussing the arguments generally proffered against legal sports wagering in Nevada).

82 NGISC FINAL REPORT, *supra* note 36, at 2-13.

83 *See* discussion *supra* Part II.C.

The existing evidence suggests that, if anything, Nevada's sports books are tools that can be used to weed out the troubling aspects of sports wagering. Under Nevada's strict regulatory scheme, Nevada sports books are required to transact their business through a computerized bookmaking system approved by state regulators.[84] These computerized systems create a detailed record of every transaction. Furthermore, while cash transactions are highly monitored throughout Nevada casinos, sports books are the only casino department that must report *non-cash* transactions of more than ten thousand dollars.[85]

For their own protection, Nevada's sports books closely monitor fluctuations in betting activity that indicate irregularities, and must report suspicious wagers that appear to relate to illegal sports wagering activities.[86] If someone is attempting a "fix," Nevada's sports books may be the target. As a result, Nevada's sports books have been the first to alert law enforcement agencies and those that guard the integrity of America's professional and amateur sports leagues to any suspicious betting activity.[87] Without assistance from Nevada's sports books, college point shaving scandals may not be uncovered as quickly, or may not be discovered at all. Therefore, to outlaw Nevada's $2.3 billion in annual sports wagering with the hope that it will somehow eradicate the $380 billion in illegal wagering would not only be naïve, it would be counterproductive to the very purpose of such an action.

Certain members of Congress have aggressively advocated measures to make amateur sports wagering illegal in Nevada.[88] However, these efforts have not yet been successful. Even if these measures were approved, they would not affect the basic legal status of Internet sports gaming under federal law. Because the proposed changes may alter the manner in which Internet wagering is conducted, or the types of wagers taken, it is more meaningful to examine the current state of federal gambling law.

2. The Legality of Interactive Wagering Under Existing Federal Law

Many federal laws regulating gambling were developed in response to advances in communications. Prohibitions against the

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84 NEV. GAMING REG. § 22.100 (2000).

85 *Id*. § 22.061.

86 *Id*. §§ 22.120-.121.

87 *Hearing on Pending Sports Wagering Legislation Before the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Frank J. Fahrenkopf, Jr., President and Chief Executive Officer of the American Gaming Association) (stating "even the NCAA admits that Nevada sports books have been helpful to them in their enforcement efforts"), *available at* 2000 WL 19304582.

88 Editorial, *College Betting Ban*, LAS VEGAS REV.-J., July 3, 2000, *available at* http://www.lvrj.com/lvrj_home/2000/Jul-03-MON-2000/opinion/13885468.html.

use of the U.S. mail to conduct or advertise lotteries came shortly after the establishment of the federal postal system, and its use by those promoting a national lottery.[89] Likewise, prohibitions against advertising lotteries over the radio came shortly after the commercial availability of radios, and their use by lottery operators.[90] These prohibitions were then extended to television shortly after the introduction of that medium. Federal laws addressing the use of telephones to conduct wagering did not appear until well after the discovery and proliferation of Alexander Graham Bell's most-prized invention.[91] The laws addressing telephone wagering were part of the 1961 federal legislative package designed to cut off those activities that organized crime used for sustenance, and to assist the states in enforcing their gambling laws.

The federal Wire Act of 1961 (Wire Act) was codified as 18 U.S.C. § 1084, and generally prohibits the use of interstate telephone lines to conduct a betting or wagering business.[92] Section 1084 provides in relevant part:

> Whoever being engaged in the business of betting or wagering knowingly uses 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, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[93]

Section 1084 mandates that a person be engaged "in the business of betting or wagering" to fall within its purview.[94] Thus, courts require that a party be engaged in the "sale of a product or service for a fee."[95] The courts also require that the party be engaged in a "continuing course of conduct."[96] Consequently, where a gambling operator charges the customers for its service, either through accepting or brokering wagers, the continuing activities of the operators will likely constitute being "engaged in the business of betting or wagering," thus leaving them open to liability under the Wire Act.

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89 18 U.S.C. §§ 1301-02 (2001); *see also* Mike Roberts, *"The Law of the Land": Tennessee Constitutional Law: The Constitutionality of Gaming in Tennessee*, 61 TENN. L. REV. 675, 678 (1994).

90 18 U.S.C. § 1304.

91 Alexander Graham Bell invented the telephone on March 10, 1876. *E.g.*, WEBSTER'S AMERICAN BIOGRAPHIES 84 (Charles Van Doren & Robert McHenry eds., 1974).

92 18 U.S.C. § 1084.

93 *Id.*

94 *Id.*

95 United States v. Baborian, 528 F. Supp. 324, 329 (D.R.I. 1981).

96 United States v. Scavo, 593 F.2d 837, 843 (8th Cir. 1979).

The language "wire communication facility" in the statute refers to the technology that existed at the time of enactment, and is defined as a system that is used to transmit writings, pictures, and sounds "by aid of wire, cable, or other like connection between the points of origin and reception of such transmission."[97] Given the available wire technologies at that time, this was undoubtedly intended to apply to telephone communications, but also has broader implications. In 1961, the government also might have intended to capture transmissions between ticker machines that printed information on paper tape, as these machines were commonly used to transmit financial information, and were adaptable for the transmission of horse race information.

In the early 1960s, little, if any, thought was given to the computer era and, more particularly, the Internet. Nevertheless, the Wire Act applies to most methods of Internet communication. The typical home user is connected to the Internet through his or her home telephone system.[98] Home telephone Internet service involves the use of a modem to convert the computer's digital signals to analog signals that can travel over copper wire.[99] Modems, however, are not the only way to access the Internet; other means exist that were never contemplated by the Wire Act. For example, radio and satellite communications, and other methods of transmission not involving a wire or cable, do not fall within the purview of the Wire Act. This raises the very real possibility that an operator could supply satellite or radio gambling services without violating § 1084. Showing that at least some part of the transmission occurs over a wire or cable may defeat this argument. The statute does not limit the definition of a wire or cable to a copper wire or cable.[100] Therefore, computer data lines, such as T1 or T3 lines,[101] which are necessary for an Internet service provider to connect to the Internet backbone and for the operation of the Internet backbone, may constitute a "wire communication facility" under the statute.[102]

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97 18 U.S.C. § 1081.

98 The majority of consumers use the telephone dial-up method to connect to the Internet. DIGITAL INCLUSION, *supra* note 50, at 23. Permanent connections, satellite, mobile phone, and handheld computer access are far less common. *Id*.

99 *See, e.g.*, About.com Inventors, Modem, *at* http://inventors.about.com/library/inventors/blmodem.htm (last visited Mar. 3, 2002).

100 18 U.S.C. § 1081.

101 T1 and T3 lines are high-speed lines that can accommodate more users than a standard telephone line. Judith Gelernter, *The Internet: Yesterday, Today, and Tomorrow,* INFO. OUTLOOK, June 2001, at 67-68.

102 18 U.S.C. § 1084. There is an argument, based on congressional intent, that the current § 1084 would prohibit such an enterprise. Courts have broadly defined "transmission" in other contexts. *See, e.g*., United States v. Pezzino, 535 F.2d 483, 484 (9th Cir. 1976); United States v. Tomeo, 459 F.2d 445 (10th Cir. 1972); Sagansky v. United States, 358 F.2d 195 (1st Cir. 1966).

In 1961, the notion that gamblers could use the telephone to wager on anything but sporting events or horse racing was unrealistic. Thus, the bill drafters prohibited only the transmission of bets or wagers on sporting events or contests.[103] Although this language may allow the application of the Wire Act to Internet sports wagering, at the same time, this language may open a window of opportunity for Internet casino-style gambling operations conducted via telephone lines.[104]

As currently written, § 1084 cannot be used as a tool to prosecute "casual" gamblers who participate in games by telephone or over the Internet.[105] The legislative history indicates that the Wire Act was not meant for social or occasional bettors, but was aimed at "persons 'engaged in the business of betting or wagering.'"[106] Given the legislative history of § 1084, and the economic and evidentiary burdens involved in prosecuting private citizens acting within the confines of their own homes, home users that gamble by telephone or on the Internet are unlikely to face federal criminal sanctions under this statute.

When Internet gaming first emerged, it was frequently debated whether § 1084 could be applied to a gambling operator that operates from outside the United States.[107] In an attempt to cir-

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103 18 U.S.C. § 1084.

104 The wording of § 1084 permits a strong argument that it pertains only to sports-related gambling. The statute specifically applies to a "sporting event or contest." *Id*. The word "sporting" appears to predicate both the word "event" and "contest." *But see* Whether Persons May Play and Bet on Card Games Using Computers With Modems or Other Transmission Devices and Related Questions, Op. Tex. Att'y Gen. No. DM-344 (1995), *available at* WL 318587 (Texas Attorney General Dan Morales explaining that § 1084 applies to betting on card games on the Internet.). Under this interpretation, the statute would be limited to the prohibition of sports-related "bets and wagers," such as baseball, football, dog racing, and horse racing. If so, the statute would be inapplicable to Internet casinos and lotteries.

Legislative history and subsequent application of the statute supports this reading. First, legislative history reveals that § 1084 was meant to apply only to sports-related betting. When explaining the bill, Attorney General Robert Kennedy explicitly referred only to sports betting. *See* H.R. REP. NO. 87-967 (1961), *available at* 1961 WL 4794. Second, Congress was aware of the other types of gambling that existed when it adopted the statute. This is evidenced in § 1955, which makes it a crime to conduct, finance, manage, supervise, direct, or own an illegal gambling business. 18 U.S.C. § 1955. In that statute, Congress defined gambling broadly to include "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." *Id.* Congress did not specifically address each of these in the Wire Act. Therefore, Congress likely did not intend the phrase "sporting event or contest" to be interpreted broadly to include non-sports related betting.

105 While Internet gamblers may not face prosecution under the Federal Wire Act, they may be subject to various state and local laws prohibiting such activities.

106 *Tomeo*, 459 F.2d at 447 (citing 18 U.S.C. § 1084); *see also* United States v. Baborian, 528 F. Supp. 324, 328 (D.R.I. 1981) (concluding that § 1084's legislative intent was directed at "business of gambling . . . and not mere betting"). A review of the House and Senate Reports and the floor debates, indicates that § 1084 was intended to target professional gamblers and bookmakers, not the "casual" gambler.

107 Many of the Internet Gaming prosecution cases discussed herein were defended on the theory that U.S. courts do not have jurisdiction over Internet gaming sites operating

cumvent the prohibitions of § 1084, most operators now offer their telephone or Internet gambling services from locations outside of the United States.[108] The issue then becomes whether § 1084 applies to non-U.S. operators that accept wagers from U.S. residents. It now appears that the Wire Act probably applies to the offshore operators accepting U.S. wagers.[109] Section 1084 prohibits the transmission of wagers by wire communications in foreign commerce.[110] Thus, the Wire Act appears to apply to non-U.S.-based operators that knowingly accept sports wagers from U.S. citizens.

At least one offshore Internet gambling operator has learned of the applicability of the Wire Act to his operations the hard way. Interactive casino operator Jay Cohen ran an offshore gambling site from Antigua, where his operations were legally licensed.[111] The U.S. Court of Appeals for the Second Circuit was not persuaded by Cohen's argument that § 1084 should not apply to Interactive gaming activities operating from a jurisdiction where such activities are legal.[112] As a result, his conviction by a New York federal district court was affirmed.[113] Yet the Cohen case was anomalous, as Cohen made the mistake of coming to the United States where authorities had personal jurisdiction over him and charged him with Wire Act violations.[114] While attempts to force American law on offshore operators are in large part futile, the U.S. government has brought charges against at least twenty-two offshore operators for violations of § 1084.[115]

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from an offshore location. *See, e.g.*, United States v. Cohen, 260 F.3d 68 (2d Cir. 2001), *petition for cert. filed*, 70 USLA 3562 (U.S. Feb. 22, 2002) (No. 01-1234).

108 *See* Andrew E. Tomback & Anne K. DeSimone, *Every State for Itself? Recent Approaches to Internet Gaming*, GAMING L. REV., vol. 5 No. 5, at 431, 442 (2001). Gambling is unregulated on about 1400 offshore websites. Tony Batt, *Leach Takes Aim at Web Gambling*, LAS VEGAS REV.-J., Nov. 23, 2001, at 1D, *available at* 2001 WL 9543589; s*ee, e.g.*, CyberSportsBook.com, *at* http://www.cybersportsbook.com (last visited Mar. 16, 2002); Golden Fortune Casino, *at* http://www.goldenfortunecasino.com (last visited Mar. 16, 2002); Luckyland Casino, *at* http://www.luckyland.com (last visited Mar. 16, 2002); Planetluck Online Casino, *at* http://www.planetluck.com (last visited Mar. 16, 2002); Starluck Casino, *at* http://www.starluckcasino.com (last visited Mar. 16, 2002).

109 *See* discussion *infra*.

110 18 U.S.C. § 1084 (2001).

111 *Cohen*, 260 F.3d at 70; s*ee also* Kelly B. Kramer, *The Jay Cohen Affair: Lessons in the Legality of Internet Betting*, GAMING L. REV., vol. 5 No. 6, at 551 (2001).

112 *Cohen*, 260 F.3d at 73-74.

113 *Id*. at 78.

114 Kramer, *supra* note 111, at 551.

115 Gary Dretzka, *Rolling the Dice on Internet Gambling, Casinos, Nevada Look to Create a Web of Wagering at Home*, CHI. TRIB., June 15, 2001, at C1, *available at* 2001 WL 4083854. Yet, even in the aftermath of the *Cohen* case, uncertainty remains about the scope of the Wire Act's prohibition of Internet gambling. Until 2001, there were no reported cases applying the Wire Act to non-sports related gaming. Prior to *In re Mastercard International Inc.*, *Internet Gambling Litigation*, 132 F. Supp. 2d 468 (E.D. La. 2001), the only cases addressing § 1084, as it applies to non-sports related gambling, were dismissed on other grounds. *E.g.*, United States v. Giovanelli, 747 F. Supp. 897 (S.D.N.Y. 1989); *see also* United States v. Chase, 372 F.2d 453 (4th Cir. 1967); United States v. Manetti, 323 F.

3. Difficulties With International Enforcement: The New Global Marketplace

The position taken by the U.S. Department of Justice, and some members of Congress, is that most Internet gambling is, or should be, unlawful.[116] Nevertheless, any actions taken by members of our government may be rendered meaningless by virtue of the Internet's characteristics. By its very nature, the Internet is global in its reach. Therefore, U.S. efforts and policy must be considered in light of international developments. One of the most difficult issues concerns how U.S. policy can be successfully implemented in a communications medium that defies national boundaries.

Since the dawn of modern history, man has existed under a system whereby the government has physical control over a geographic area and its inhabitants. Indeed, according to one authority, "Under International law, a state is an entity that has a defined territory and a permanent population, under the control of its own government . . . ."[117] Modern technology has gradually eroded government control by facilitating inter-jurisdictional

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Supp. 683 (D. Del. 1971). In the cases where conviction occurred, sports betting was the only contested activity. *See, e.g.*, United States v. Segal, 867 F.2d 1173 (8th Cir. 1989) (betting related to football games); United States v. Campagnuolo, 556 F.2d 1209 (5th Cir. 1977) (betting related to various sports events); United States v. Stonehouse, 452 F.2d 455 (7th Cir. 1971) (betting related to sporting events); Tel. News Sys., Inc. v. Ill. Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963) (betting related to horse racing).

Several months before the *Cohen* opinion, the U.S. District Court for the Eastern District of Louisiana issued an opinion in *In re Mastercard*, 132 F. Supp. 2d 468. The *In re Mastercard* case dealt with a number of plaintiff Internet gamblers who attempted to sue their credit card companies for illegal involvement with Internet gaming operators. *Id*. at 473. Their claims were based on alleged Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, violations, which required an analysis of underlying violations of state laws and the federal Wire Act. *In re Mastercard*, 132 F. Supp. 2d at 473. Upon examination of the Wire Act's applicability to the types of wagering engaged in by the plaintiffs, the court interpreted the Wire Act as inapplicable to non-sports gaming. *Id*. at 480.

The court held that "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." *Id*. Although the court held that the plain language of the statute is clear, rendering a look at legislative history unnecessary, it nevertheless stated that the legislative history of recent Internet gambling legislation supports the idea that the statute applies only to sporting contests. *Id*. Because the plaintiffs failed to allege they had engaged in sports betting, the court said the Wire Act did not apply to their claims. *Id*. at 481. The court concluded, "Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act." *Id*. As it now stands, this is the only case law on point with respect to the Wire Act's application to non-sports betting on the Internet.

116 *E.g*., Letter from Jon P. Jennings, Acting Assistant Attorney General, U.S. Department of Justice, to The Honorable Patrick J. Leahy, Ranking Minority Member, Committee on the Judiciary, U.S. Senate (June 9, 1999), *available at* http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm.

117 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT].

transactions. The creation of a national mail system spurred the development of mail fraud, as well as the advent of the first national lottery.[118] More recently, the dawn of electronic bank transfers made the movement of money received from illegal transactions more difficult to track.[119] The Internet significantly raises the stakes. We now live in a human community that exists without traditional notions of territory. Therefore, the question for each government is whether to extend its monopoly to a boundless territory, or to control the Internet only within its own territorial boundaries.

For many countries, this proposition is easily answered. So long as government controls access to the Internet, it can also control what its citizens view. While this approach may be acceptable in some regions of the world, it is unacceptable in most Western cultures, such as the United States, Canada, Western Europe, and Australia. The most daunting option is for a country to maintain traditional governmental controls over its citizens, while relinquishing control of the Internet infrastructure.

Without government control over Internet access, citizens can buy virtually anything over the Internet from a business that does not exist anywhere but in "cyberspace." For example, consider the online gaming industry. Where is the sports book located? Is it really in Antigua where it is licensed? Or is it next door, but routed through a surrogate server in Antigua? Moreover, how long does it take to move the Internet sports book between countries? These questions illustrate that the physical location of the Internet business is increasingly irrelevant. These questions also point to a greater issue: without having physical control over the business, the government lacks the ability to control or tax gambling activity.

The basic struggle concerns whether government can control the Internet or whether the Internet will control the government. This issue goes beyond gambling, to include issues such as bank fraud, consumer fraud, theft of intellectual property, copyright infringement, and child pornography, and may need to be addressed via international treaty.

IV. The Challenge of Jurisdiction

Assuming that operating a gambling site on the Internet is illegal, whether under national or international law, governments must have a vehicle to enforce the particular law at issue. Prior to

118 *See* Kevin D. Doty, *Mailing and Transporting Lottery Materials, in* Federal Gambling Law, 39, 39-40 (Anthony N. Cabot et al. eds., 1999).

119 *See generally* David Mussington et al., Exploring Money Laundering Vulnerabilities Through Emerging Cyberspace Technologies (1998). *See also Cash Transaction Reporting, in* Federal Gambling Law, 247 (Anthony N. Cabot et al. eds., 1999).

creation of the Internet, enforcement was accomplished more easily. For example, the sheriff could simply locate the alleged perpetrator within his jurisdiction, arrest him, and bring him before the magistrate. The world of the Internet is much different. Mobility allows the alleged perpetrator to be in another state or halfway around the world. Jurisdictional battles often overshadow questions of guilt or innocence.

A. Federal Jurisdiction

A country's ability to enforce its laws is based on three different principles of jurisdiction: "jurisdiction to prescribe," "jurisdiction to adjudicate," and "jurisdiction to enforce."[120] "Jurisdiction to prescribe" is defined as the ability of the country to adopt laws that apply to particular persons and circumstances.[121] Likewise, "jurisdiction to adjudicate" means the authority of that state to subject those persons to its judicial process.[122] Finally, "jurisdiction to enforce" is the authority of that state to use its resources to induce or compel compliance with its law.[123]

1. Jurisdiction To Prescribe

The federal government may only assert extra-territorial jurisdiction in limited circumstances. Unlike territorial jurisdiction, where a country may both apply its laws to certain conduct and enforce those laws, extra-territorial jurisdiction refers to instances where a country applies its laws to conduct occurring outside of its territory.[124] To enforce those laws, it must wait for the alleged perpetrator to return to its territory, or have him returned by another nation (such as through extradition).[125] Exercises of extra-territorial jurisdiction must be permissible under international law, and must be provided for under the law of the country asserting jurisdiction.[126]

International law recognizes four bases for extra-territorial jurisdiction: *national*, where the nationality of the offender serves as the basis for jurisdiction; *protective*, where an injury to national interest serves as the basis for jurisdiction; *universal*, where physical custody by any forum of the perpetrator "of certain offenses considered particularly heinous and harmful to humanity" serves as the basis for jurisdiction; and *passive personal*, where the na-

120 RESTATEMENT, *supra* note 117, § 401.
121 *Id*. §§ 401-02.
122 *Id*. §§ 401, 421.
123 *Id*. §§ 401, 431.
124 *See generally* 45 AM. JUR. 2D *International Law* § 78 (1999) [hereinafter AM. JUR. 2D *Int'l Law*].
125 *Id*. §§ 78-80; *see also* United States v. Yunis, 681 F. Supp. 896, 906 (D.D.C. 1988).
126 *E.g*., *Yunis*, 681 F. Supp at 899.

tionality of the victim serves as the basis for jurisdiction.[127] The second and third bases for extra-territorial jurisdiction, "protective" and "universal," do not apply to Internet gambling. Despite some negative commentaries on gambling, the potential injury caused by Internet gambling is unlikely to rise to the level of injuring the "national interest" or "considered particularly heinous and harmful to humanity."[128] Further, assuming that the games are not fraudulent, the fourth basis, "passive personal," also does not apply because the player voluntarily participates in the gambling transactions. Even if a home user is a "victim" of the gambling operator, "passive personal" is an unpopular basis for extra-territorial jurisdiction and applies only to "serious and universally condemned crimes."[129] Gambling, which is legal in many parts of the world, including numerous jurisdictions within the United States, is not such a crime.

However, the first basis, "nationality," can apply to Internet gambling. The United States can exert jurisdiction over its citizens for conducting gambling anywhere in the world, despite the fact that the activity is legal where it is conducted.[130] For example, under federal law, U.S. owned or operated aircraft cannot offer in-flight gambling even between two foreign cities.[131]

In the United States, a presumption exists against the extension of extra-territorial jurisdiction.[132] Therefore, if the federal government wants to extend extra-territorial jurisdiction to Internet gambling, it must amend federal law to explicitly include operating an Internet site outside of the United States. However, applying federal laws to Internet gambling conducted by American citizens does not present a personal jurisdiction problem for the U.S. government. American citizens and American corporations are always subject to the personal jurisdiction of the United States.[133]

2. Jurisdiction To Adjudicate

A key requirement of "jurisdiction to adjudicate" is the presence of the accused. Simply put, "no court in the United States may bring a person to trial without his or her presence."[134] Even

127 *Id*. at 899-900.

128 *Id.* at 900.

129 *Id.* at 902.

130 *See generally* AM. JUR. 2D *Int'l Law*, *supra* note 124 (citing United States v. Reeh, 780 F.2d 1541 (11th Cir. 1986)). Nationality can also serve as the basis for federal law enforcement officials to prosecute individuals involved in the management, operation, and ownership of Internet gambling sites, including officers, directors, shareholders, and managers of the gambling business. *Id.*

131 49 U.S.C. § 41311 (1996).

132 *See* AM. JUR. 2D *Int'l Law*, *supra* note 124, § 80.

133 *E.g.*, United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995).

134 RESTATEMENT *supra*, note 117, § 422 cmt. c(iii).

with the advantage of having extra-territorial jurisdiction, the federal government will find it difficult to prosecute offshore Internet gambling operators. Most operators are likely to hide their involvement in the actual business by using a series of offshore corporations with "nominee" directors that obscure the actual ownership and operation.[135] A company can incorporate in a Caribbean country for about three thousand dollars, with annual fees of approximately five hundred dollars.[136] Moreover, no requirement exists to keep a base of operation within the incorporating offshore country.[137] All of these factors combine to make it difficult for anyone, especially law enforcement, to determine the actual owners and operators of the corporation.

Internet operators can further complicate matters by the use of surrogate servers. For instance, an Internet site can prevent others from tracking the origination point by using a surrogate server in another country.[138] By stripping off the server's header, which indicates the origination point, the operator can make tracking the origin of the Internet site virtually impossible. Thus, the actual server can claim to be in a foreign country, but actually be located within the United States. If the surrogate site operates outside of the United States, authorities cannot use their subpoena authority to learn the location or identity of the actual server.[139] Moreover, as the potential threat becomes apparent to the operator, the operator can easily relocate to another, more accommodating country, without disturbing its Internet site.[140]

A trend among Internet gambling operators is to locate their servers in a friendly Caribbean nation.[141] This presents difficult problems for the federal government, even if it amends federal laws to prohibit all forms of Internet gambling. If federal law enforcement officials gather evidence of the gambling activity, and obtain federal indictments against the Internet casino operator,

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135 For a cost of approximately $250, persons called "nominee" directors may be appointed and can prevent the disclosure of the names of the company's actual directors. *See generally* Global Money Consultants, *at* http://global-money.com/offshore/ (last visited Mar. 16, 2002) (providing an example of the ease with which companies may incorporate offshore).

136 *Id*. Unless otherwise indicated, all currency figures are in U.S. dollars.

137 *Id.*

138 *See* Symposium, *Panel III: The Privacy Debate: To What Extent Should Traditionally "Private" Communications Remain Private on the Internet?* 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 329, 365-66 (1995).

139 *See* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316-17 (D.C. Cir. 1980) (explaining that an American court's attempt to enforce a subpoena internationally would be an attempt to invoke the court's enforcement jurisdiction beyond the borders of the country, which would be a violation of international law).

140 Nicholas Robbins, Note, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U.J. SCI. & TECH. L. 7, 51 (1996).

141 For example, see *United States v. Truesdale*, 152 F.3d 443, 444 (5th Cir. 1998), where the gaming operation occurred in Jamaica and the Dominican Republic, and was legal under both nations' laws.

what then? The casino operator could simply ignore service and remain insulated from U.S. jurisdiction.

Despite the fact that a foreign government may authorize foreign-based Internet casinos, American law enforcement agencies and courts may still enforce U.S. laws against them. The laws of foreign countries do not bind American jurisdictions.[142] The casino, however, would only be subject to the personal jurisdiction of the United States if it were incorporated here, any of its owners or operators were U.S. citizens, or any of the owners or operators were physically present and arrested in the United States.[143]

If those involved in the Internet casino business remain outside the jurisdiction of the United States, law enforcement officials have few options. The federal government can demand that the country in which the Internet casino is based surrender those involved as fugitives from justice. However, the right of the United States to request delivery of a fugitive or federal criminal defendant usually requires a treaty between the two nations.[144] The United States has extradition treaties with only 110 countries.[145] Moreover, criminal suspects can only be extradited for committing crimes that are enumerated in the specific treaty.[146] Therefore, two steps are required to extradite a casino owner or operator from a foreign country. First, the United States must have an extradition treaty with the foreign country. Second, the treaty must make gambling an extraditable offense.

The federal government could also attempt to obtain extradition of a foreign casino owner or operator through international comity. The doctrine of "comity" is based on a reciprocal courtesy that one nation owes to another, based on notions of justice and regard for what is due other states.[147] Under this doctrine, a foreign country may voluntarily surrender a fugitive without regard to the existence or nonexistence of a treaty. The United States has sought extradition on the basis of comity on only a few occa-

142 Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."). The "comity" doctrine permits American courts to recognize the applicability of legislative, executive, or judicial acts of another nation. However, comity is not mandatory and is not appropriate when recognition of a foreign law is in direct conflict with a law or policy of the United States. *See* Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 541-44 (1987). Thus, any firm operating in a county that has laws permitting Internet gambling cannot apply the doctrine of comity to their enterprise.

143 *See* United States v. Juda, 46 F.3d. 961, 967 (9th Cir. 1995).

144 18 U.S.C. § 3181 (2000); *see also* Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); United States v. Rauscher, 119 U.S. 407, 411-12, 429-30 (1886); United States v. Schultz, 713 F.2d 105, 107-08 (5th Cir. 1983).

145 See 18 U.S.C. § 3181 for a complete list of countries with which the United States has an extradition treaty.

146 *Rauscher*, 119 U.S. at 430.

147 *See* AM. JUR. 2D *Int'l Law*, *supra* note 124, § 7.

sions,[148] likely because U.S. federal law enforcement officials do not have the authority to reciprocate the effect of an extradition based on comity.[149] However, an advantage of comity is that the foreign country has the power to surrender a fugitive accused of a crime not named in an extradition treaty.

The reality, however, is that without an extradition treaty, a foreign country will rarely be compelled by a sense of loyalty or justice to surrender an Internet gambling operator. This would be particularly true with those countries that have invited Internet gambling operators to conduct business within their borders.[150] Despite the realization that the U.S. government does not welcome their actions, these countries have encouraged Internet gambling operators.[151] It is therefore unlikely that these or any nations would consider Internet gaming a serious enough offense to merit extradition on the basis of comity.

Though highly unlikely, the federal government could also obtain custody of a foreign Internet casino operator by force, such as kidnapping. While abduction of a foreign criminal suspect might seem abhorrent, it is an effective means of securing jurisdiction. Surprisingly, most courts dealing with this issue have held that a court's right to try a criminal defendant is not disturbed by the manner in which he was brought within a court's jurisdiction.[152] Following this precedent, most courts have held that an individual's due process rights are not affected by abduction from a foreign country.[153] Thus, when the U.S. government abducted Manuel Noriega from Panama for RICO violations, the court held that due process is denied only when the defendant proves that the forcible abduction was accompanied by "torture, brutality, and similar outrageous conduct."[154]

Although the government could obtain jurisdiction over a foreign Internet casino operator by way of forceful abduction, it is doubtful that illegal gambling alone could be so egregious to war-

148 David B. Sweet, Annotation, *Application of Doctrine of Specialty to Federal Criminal Prosecution of Accused Extradited from Foreign Country*, 112 A.L.R. FED. 473, § 3 (1993).

149 *Ex parte* Foss, 36 P. 669, 670-71 (Cal. 1894); *see also* 31 AM. JUR. 2D *Extradition* § 21 (1989).

150 Numerous jurisdictions throughout the globe now license online gaming. *See Licensing Information: Online Gaming Jurisdictions*, INTERACTIVE GAMING NEWS, *at* http://www.igamingnews.com/countries.cfm (last visited Apr. 3, 2002).

151 *See*, *e.g.*, Northern Territory Treasury, Gaming, *at* http://www.treasury.nt.gov.au/ntt/licensing/gaming/gaming.htm (last visited Mar. 16, 2002) (touting the benefits of licensure in the Northern Territory of Australia).

152 Richard P. Shafer, Annotation, *District Court Jurisdiction Over Criminal Suspect Who Was Abducted in Foreign County and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED. 292, § 2 (1983).

153 *See, e.g.*, United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

154 *Id*. at 1530 (citing United States *ex rel*. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975)).

rant the exercise of government force. As such, without the assistance of an extradition treaty or comity of nations, Internet casino operators operating outside of the United States may avoid U.S. jurisdiction to adjudicate them for their offenses. Without the ability to extradite Internet gambling operators, the U.S. government's best hope to deter foreign Internet gambling operations is the use of diplomatic leverage.[155]

3. Jurisdiction To Enforce

The United States can enforce its laws within its own territory.[156] It does not, however, have the ability to enforce its laws outside of the United States without the consent of that nation.[157] Thus, "A person apprehended in a foreign state . . . and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society."[158] Additionally, in most circumstances, the United States can employ non-criminal enforcement measures against persons located outside of the United States if it provides reasonable notice of the claims or charges and an opportunity to be heard.[159]

B. Personal Jurisdiction Under The U.S. Constitution

When an American state attempts to assert jurisdiction over a nonresident, the due process clause of the U.S. Constitution requires that the nonresident defendant have "minimum contacts" with the forum state, such that he "should reasonably anticipate being haled into court there."[160] Moreover, maintenance of the suit in the forum state cannot offend "traditional notions of fair play and substantial justice."[161] The judiciary is increasingly addressing whether these standards are met through Internet communications.[162]

Much like the standards established by the U.S. Constitution, an overriding principle of international law is that the exercise of

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155 As of 1996, no international agreements existed regulating the Internet. Scott M. Montpas, Comment, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163, 182 (1996).

156 RESTATEMENT, *supra* note 117, § 432.

157 *Id*.

158 *Id*. § 433(2).

159 *Id.* § 431(3).

160 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 297 (1980).

161 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1941) (internal quotation omitted)).

162 *E.g*., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

jurisdiction must be reasonable.[163] However, a long-held principle of criminal jurisdiction is that the person charged need not have ever been physically present in the forum state or country to be subject to its laws.[164] In 1911, the U.S. Supreme Court held, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[165] Nevertheless, application to the Internet is testing this long-held principle.

C. State Jurisdiction to Enforce Internet Gaming Laws

Just as the federal government must conquer jurisdictional hurdles to enforce its Internet sports gaming laws, the states must overcome the same jurisdictional challenges to enforce their own laws in this area. Both legal and practical problems face the states as they attempt to enforce their laws against sports wagering in the new Internet era.

1. State Civil Jurisdiction Over the Operator

Several states have already begun to test the limits of their personal jurisdiction over those who offer online gaming services. The State of Minnesota has been particularly aggressive in testing the boundaries of its personal jurisdiction in this area. Minnesota has asserted that it has jurisdiction over online gambling anytime it is offered to Minnesota residents.[166] On the basis of this assertion, Minnesota Attorney General Hubert Humphrey III filed a consumer protection suit against U.S. citizen, Kerry Rogers, and his company, Granite Gate Resorts, Inc., in 1995.[167] The suit alleged that the online advertising for Rogers's proposed Belize-based "WagerNet" service was false and misleading.[168]

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163 RESTATEMENT, *supra* note 117, § 403(1). This standard of reasonableness would include factors such as: (1) the relationship between the activity and the country asserting jurisdiction; (2) the relationship between the persons conducting the activity and the country asserting jurisdiction; (3) the character of the activity and the importance and desirability of the regulation; (4) the existence of expectations that may be injured or protected by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the consistency of the regulation with international traditions; (7) the extent of another state's interest in regulating the activity; and (8) the likelihood of conflict with another state's regulation. *Id*.

164 Strassheim v. Daily, 221 U.S. 280, 285 (1911).

165 *Id*.

166 *See* Memorandum from Hubert Humphrey III, Minnesota Attorney General, to all Internet users and providers, *available at* http://www.jmls.edu/cyber/docs/minn-ag.html [hereinafter Minnesota Memorandum] (setting forth the enforcement position of the Minnesota Attorney General's Office with respect to certain illegal activities on the Internet).

167 Minnesota v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *1 (D. Minn. Dec. 11, 1996).

168 *Id*. at *1-2.

The WagerNet service would match people wishing to bet on a similar sporting event for a charge of 2.5% of any bet.[169] Because the service only matched casual bettors, Oscar Goodman, a Las Vegas attorney advising WagerNet, claimed that it was not actually engaging "in the business of betting or wagering," and thus, did not violate § 1084.[170] Minnesota, however, argued that telling potential WagerNet customers that the service was legal constituted false and misleading advertising, in violation of Minnesota's consumer protection laws.[171]

In January 1996, a Minnesota court denied Rogers's motion to dismiss for lack of jurisdiction.[172] The state district court applied a five-factor analysis to determine whether Rogers and his company had subjected themselves to personal jurisdiction in Minnesota: the quantity of the defendant's contacts with the forum state, "[t]he nature and quality of those contacts," "[t]he connection of the cause of action with the contacts," the "[i]nterest of the state in providing a forum," and the defendant's inconvenience in defending an action in that forum.[173]

Considering the first factor, the quantity of contacts with the forum state, the court analogized WagerNet's advertisements on the Internet to advertisements placed in nationally distributed magazines and newspapers. The court found no reason to treat the particular nuances of Internet advertising differently, stating:

> The Defendants attempt to hide behind the Internet and claim that they mailed nothing to Minnesota, sent nothing to Minnesota, and never advertised in Minnesota. This argument is not sound in the age of cyberspace. Once the Defendants place an advertisement on the Internet, that advertisement is available 24 hours a day, seven days a week, 365 days a year to any Internet user until the Defendants take it off the Internet.[174]

The court flatly rejected Rogers's argument that WagerNet had transmitted nothing into Minnesota because it merely allowed Minnesota residents to access a Nevada-based Web site.[175] The court said that if it accepted that argument, then Minnesota residents necessarily could not be receiving anything from the WagerNet Internet site.[176] The court decided, however, that to access and interact with the WagerNet site, Minnesota residents

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169 *Id*. at *4.

170 Dan Goodin, *On-line Wagering: Place Your Bet on the Internet*, LAS VEGAS REV.-J., July 23, 1995, at 1C, *available at* 1995 WL 5795946.

171 *Granite Gate Resorts,* 1996 WL 767431, at *1, *3.

172 *Id*. at *1.

173 *Id*. at *6.

174 *Id.*

175 *Id*. at *7.

176 *Id*. at *9.

must have received electric transmissions from the Nevada-based site.[177]

The obvious implication of the court's approach is that electric transmissions may serve as contacts between an Internet-based gambling operation and any jurisdiction from which a user accesses that operation. The number of contacts may be debatable, but this issue did not trouble the Minnesota court.[178] Because the advertisements were constantly available to Minnesota residents, and the defendants knew that 1.5 million consumers viewed WagerNet's advertisements every month, the court concluded "[l]ogic dictates" that the quantity of contacts with Minnesota was substantial.[179] Because Rogers refused to turn over copies of WagerNet's mailing lists, the court found, for purposes of the motion to dismiss for lack of jurisdiction, that the WagerNet mailing lists contained Minnesota residents.[180]

The court also found that the second factor, the nature and quality of the defendant's contacts with Minnesota, weighed in favor of finding personal jurisdiction.[181] The court found that by soliciting Minnesota residents, WagerNet purposely availed itself of the privilege of conducting business within the state.[182] The court even suggested that the quality of contacts created by Internet solicitation is inherently greater than the contacts created by other means of communication, stating, "Unlike when one puts solicitation in the mail, the Internet with its electronic mail operates tremendously more efficiently, it generates much more quickly and possesses a vast means of reaching a global audience."[183]

Assessing the third factor, namely the connection of the cause of action with the contacts, the court also weighed in favor of finding personal jurisdiction.[184] The court relied upon consumer protection cases, stating, "[C]ourts have routinely held that out-of-state defendants soliciting in-state residents have purposefully availed themselves of the privilege of conducting business within

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177 *Id*. The court stated:

> If that argument is correct, then the Minnesota user would not be able to obtain anything from WagerNet. However, when the Minnesota user plugs in the URL address for Vegas.Com, if Vegas.Com did not send an electric transmission back to the computer user, the computer user would see nothing. He or she would see a blank screen. The way the pictures and words get to the Minnesota residents is by the server, Vegas.Com, automatically transmitting it back to the Minnesota resident.

Id.

178 *Id.* at *8.

179 *Id*.

180 *Id*. at *9.

181 *Id*. at *10.

182 *Id*.

183 *Id*.

184 *Id*.

the state."[185] The court added that the threshold for sufficient contacts is lower when a state acts in the consumer protection context than when private litigants attempt to avail themselves of a forum reached via Internet contacts.[186]

The court found that the fourth factor, the interest of the State of Minnesota in providing a forum, also weighed in favor of finding personal jurisdiction.[187] The court stated that the defendants had intentionally solicited Minnesota residents for their illegal venture, and that if Minnesota lacked jurisdiction, then its citizens and consumers would be unprotected.[188]

The final factor in the "minimum contacts" analysis, inconvenience in being forced to defend against an action, was an easy determination for the court because WagerNet's advertisement told potential customers that WagerNet could sue them in their home states.[189] This statement allowed the court to find that the defendants could "reasonably anticipate being hailed into court" in Minnesota.[190] The court called this statement a "*coup de grace*" that guaranteed jurisdiction.[191]

In September 1997, the Minnesota Court of Appeals rejected Rogers's appeal.[192] The court of appeals expressed its understanding of the implications of any decision involving Internet jurisdiction:

> We are mindful that the Internet is a communication medium that lacks historical parallel in the potential extent of its reach and that regulation across jurisdictions may implicate fundamental First Amendment concerns. It will undoubtedly take some time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare. But our task here is limited to deciding the question of personal jurisdiction in the instant case, and on the facts before us, we are satisfied that established legal principles provide adequate guidance.[193]

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185 *Id*. The court likened WagerNet's online advertising to the advertisements mailed to Washington residents in *State v. Reader's Digest Ass'n*, 501 P.2d 290 (Wash. 1972). *Granite Gate Resorts*, 1996 WL 767431, at *10.

186 *Granite Gate Resorts,* 1996 WL 767431, at *10.

187 *Id*. at *10-11.

188 *Id*. at *11.

189 *Id.*

190 *Id*.

191 *Id.*

192 Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 721 (Minn. Ct. App. 1997). In 1998, the Minnesota Supreme Court, without publishing an explanatory opinion, upheld the Court of Appeals decision on a split vote. Minnesota v. Granite Gate Resorts, Inc., 576 N.W.2d 747 (Minn. 1998).

193 *Granite Gate Resorts*, 568 N.W.2d at 718.

The court of appeals, however, did not rely upon the lower court's argument that jurisdiction is established when an inanimate server sends an electric transmission into Minnesota.[194] The court of appeals also did not adopt the broad approach of the lower court regarding the quality of Internet-based activities, as opposed to other advertising mediums.[195] When examining the first factor of the five-part test, the quantity of contacts with Minnesota, the court of appeals focused on the specific evidence that at least 248 Minnesota computers had accessed the WagerNet site.[196] The court also noted that WagerNet, through phone calls and its mailing list, was aware that Minnesota residents were accessing its site.[197] The court held that the specific proof of Minnesota contacts and that WagerNet had knowledge of those contacts satisfied the first element of the personal jurisdiction test.[198] The court of appeals also deviated from the lower court's reasoning regarding the second factor, the quality of contacts with the forum state. The court of appeals did not adopt the district court's argument that Internet advertising creates a greater quality of contact because it is available twenty-four hours a day.[199] According to the court of appeals, all forms of advertising are quality contacts with a forum state because they indicate "a defendant's intent to serve the market in that state."[200]

Particularly important in the decision was the court's comparison of advertising mediums. The court of appeals cited Minnesota court decisions involving television advertising to support its conclusion that defendants who know their message will be broadcast in Minnesota are subject to suit in Minnesota.[201] The court made the following analogy: "Internet advertisements are similar to broadcast and direct mail solicitation in that advertisers distribute messages to Internet users, and users must take affirmative action to receive the advertised product."[202]

In future Internet jurisdiction cases, analogizing to television cases may become a popular approach. Just as an individual who turns on a computer and chooses to view a particular website may be involuntarily exposed to Internet advertising, television advertising is accessed by an individual who turns on a television, and chooses a particular channel or program to view. Commentators

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194 *Id*. at 718-19.
195 *Id*. at 719-20.
196 *Id*. at 718-19.
197 *Id*.
198 *Id*.
199 *Id*. at 719-20.
200 *Id.* at 719.
201 *Id.* at 719-20 (citing Tonka Corp. v. TMS Entm't, Inc., 638 F. Supp. 386, 391 (D. Minn. 1985) and BLC Ins. Co. v. Westin, Inc., 359 N.W.2d 752, 755 (Minn. Ct. App. 1985)).
202 *Granite Gate Resorts,* 568 N.W.2d at 720.

have raised the argument that Internet advertising is still more dormant than television advertising.[203] Advances in technology, however, are increasingly blurring the lines between the Internet and television.[204]

Courts have relied upon the uniqueness of broadcast television to justify federal regulations that are not constitutionally permitted when applied to print media or Internet content. For instance, the federal government may regulate indecent material on television, but may not regulate the same material on the Internet.[205] However, this disparate treatment of televised content relies on the inherent scarcity of broadcast signals and the federal government's special role in allocating these signals.[206] Logically, however, there may be little reason to treat Internet content differently than cable television content for purposes of state jurisdiction. This may become particularly obvious as the Internet's video and sound capabilities improve and the number of cable television channels increases by the hundreds.

When a company places an advertisement on a nationally distributed cable television program, the advertisement may not be directed at any particular state or any particular viewer. Nevertheless, the advertiser has knowledge that the advertisement may be viewed by anyone in the country who has chosen to access the program. The same may be said of advertising placed on an Internet site, which is also available nationally. Internet operators arguing that their websites do not subject them to personal jurisdiction in numerous states must be prepared to address the television analogy utilized by the court of appeals in the WagerNet case.[207]

Rogers, the defendant in the WagerNet case, however, went further than merely making content available on a website. By

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203 Dennis Hernandez & David May, *Personal Jurisdiction and the Net: Does Your Website Subject You to the Laws of Every State in the Union?*, L. A. DAILY J., July 15, 1996, *available at* www.gseis.ucla.edu/iclp/dhdm.html.

204 WebTV allows a customer to access the Internet through a television. In the future, it may be commonplace for Internet access and television signals to enter the home through the same cables or same satellite dish and be utilized via one piece of equipment that functions as both a computer and a television.

205 *Compare* FCC v. Pacifica Found., 438 U.S. 726, 748-51 (1978) (upholding the FCC's ability to impose sanctions on a radio station for broadcasting, during the afternoon when children may have been listening, a twelve-minute George Carlin monologue describing the seven "Filthy Words" that you cannot say on the public airwaves), *with* Reno v. ACLU, 521 U.S. 844, 882-85 (1997) (striking down, as unconstitutional, provisions of the Communications Decency Act that prohibited indecent content on the Internet that could be accessed by children).

206 *See Pacifica Found.*, 438 U.S. at 731 n.2.

207 *Granite Gate Resorts*, 568 N.W.2d at 720. The U.S. Supreme Court provided material that may be useful when attempting to make this argument. In *Reno v. ACLU,* 521 U.S. at 854, the Court stated that the Internet is not as invasive as television or radio because Internet users "seldom encounter such content accidentally." The Justices are obviously more familiar with "channel surfing" than with "surfing the Net."

maintaining customer lists and failing to disclose them to the court, Rogers allowed the court to assume that Minnesota residents were on those lists. In doing so, Rogers effectively conceded that he had knowledge the site was being accessed in Minnesota. Second, Rogers had a telephone conversation with a consumer investigator for the Minnesota Attorney General's office who identified himself as a caller from Minnesota.[208] Finally, WagerNet's statement that WagerNet could sue customers in their home states established that WagerNet was willing to avail itself of the benefits of conducting business in Minnesota.

WagerNet and similar cases illustrate that deciding whether a state court has personal jurisdiction over an Internet operator may inevitably depend upon specific factual circumstances.[209] As stated by one court attempting to reconcile recent decisions regarding this issue:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[210]

In *Bensusan Restaurant Corp. v. King*, the Court of Appeals for the Second Circuit held that a passive website does not subject the website's operator to personal jurisdiction in New York.[211] This decision, however, may be more a result of the New York courts' narrow construction of personal jurisdiction in tort cases than of any attribute of the Internet. A different result may be

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208 The telephone conversation alone may have been enough to confer personal jurisdiction. *See* Brainerd v. Governors of the Univ. of Alta., 873 F.2d 1257, 1259-60 (9th Cir. 1989).

209 *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262-63 (6th Cir. 1996); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 298-300 (S.D.N.Y. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996).

210 *Zippo*, 952 F. Supp. at 1124 (citations omitted).

211 *Bensusan*, 126 F.3d at 29. The Second Circuit noted that "attempting to apply established trademark law in the fast-developing world of the [I]nternet is somewhat like trying to board a moving bus . . . ." *Id*. at 27.

reached in a state like Minnesota that extends its personal jurisdiction to the limits allowed by constitutional due process.

For example, another federal district court held that Connecticut could assert jurisdiction over a Massachusetts defendant merely for advertising on a webpage and providing a phone number for persons to call.[212] The court echoed the comments of the district court in the WagerNet case, focusing on the permanency of Internet advertising. The court stated:

> In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.[213]

According to the test set out by the court, the defendant presumably availed itself of the privilege of doing business in every state.

By contrast, the United States Court of Appeals for the Ninth Circuit has held that it would violate traditional notions of fair play and substantial justice "for Arizona to exercise personal jurisdiction over an allegedly infringing Florida web site advertiser who has no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet."[214] These decisions illustrate the unsettled question of jurisdiction over Internet operators. The parameters of personal jurisdiction over Internet activity will continue to evolve as more courts address the issue in cases involving varying fact patterns.

Merely creating a website that can be accessed by anyone may not be sufficient to establish personal jurisdiction, absent a showing that the site operator either actively sought business from within the state, or directed some other form of conduct at the state. However, economic sense dictates that operators will not create a website and then avoid further contact or commercial interaction with customers. It may be very difficult to devise an Internet gambling operation that is commercially viable, and yet does not create the types of contacts necessary for a state to assert personal jurisdiction.[215] Therefore, it is unlikely that issues of per-

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212 Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996).

213 *Id*. at 165.

214 Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415 (9th Cir. 1997).

215 For example, in *State v. Interactive Gaming & Communications Corp.*, No. CV97-7808 (Mo. Cir. Ct. May 22, 1997) (order granting permanent injunction and final judgment), the State of Missouri was able to obtain an injunction against an Internet gaming

sonal jurisdiction will prevent civil enforcement against Internet sports gaming operators.

2. State Criminal Jurisdiction Over the Operator

Although the WagerNet suit was based on false advertising, Minnesota Attorney General Humphrey sent a message that Minnesota is willing to try to assert jurisdiction over all online gaming operators outside of Minnesota. While obtaining civil jurisdiction will allow the application of consumer protection laws to Internet gambling operations, the issue of attaining criminal jurisdiction to apply state antigambling laws is more complex.

Humphrey asserts that Minnesota's general criminal jurisdiction statute grants jurisdiction to prosecute Internet gambling operators.[216] Humphrey relies on a case where a person fired a rifle from an Indian Reservation, across the boundary into Minnesota, in violation of a criminal statute.[217] The shooter claimed that Minnesota courts had no jurisdiction because the act that constituted the crime (the *actus reus*) did not take place in Minnesota.[218] Applying the Minnesota criminal jurisdiction statute and common law, the court held that it could try the shooter because the shots took effect in Minnesota, and therefore Minnesota was the "situs of the crime."[219]

Humphrey has analogized this case to Internet gambling, arguing that the same reasoning would give Minnesota jurisdiction to prosecute online casino operators who offer their services to Minnesota residents. There is some authority supporting Humphrey's view. As early as 1916, the U.S. Supreme Court held that when a person uses a telephone to commit a crime, the offense takes place in the location where the hearer, not the speaker, is located.[220] The use of a telephone, however, indicates a purposeful direction of conduct into a state. In contrast, making an Internet site available to whoever may access it may not constitute directing conduct towards any particular state. Therefore, it is unclear whether this logic will support criminal jurisdiction over Internet gaming operators. In addition, many states have

operator for violating the state's "Merchandising Practices Act." *Id*. Missouri customers had filled out account applications and paid fees to enter online gambling tournaments. *Id*. Using contract principles, the Missouri Attorney General successfully argued that this conduct constituted an "acceptance" in Missouri of the Internet operator's "offer." *Id*. The injunction requires the operator to post a notice on its website stating that it is under court order not to accept applications from Missouri residents. *Id*.; *see also* Martin H. Samson, *Internet Law—Gambling*, *at* www.phillipsnizer.com/int-art77.htm (last visited Apr. 18, 2002).

216 *See* Minnesota Memorandum, *supra* note 166.

217 *Id.* (citing State v. Rossbach, 288 N.W.2d 714, 715-16 (Minn. 1980)).

218 *Rossbach*, 288 N.W.2d at 715.

219 *Id*. at 715-16.

220 Lamar v. United States, 240 U.S. 60, 65-66 (1916).

not expanded their common law criminal jurisdiction through the enactment of statutes similar to Minnesota's. Therefore, these states may face common law limitations on territorial jurisdiction if they attempt to assert criminal jurisdiction over Internet gambling.[221]

As with issues of personal jurisdiction in civil suits, no established rule governs when a state can assert criminal jurisdiction over acts committed via the Internet. As one federal court has noted: "The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages."[222]

Regardless of the exact parameters of a state's law, presumably some conduct must be directed at the forum state, and produce an effect in that state before that state may impose its criminal jurisdiction. As stated by the U.S. Supreme Court, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[223]

The Supreme Court's reference to bringing a defendant within a state's power raises another problem with criminal jurisdiction: personal jurisdiction over an out-of-state criminal defendant requires obtaining the physical presence of that defendant.[224] In many cases, this would likely involve the defendant's extradition from another state. If a state attempted to enforce its criminal laws against a defendant in another country, the extradition problems could become insurmountable.[225]

Jurisdiction questions, the time and effort required for extradition from another state, and the problems that a state may face when attempting to extradite a defendant from another nation all raise the question of whether federal law may be used to enforce the gambling laws of the various states. Nevertheless, as discussed above, those enforcing federal gambling laws may face similar challenges, and be rendered similarly ineffective.

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221 *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 16.2(c) (3d ed. 2000).

222 Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

223 Strassheim v. Daily, 221 U.S. 280, 285 (1911).

224 *See* 21 AM. JUR. 2D *Criminal Law* § 480 (1998).

225 *See generally* AM. JUR. 2D *Int'l Law*, *supra* note 124, § 80.

V. The Philosophy and Realities of Sports Wagering in the United States

If one assumes that sports wagering creates social problems, the challenges to government cannot be met by simply passing laws making the activity illegal. Laws only prescribe what conduct is punishable. However, if people ignore the laws, or if law enforcement does not or cannot enforce the laws, the public policy behind the law is frustrated. Moreover, passing laws that are ignored, not enforced, or unenforceable may be counterproductive. Proponents of legal sports wagering make several arguments, including:

1. The activity can be better regulated for the protection of the player and the sport.[226]
2. The government can realize tax revenues.[227]
3. Money currently wagered with criminal organizations will be diverted from the underground economy.
4. Making sports wagering illegal when such laws are unenforceable brings disrespect to the legal process and contributes to police corruption.

Internet sports wagering, in particular, presents the government with social challenges. The issues pushing the envelope of Internet regulation include pornography and gambling *because these issues challenge traditional government roles.* Online gambling will shape the government's role in the Internet world more significantly than pornography because gambling has prompted a more diverse government reaction. Namely, in some places it is legal, or even sponsored, while in other locations it is prohibited.[228] In contrast, no government sponsors pornography or openly supports pornographers.

The possible government responses to Internet gambling are limited. There is, of course, the prospect of an international treaty, but the disparate approaches taken by various countries make this option unlikely. The other government alternatives are either assuming control of all Internet services and blocking or regulating objectionable sites, or allowing the Internet to remain open and uncontrolled. The latter course, however, will change the nature of government from the purveyor of monopoly power over its territory to a service provider. Instead of being "governed" in the traditional sense by a territorial state, mobile Internet industries have the ability to shop around for the government services that best match their needs.

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226 *E.g.*, Ray Tennenbaum, *It's Time to Consider Legalized Sports Betting*, Newsday, Mar. 22, 1999, at A27, *available at* 1999 WL 8163324.

227 *Id.*

228 *See*, *e.g.*, Ariz. Rev. Stat. § 5-504(J) (2001).

This evolution is evident in the world of Internet gambling. The first government providers came from the Caribbean. Antigua passed legislation in early 1997 to grant licenses to Internet operators.[229] For one hundred thousand dollars per year, Internet gaming operators are assured of little regulatory oversight, anonymity, and tax-free profits.[230] St. Kitts soon followed this example, providing licenses for an initial fee of eighty thousand dollars, and a renewal fee of forty thousand dollars per year.[231] In contrast, the small island nation of Dominica requires an initial fee of twenty-five thousand dollars, plus continuing profit participation.[232] Rather than requiring a government license to operate an Internet sports book, some countries grant "master" licenses, allowing holders to sublicense additional persons to operate Internet gambling sites.[233] This allows some operators to enter the business with lower initial licensing costs of as little as four thousand to eight thousand dollars per month.[234]

The price of these government regulatory services will necessarily vary according to market conditions. When few governments offered Internet gaming licenses, operators were willing to pay one hundred thousand dollars per year for minimal government benefits. As more governments offered similar benefits, the costs decreased. In addition, the benefits provided by governments perceived as more legitimate and offering a higher regulatory standard will come at a considerable premium. The experience of the Isle of Man, a semi-autonomous jurisdiction in the United Kingdom, highlights this reality. Some of the world's largest casino corporations lined up to apply for an interactive gaming license from this British jurisdiction.[235] These licenses cost an annual fee of eighty thousand pounds, in addition to a 2.5% tax on gambling revenues.[236]

Pressure is high to be the leader in this area because the first major country to provide viable government oversight will have, at the very least, a temporary monopoly. Obvious benefits accrue to both the regulated Internet operators and the sponsoring country that offers effective regulation. Internet gambling operators have

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229 *E.g.*, Mark Fineman, *'Virtual Casinos' Cash in on Lax Rules in Antigua*, L.A. TIMES, Sept. 21, 1997, at A1, *available at* 1997 WL 13982286.

230 *Id.*

231 *Can Gambling Work on the Internet*, *in* INTERNET GAMBLING REPORT IV: AN EVOLVING CONFLICT BETWEEN TECHNOLOGY, POLICY & LAW 25, 37 (Anthony N. Cabot ed., 2001).

232 *Id.*

233 *Id.*

234 *Id.*

235 Las Vegas-based casino giant MGM-Mirage applied, and was awarded one of these licenses. Judy Dehaven, *MGM Wins License for an Online Casino*, STAR-LEDGER, Sept. 21, 2001, at 30, *available at* 2001 WL 27929976.

236 Steve Pain, *E-business: Islands Gambling on a Safe Bet in Casinos*, BIRMINGHAM POST, Aug. 28, 2001, at 22, *available at* 2001 WL 26526735.

certain needs or wants and will bargain for: (1) infrastructure support; (2) basic legality of the types of gambling that the operator wishes to offer; (3) financial infrastructure; (4) anonymity for customers; and (5) credibility through regulatory oversight and public accountability.

As with all negotiations, the sellers (in this case, the government) will want certain things in return. First and foremost, governments will insist on receiving fees and taxes. The fees will presumably be used to pay for the cost of the regulatory services provided by the government. The taxes will be used for other governmental purposes as well. Moreover, most modern civilized governments have a notion of social responsibility. For this reason, licensing governments will seek some basic implementation of public policy, including controls on underage gambling, bet limitations or loss limits, and minimum levels of fairness in the games.

Still, the notion that government can successfully implement public policy by regulating Internet gambling poses its own implementation problems. Only a few years ago, it was thought that the best regulators could do was to provide a safer gambling environment; one in which the gamblers know the games are fair and honest, and that they will be paid if they win. Regulations requiring sites to prohibit underage gambling, or gambling in jurisdictions where interactive gaming is illegal, were thought to be technologically infeasible. New technological advances have changed this view.

New technology now permits Internet sites to determine, with a high degree of accuracy, the geographic location of an Internet user.[237] This technology, in turn, allows Internet casinos to block users from jurisdictions where such activities are illegal. Other technologies, like retinal scans and biometric fingerprinting, while somewhat costly, allow websites to verify the identity of players with nearly one hundred percent accuracy.[238] At least one Nevada casino pursuing interactive gaming from an offshore location has expressed its confidence that such technologies will permit its planned offshore site to prevent betting by U.S. residents.[239] As these technologies become more reliable, less expensive, and more readily available, fears about the inability to regulate will no longer present barriers to interactive gaming.

The decision of some economically powerful countries to legalize and regulate interactive gaming may force the United States

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237 *See*, *e.g.*, InfoSplit, We Know Where Your Customers Are, *at* http://www.infosplit.com/prod/main3.htm (last visited Mar. 16, 2002); IXIA, IxMapping™ - IP Host and Networks Graphoc Location Service, *at* http://www.ixiacom.com/products/paa/netops/IxMapping.php (last visited Mar. 16, 2002).

238 *See* Dretzka, *supra* note 115.

239 *See* Dehaven, *supra* note 235.

to reevaluate the reality of the situation. The world arena changed dramatically when Australia set standards for its states and territories to issue Internet gaming licenses.[240] Where the online industry was once a group of upstarts trying to establish a foothold in Caribbean nations, Australia opened the door to more mainstream interests, now including a growing list of Western, industrialized jurisdictions.[241]

Uncertainty regarding U.S. law, as well as the lack of definitive congressional action, has even led some jurisdictions in the United States to pursue the possibility of legal interactive gaming. In 2001, Nevada's State Legislature passed a bill authorizing Nevada gaming regulators to proceed with interactive gaming licensing if it can be conducted in accordance with all applicable laws.[242] Nevada regulators are now engaged in an extensive analysis of the laws of different jurisdictions, and the feasibility of technological controls to assure compliance with these laws.[243] Nevada's bill further illustrates the premium that regulators believe interactive casinos may be willing to pay to operate under a highly regulated and respected regulatory regime. Under Nevada's bill, licensees would pay an initial licensing fee of $500,000, followed by an annual renewal fee of $250,000.[244] These fees would be in addition to Nevada's 6.25% tax on gross gaming revenues.[245] Additionally, New Jersey's legislature has introduced bills that would permit the State to license interactive gaming operations.[246]

If Congress preserves the Wire Act's current ban on online sports wagering, or prohibits Internet gambling in its entirety, preventing Americans from making wagers online will require the cooperation of other countries. Specifically, other countries will need to adopt laws prohibiting their licensed operators from accepting wagers from patrons in the United States. However, attempts by the United States, which realizes more than sixty billion dollars each year in legal gaming revenues, to tell a small Caribbean country to stop receiving a few million dollars in fees

240 *See* Adam Snyder, *Odd Alliance Tackles Net Gambling*, *at* http://www.msnbc.com/news/130443.asp (last visited Jan. 7, 2002).

241 In addition to several jurisdictions in Australia, several jurisdictions in the United Kingdom, including the Isle of Man and Alderney, are licensing Internet gaming operations.

242 *See* 2001 Nev. Stat. 593. The Wire Act's applicability to sports-related online wagering would limit this online gaming to non-sports wagering.

243 Jeff Simpson, *Internet Gambling: Gaming Regulators Seek Legal Advice*, LAS VEGAS REV.-J., June 30, 2001, *available at* 2001 WL 9536797.

244 2001 Nev. Stat. 593 § 6.

245 NEV. REV. STAT. 463.370 (2001).

246 *See* Assemb. 568, 210th Leg., 2002 Sess. (N.J.) (allowing Internet casino gambling by Atlantic City casinos when permitted by the Casino Control Commission); Assemb. 1532, 209th Leg., 2d Reg. Sess. (N.J.) (allowing Atlantic City casinos to take bets on live Atlantic City casino games from remote locations, when permitted by the Casino Control Commission).

annually from Internet operators, are likely to fall on deaf ears. Even larger, industrialized trading partners and military allies, whose citizens have gambled billions in Las Vegas casinos over the years, may not be sympathetic to U.S. policy on this issue. Even if such nations are sympathetic, it may not make a difference. American gamblers will still be free to gamble on most of the current 1400 online gambling sites, which have more than doubled since 1999.[247] These sites would likely continue to offer online sports wagering to U.S. citizens regardless of U.S. policy.

VI. Conclusion

Laws intended to regulate sports gaming traditionally have presented unique challenges to the law enforcement community. Now, with the advent of the Internet, both federal and state law enforcement agencies, as well as courts, are faced with new challenges. Gaining custody of and jurisdiction over Internet gaming operators may further hinder the government anti-gaming agenda. In light of the evolving technologies and the expanding global marketplace, federal and state governments may be forced to reconsider their approach to sports gaming.

247 *See* Dretzka, *supra* note 115.