

Pace International Law Review

Volume 12
Issue 1 *Spring 2000*

Article 6

April 2000

Playing for Free - The Legality and Enforceability of On-Line Gambling Debts

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Charles B. Brundage, *Playing for Free - The Legality and Enforceability of On-Line Gambling Debts*, 12 Pace Int'l L. Rev. 153 (2000)

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COMMENTS

PLAYING FOR FREE? THE LEGALITY AND ENFORCEABILITY OF ON-LINE GAMBLING DEBTS

CONTENTS

I.	INTRODUCTION	154
II.	TRADITIONAL STANDARDS	156
	A. <i>Personal Jurisdiction</i>	156
	B. <i>Applicable Federal Laws</i>	161
	C. <i>Attempts to Regulate On-Line Gambling Internally</i>	165
III.	A RECENTLY FILED LAWSUIT IN CALIFORNIA SHOULD SPELL MAJOR TROUBLE FOR THE INTERNET GAMBLING INDUSTRY	168
	A. <i>Providian National Bank v. Haines</i>	168
	B. <i>Public Policy Against Contracts for Gambling on Credit</i>	170
	C. <i>Full Faith and Credit, Comity and the Judgment / Cause of Action Distinction</i>	176
IV.	CONCLUSION	178

I. INTRODUCTION

The recent popularity of the Internet¹ and on-line gambling in particular has provided some hotly debated legal issues, many of which are yet to be decided. One issue is whether credit card companies can enforce debts incurred while gambling on-line. Most of the "virtual casinos" visited by Americans are based in other countries, such as Belize, Antigua and the Dutch Antilles.² Thus, on-line gambling is forcing the legal field to revisit traditional standards, such as jurisdiction, sovereignty and international comity. This paper will discuss the problems inherent in using outdated legal concepts to address the new phenomenon of the Internet in general and on-line gambling specifically.

Gambling on the Internet is growing by leaps and bounds. In 1998 it was estimated that over \$600 million would be wagered online by Americans.³ Market analyst, Datamonitor, predicts that by the year 2002 this figure will rise to \$10 billion.⁴ To put this into perspective, \$10 billion represents one fourth of the legal gambling revenue collected in the United States in 1995.⁵

A recently filed lawsuit in California, if successful, could spell the end of the Internet gambling industry in the United

¹ The Internet is a huge web of approximately 30,000 interconnected computer networks, spanning the entire planet. It was established in the 1960's as a military network to provide a fail-safe system that could be fully activated in the event of war or public emergency. Phaedra Hise, NET PROFIT, INC., Oct. 1994, at 80. "The Internet is the world's largest computer network, often described as a 'network of networks.' Computer networks are systems of interconnected computers that allow the exchange of information between the connected computers." EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 2-11 (1994).

² Joshua Quittner, *Betting on Virtual Vegas; To Get Around U.S. Gambling Laws, the First Online Casinos are Setting up Their Card Tables Offshore*, TIME, June 12, 1995, at 63.

³ See Michael O'D. Moore, *Internet Gambler's Suit Puts Cards on the Spot*, AMERICAN BANKER, Aug. 27, 1998.

⁴ See Moira Muldoon, *Gamers Raise Senate's Bet*, Wired News, (visited Nov. 9, 1998) <<http://www.wired.com/news/news/politics/story/14263.html>>.

⁵ See *Chance a Flutter on the Internet; Hi-tech Firms Scent Big Profits as Betting and Blackjack Make Their Debuts on the Information Superhighway*, EVENING STANDARD, June 5, 1995, at 38.

States.⁶ In this lawsuit, *Providian National Bank v. Haines*, the plaintiff is attempting to nullify \$70,000 worth of debts incurred while gambling on-line.⁷ The theory behind the suit is that since gambling is illegal in California and there is strong public policy against enforcing debts for gambling on credit, the court should declare the credit card debts void as against public policy.⁸ The suit also alleges unfair business practices on the part of Visa and MasterCard, in that they allowed their merchant accounts to mislead consumers into believing gambling is legal in California.⁹ The suit also seeks an injunction barring the credit card companies and their issuing banks from collecting any Internet gambling debts.¹⁰

If the California courts do hold that on-line gambling debts are unenforceable, it could be the beginning of the end for this multi-million dollar industry.¹¹ It is not hard to see why, as credit cards logically are the payment type of choice, as the only practical means of quickly setting up an account with an on-line casino.¹² According to I. Nelson Rose, a gambling law expert, "anything else is too slow."¹³ If they cannot use credit cards, virtual casinos will be doomed.¹⁴ In this author's opinion, there is a good chance that the California courts will be the first to announce that on-line gambling debts are unenforceable, based on public policy considerations and a long line of precedent.

The very nature of the Internet challenges the traditional legal standards and laws that were enacted before its existence. Part II of this comment will discuss the traditional standards, such as the tests for asserting personal jurisdiction over non-residents and the Federal statutes currently being applied to the Internet. Their effectiveness and reasonableness will also be addressed. Part II will also discuss the opinions of the Inter-

⁶ See Matt Beer, *Suit Challenges On-Line Casinos*, S. F. EXAM., Aug. 17, 1998; *Providian National Bank v. Haines*, No. V980858 (Cal. Super. Ct. July 23, 1998) [hereinafter Cross Complaint].

⁷ See Cross Complaint, *supra* note 6.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Beer, *supra* note 6. (quoting the opinion of I. Nelson Rose, Whittier College law professor and American Bar Association gambling expert).

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

active Gaming Council and its attempt to regulate on-line gambling internally. Part III will discuss the recently filed *Haines* lawsuit and the favorable precedent upon which it relies. Part III will also analyze this lawsuit and the precedential support, which makes a key distinction between public policy considerations involving gambling and gambling on credit. Part IV will state the conclusion that the *Haines* case should succeed based on the law and precedent in California and that this could signal the end of on-line gambling in the United States. Part IV will also conclude that the tests for asserting jurisdiction over Internet gambling sites are antiquated but can work. The Federal and state statutes currently being used to combat on-line gambling need to be revised or new legislation needs to be passed.

II. TRADITIONAL STANDARDS

A. *Personal Jurisdiction*

Since by its very nature the world wide web knows no boundaries and Internet sites can be accessed from anywhere on the globe, the question of asserting jurisdiction will necessarily arise in Internet cases. For a federal district court to exercise in personam jurisdiction over a non-resident defendant, it applies the long-arm statute of the state in which it sits.¹⁵ These long-arm statutes must comport with the due process clause of the 14th Amendment to the United States Constitution.¹⁶ The traditional due process test for in personam jurisdiction is the "minimum contacts" test, first announced by the Supreme Court in *International Shoe Co. v. State of Washington*.¹⁷ Under the minimum contacts test the defendant's contacts with the forum state must be such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."¹⁸ In order to satisfy the due process requirement the defendant's conduct and connection with the forum state must be such that he should reasonably anticipate

¹⁵ See *Howard v. Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997) (quoting *Ensign-Bickford Co. v. ICI Explosives USA Inc.*, 817 F. Supp. at 1026 (D.Conn. 1993)).

¹⁶ See *id.*

¹⁷ 326 U.S. 310 (1945).

¹⁸ *Id.* at 316.

being haled into court there.¹⁹ The due process requirement protects non-resident defendants from the burdens of litigating claims where they have not created a “substantial connection” with the forum state.²⁰

Although worded differently and fact sensitive, the courts have for the most part settled on a three-part test for finding minimum contacts, so as to confer in personam jurisdiction over a non-resident defendant.²¹ The first requirement is that the defendant must have purposefully availed itself of the privilege of conducting business in the state, and thus, availed itself of the benefits and protections of the courts.²² Second, the claim must arise or result from the defendant’s forum related activities.²³ Third, the exercise of jurisdiction must be reasonable.²⁴ In the past this test has not always been simple to administer, and with geographic lines becoming blurred as more and more business is conducted over the Internet, the three-part test has become a gray area of the law.²⁵

One inherent feature of Internet activity is its indifference to traditional geographical borders erected by states and nations.²⁶ Over the Internet, people and businesses regularly

¹⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

²⁰ See *id.* at 297.

²¹ See John Gibeaut, *Questions of Authority: Jurisdiction Cases Crop As Internet Sales Erase Borders*, ABA JOURNAL, June 1997, at 42.

²² See *Hanson v. Deckla*, 357 U.S. 235, 253 (1958). In *Hanson*, the Supreme Court outlined when a state court does not have personal jurisdiction over an out of state defendant. A wealthy Pennsylvania widow had a trust with a Delaware bank. She moved to Florida and continued to do business with the Delaware bank. The Supreme Court held that the Florida court could not assert personal jurisdiction over the Delaware bank because there was no relevant contact with the forum State. The Court reasoned that since the bank did not solicit business in Florida and its contact with that State resulted from one of its customers moving there, it could not be shown that the bank had reached out to the forum state or purposefully availed itself of the privilege of doing business there. *Id.*; cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (upholding California court’s assertion of personal jurisdiction over Texas insurance company that sold only one policy in California, where defendant solicited business in state, the claim arose from defendant’s contact with state, and California had a strong interest in providing its citizens with a forum).

²³ See *Cybersell v. Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997).

²⁴ See *id.* at 416.

²⁵ See Gibeaut, *supra* note 21, at 42.

²⁶ See Thomas O’Toole, *Civil Procedure - Personal Jurisdiction: Familiar Notions of Fairness, Foreseeability Dwell Uneasily In Borderless Online World*, U.S. LAW WEEK, July 1, 1997.

communicate with each other without knowing for sure where the other party physically resides in the "real world."²⁷ Not surprisingly, this fact has confounded the courts that have addressed the issue of asserting personal jurisdiction over non-resident defendants, whose contact with the forum state arises out of communications via the Internet.²⁸

This gray area of the law is best evidenced by the decisions of courts who have addressed the issue of asserting personal jurisdiction over defendants whose *only* contact with the forum state is through its website. At this time only the Second, Sixth and Ninth Circuits have addressed the issue of personal jurisdiction in "website only" cases, and they are split on the answer.²⁹ In *CompuServe, Inc. v. Patterson* the Sixth Circuit found that defendant had purposefully availed himself of the forum State where he had entered into a contract in Ohio and transmitted software to plaintiff there.³⁰ The court in *Patterson* stressed that it was both entering into the contract and placing the software in the stream of commerce which made the defendant amenable to suit in Ohio, and that either act alone would not have been sufficient to confer jurisdiction.³¹ The *Patterson* court also stated that it is the quality of defendant's contacts and not their number or status, that will determine purposeful availment for purposes of asserting personal jurisdiction.³²

In another "website only" case,³³ the Ninth Circuit refused to assert personal jurisdiction over a non-resident website advertiser who had no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else over the Internet.³⁴ The *Cybersell* court refused to accept

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) *aff'd*, 126 F.3d 25 (2d Cir. 1997); see also *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Cybersell v. Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997).

³⁰ 89 F.3d. 1257, 1264 (6th Cir. 1996).

³¹ See *id.* at 1265, see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478; compare *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112, 117 (1987) (O'Connor, J) (plurality opinion) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed at the forum State.") with *id.*, at 117 (Brennan, J., concurring in part) (rejecting the plurality's position on the stream of commerce theory).

³² See *CompuServe, Inc.*, 89 F.3d. at 1265.

³³ See *Cybersell*, 130 F.3d at 416.

³⁴ See *id.* at 415.

plaintiff's argument that Cyberspace is without borders and that by advertising its service on the Internet, defendant necessarily intended that it be used on a world wide basis.³⁵ The court stated that use of the Internet alone, without conducting commercial activity over the Internet in the forum State or purposefully directing its merchandising efforts towards Arizona residents, will not be enough to confer in personam jurisdiction over out of state defendants.³⁶ The *Cybersell* court stressed that the website was a passive one, and that defendant did nothing to encourage anyone in Arizona to log on to its site.³⁷

The Second Circuit, in *Bensusan Restaurant Corp. v. King*,³⁸ also refused to find personal jurisdiction over a non-resident defendant that operated a passive web page that was accessible to New York residents.³⁹ Here, the defendant operated a web page to promote his jazz club in Missouri and was sued by a New York Plaintiff for allegedly infringing on its trademark.⁴⁰ The court stated that since no money exchanged hands, no tickets were sent to New York by defendant, and New York residents would have to pick up tickets in Missouri, defendant did not purposefully avail itself of the New York market and also, that the alleged trademark infringement, if at all, occurred in Missouri.⁴¹

The court in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*⁴² analyzed the above cases and found a common thread running through them: "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."⁴³ This indeed seems to be a

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.* at 419, "Here, Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name 'CyberSell,' which Cybersell AZ was in the process of registering as a federal service mark. While there is no question that anyone anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents." *Id.*

³⁸ 937 F. Supp. 295 (S.D.N.Y. 1996) *aff'd*, 126 F.3d 25 (2d Cir. 1997).

³⁹ See *id.* at 297.

⁴⁰ See *id.*

⁴¹ See *id.* at 299, 301.

⁴² 952 F.Supp. 1119, 1124 (W.D.Pa. 1997).

⁴³ *Cybersell*, 130 F.3d at 419 (quoting *Zippo*, 952 F.Supp. at 1124).

trend and also is a theory consistent with the requirement that assertion of personal jurisdiction not offend traditional notions of fair play and substantial justice.⁴⁴ The cases cited above and others require something more than simply advertising a product or service on a website that can be accessed by citizens of the forum State (as well as anyone around the world).⁴⁵

The broadest view of Internet jurisdiction for "website only" cases was stated by the court in *Inset Systems, Inc. v. Instruction Set, Inc.*,⁴⁶ where the court found assertion of jurisdiction proper based only on the defendant's maintenance of a website that could be accessed by residents of the forum state.⁴⁷ The court compared defendant's Internet advertisements to advertisements in print publications and decided that the electronic nature of defendant's advertisements made them more continuous and accessible than those in traditional printed format.⁴⁸ The court reasoned that these advertisements were sufficient contacts with the forum to allow the defendant reasonable anticipation of being haled into court there.⁴⁹ In a broad reading of the purposeful availment theory, the court held that the posting and maintenance of a website that was accessible to Connecticut residents satisfied the test that defendant must avail itself of the privilege of doing business in the state, thus obtaining the protections and benefits of its laws.⁵⁰ The court also proposed that the defendant's website was not only directed at Connecticut, but to all fifty states, seemingly endorsing a theory of "jurisdiction anywhere" for Internet sites.⁵¹

This theory was followed by *State of Minnesota v. Granite Gate Resorts, Inc.*,⁵² a case involving State charges of deceptive trade practices, false advertising and consumer fraud on the part of an on-line gambling site based in Nevada.⁵³ The court

⁴⁴ See *International Shoe Co.*, 326 U.S. 310 (1945).

⁴⁵ See *Bensusan Restaurant Corp.*, 126 F.3d. at 301; *Cybersell*, 130 F.3d at 419; *CompuServe, Inc.*, 89 F.3d. at 1264.

⁴⁶ 937 F. Supp.161 (D.Conn. 1996).

⁴⁷ *Id.*; see also O'Toole, *supra* note 26.

⁴⁸ See *Inset Systems*, 937 F. Supp.161; see also O'Toole, *supra* note 26.

⁴⁹ See *id.*; see also *World-Wide Volkswagen*, 444 U.S. at 295 (1980).

⁵⁰ See *Inset Systems, Inc.*, 937 F. Supp. at 161 (D.Conn. 1996); see also Hanson, *supra* note 22.

⁵¹ See *Inset Systems*, 937 F. Supp. at 50; see also O'Toole, *supra* note 26.

⁵² 568 N.W.2d 715 (Minn.App. 1997).

⁵³ See *id.*

relied on prior Minnesota decisions which held that if a defendant knows its message will be broadcast in that state, they will be amenable to suit there.⁵⁴ The court looked at the fact that defendant had advertised itself as being available to international markets and found they intended to serve all jurisdictions in the market, including Minnesota.⁵⁵ The cause of action was also found to have arisen from defendant's contacts with the State as the consumer protection action was based on their advertisements, which reached at least one person in Minnesota.⁵⁶ It is important to note at this point that the website in this case would be considered a passive one because it was not accepting bets or money, but simply compiling a mailing list for future operations.

The above mentioned cases are evidence of a jurisdictional quagmire, with courts struggling to apply theories and tests based largely on geographic lines that do not exist in Cyberspace. As it stands now, the area of personal jurisdiction over the Internet can best be described as inconsistent, with the rules being different depending on which Circuit suit is filed in. The law can not be relied on by those involved in electronic commerce via the Internet. The same advertisement or website that is "passive" in one area of the country, may be found to be purposeful availment in another. The Circuits are in disagreement and it is time for the matter to be resolved, in this author's opinion. This may not be far away, as a petition for certiorari is expected to be filed by the defendant in the *Granite Gate* case.⁵⁷

B. *Applicable Federal Laws*

There are currently three federal statutes which can be applied by the government to Internet gambling sites: the Federal Interstate Wire Act,⁵⁸ the Travel Act,⁵⁹ and the Organized

⁵⁴ See *id.*, at 719, see, e.g., *Tonka Corp. v. TMS Entertainment, Inc.*, 638 F.Supp. 386, 391 (D.Minn. 1985); see also *BLC Ins. Co. v. Westin, Inc.*, 359 N.W.2d 752, 755 (Minn.App. 1985).

⁵⁵ See BLC, *supra* note 54, at 720.

⁵⁶ See *id.* at 721.

⁵⁷ See *Letter from Interactive Gaming Council Chairman Sue Schneider to Indiana Attorney General Jeff Modisett* (visited Nov. 9, 1998) <http://www.igcouncil.org/opinion/indiana1022_full.html> at 6 [hereinafter "*Letter*"].

⁵⁸ 18 U.S.C. § 1084 (1994).

⁵⁹ 18 U.S.C. § 1952 (1994).

Crime Control Act of 1970.⁶⁰ These statutes were enacted to combat the growing problem of organized gambling and the transmission of gambling information across state lines using telephones.⁶¹ Since the Internet is a huge web of interconnected computer networks,⁶² linked together using telephone wires, it is easy to see how the government would try to enforce these statutes, enacted long before the advent of the world wide web, on Internet gambling activity.

The Wire Act⁶³ states in pertinent 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 information assisting in the placing of bets . . . on any sporting event or contest . . . which entitles the recipient to receive money or credit as a result of bets . . . or for information assisting in the placing of bets . . . shall be fined under this title or imprisoned not more than two years, or both."⁶⁴

To obtain a conviction under the Wire Act the prosecutors would need to prove that: (1) defendants were engaged in the business of betting, (2) they knew gambling information was being communicated through a wire facility, (3) the transmittal must be in interstate or foreign commerce, and (4) money or credit must be able to be received in connection with the bets or information regarding bets.⁶⁵ Under this wording, the owners or operators of a website that accepts bets are definitely breaking a Federal law. It also appears that owners or operators of websites that merely give information or advice about betting can be charged with violating the Wire Act. Clearly, being in the business of gambling is a prerequisite to being charged under the Wire Act and courts have held that the statute does not cover individual bettors.⁶⁶ By using the Wire Act the Fed-

⁶⁰ 18 U.S.C. § 1955 (1994).

⁶¹ H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631 (1961).

⁶² *See* Hise, *supra* note 1.

⁶³ 18 U.S.C. § 1084 (1994).

⁶⁴ 18 U.S.C. § 1084(a) (1994).

⁶⁵ *See id.*

⁶⁶ *See id.*; *see also* United States v. Baborian, 528 F. Supp 324, 329 (D.R.I. 1981). Congress did not intend to include a social bettor within the prohibition of the statute and congress did not contemplate prohibiting the activities of mere

eral government is going after organized crime and is not concerned with mere bettors.⁶⁷

The first arrests for Internet gambling were based on the Wire Act.⁶⁸ In actuality the 14 defendants that were arrested were charged with conspiracy to violate the Wire Act, which means prosecutors will not have to prove that they violated the Wire Act, only that they agreed to do so and one of them did an "overt act" in furtherance of the conspiracy.⁶⁹ All fourteen people charged were United States citizens.⁷⁰ The FBI seemingly did this to avoid the complicated question of whether the United States can arrest and charge a citizen of another country, who claims to be licensed by his own government.⁷¹

The Travel Act⁷² states in pertinent part: "Whoever travels in interstate or foreign commerce or uses . . . any facility in interstate or foreign commerce, with intent to distribute the proceeds of any unlawful activity; or promote, manage, establish . . . any unlawful activity . . . shall be fined under this title, imprisoned not more than five years, or both . . . 'unlawful activity' means (1) any business enterprise involving gambling."⁷³

Courts have held the word "facility" includes telephone lines and not just physical transportation facilities like cars or railroads.⁷⁴ Since telephone lines can actually transport a voice or message across state lines to the same extent that illegal materials can be transported across state lines, communication facilities are within the reach of the statute.⁷⁵ Like the Wire

bettors . . . even when they bet large quantities of money and show great sophistication. *Id.*

⁶⁷ See I. Nelson Rose, *Internet Operator Arrested*, ANDREWS GAMING INDUSTRY LITIGATION REPORTER, April, 1998.

⁶⁸ See *id.*

⁶⁹ See *id.* Rose seems to be implying that the U.S. Attorneys used the conspiracy theory because the Wire Act is so poorly worded that no one knows if it covers Internet gambling, and conspiracy is much easier to prove. See *id.* Overt act has been defined as: "An open, manifest act from which criminality may be implied. An outward act done in pursuance and manifestation of an intent or design. An open act, which must be manifestly proved." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990).

⁷⁰ See Rose, *supra* note 67.

⁷¹ See *id.*

⁷² 18 U.S.C. § 1952 (1994).

⁷³ *Id.*

⁷⁴ See *United States v. Smith*, 209 F. Supp. 907 (E.D.IL 1962).

⁷⁵ See *id.*

Act,⁷⁶ the Travel Act also can be applied to Internet gambling, as the statute reaches communications crossing state lines, which is inherent in Internet gambling. The Travel Act is broader however, as it does not have the prerequisite of "being engaged in the business of betting."⁷⁷ It theoretically could be used to prosecute mere bettors, although the Federal Government is more likely to ignore them and concentrate on organized crime.⁷⁸

The Organized Crime Control Act of 1970⁷⁹ states in pertinent part: "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both . . . 'illegal gambling business' means a gambling business which—(i) is a violation of the law of a state . . . in which it is conducted; (ii) involves five 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 thirty days or has a gross revenue of \$2,000 in any single day."⁸⁰

The wording of the statute makes the intent of Congress clear: the Crime Control Act was enacted to thwart large scale organized illegal gambling businesses.⁸¹ The statute seemingly would apply to Internet casinos, as long as five or more people manage or are involved in the day to day activities of the website, and the casino is operational for more than thirty days or makes \$2,000 in a single day.⁸² Under this act, it would be a federal crime for an Internet Casino to violate any state law, as long as it meets the five or more persons and more than thirty days in business requirements.⁸³ Obviously, the Crime Control Act was not aimed at people who are mere bettors over the Internet, but a virtual casino, which is likely to fulfill the five or more persons requirement, comes within the purview of the statute. Even if it does not take five people to run a virtual ca-

⁷⁶ 18 U.S.C. § 1084 (1994).

⁷⁷ 18 U.S.C. § 1084 (a) (1994).

⁷⁸ See Rose, *supra* note 67.

⁷⁹ 18 U.S.C. § 1955 (1994).

⁸⁰ *Id.*

⁸¹ See I. NELSON ROSE, GAMBLING & THE LAW 49 (1986).

⁸² 18 U.S.C. § 1955 (1994).

⁸³ See *id.*

sino, it seems very likely that they would have no problem meeting the \$2,000 of revenue in a single day requirement.

The above analysis of the Interstate Wire Act,⁸⁴ the Travel Act,⁸⁵ and the Crime Control Act⁸⁶ shows that these statutes, which were originally enacted to combat the widespread effect of illegal gambling and aimed primarily at organized crime within this country, are applicable to owners or operators of Internet casinos, many of which reside outside of the United States. Internet casinos are covered by all three statutes and people who visit these virtual casinos are covered under the Travel Act.⁸⁷ The key problem for the federal government in combating on-line gambling will be obtaining jurisdiction over international defendants and the hazy question of enforcing United States laws abroad.

C. Attempts to Regulate On-Line Gambling Internally

In response to proposed federal legislation that would make on-line wagering *per se* illegal⁸⁸ and attempted state enforcement of anti-gambling laws toward Internet casinos,⁸⁹ the Interactive Gaming Council ("IGC") was formed.⁹⁰ The IGC has developed its own code of conduct that mandates (among other things) accountability and testing, consumer privacy and data protection, truth in advertising, dispute resolution and the creation of audit trails.⁹¹ The IGC agrees with the various federal and state legislators and Attorneys General that the current state of unregulated Internet gambling is dangerous to Americans in general and minors and compulsive gamblers in particu-

⁸⁴ 18 U.S.C. § 1084 (1994).

⁸⁵ 18 U.S.C. § 1952 (1994).

⁸⁶ 18 U.S.C. § 1955 (1994).

⁸⁷ See 18 U.S.C. § 1084 (1994); 18 U.S.C. § 1952 (1994); 18 U.S.C. § 1955 (1994).

⁸⁸ See Internet Gambling Prohibition Act of 1998, S. 474, 106th Cong.

⁸⁹ See *State of Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn.App.1997).

⁹⁰ See *Letter*, *supra* note 57, at 1. The Interactive Gaming Council is a representative and regulatory body of the interactive gaming industry. *Id.* Formed in 1996 under the auspices of the Interactive Services Association, the IGC has more than 60 members from around the globe. *Id.* The IGC is working to address consumer protection issues on its own as they seek a comprehensive regulatory framework for interactive gaming. *Id.*

⁹¹ See *Letter*, *supra* note 57, at 1.

lar.⁹² Unlike these legislators and law enforcement officials, the IGC believes regulation, and not prohibition, is the proper approach to on-line gambling.⁹³ The IGC believes that a prohibition of Internet gambling as opposed to a scheme of regulation would legislate honest on-line casinos out of business; leaving only the unscrupulous “fly by night” operators, who will have no incentive to obey the law.⁹⁴ This would truly be ironic: Congress passes legislation to ban Internet gambling instead of regulating it, leaving Cyberspace open to “fly by night” operations and organized crime - the very element they were worried about to begin with.

Regulation, rather than prohibition, seems to be the better choice in the area of Internet gambling. Common sense suggests that if the government regulates gambling, the criminal or “bad” element is either taken out of the picture completely or at least drastically reduced. For example, a typical bettor would be much more confident that he will collect his winnings in an Atlantic City or Las Vegas casino, as opposed to the local street dice game being run by the Mafia or the three card monty game being run by some “fly by night” operators. Obviously, this is because the casinos in Atlantic City and Las Vegas are strictly regulated by the government. The best way to ensure this same confidence in on-line gambling is for the government to regulate the industry as they do regular land-based casinos.⁹⁵

Strict regulation of Internet gambling would also help to ensure that minors do not have access to the casinos.⁹⁶ Internet casinos are already encouraged not to allow minors access to

⁹² See Testimony of Sue Schneider, *Chairman of the Interactive Gaming Council before the National Gambling Impact Study Commission, May 21, 1998*, (visited Nov. 9, 1998) <<http://www.igcouncil.org/opinion/ngisc0525.html>> [hereinafter Testimony].

⁹³ See *id.* at 2. “I don’t think that an outright prohibition of Internet gambling is desirable, even if we could implement such a policy. The solution, I believe, is regulation. No matter how many honest operators there are out there, without a viable regulatory framework, the potential for fraud and abuse is quite significant.” *Id.*

⁹⁴ See *id.* at 3. “If the federal or state government are willing to license and supervise internet gambling sites the way they license and supervise land-based casinos, customers will know what they are getting. And as a consumer, why risk your hard earned cash at www.FlyBynight.org, when you can do the same thing at www.licenseandregulated.com?” *Id.*

⁹⁵ See Testimony, *supra* note 92.

⁹⁶ See *id.*

their sites. If a minor racks up a large tab on his or her parents' credit card by gambling on-line, the parents will not be liable for the debts incurred.⁹⁷ If the on-line casino were licensed by the state or federal government, it would have even more reason to ensure that minors did not use their service: they would lose their license and be out of business.⁹⁸

In the author's opinion, the Interactive Gaming Council makes some very good arguments in favor of regulating the on-line gambling industry and against total prohibition. The Internet is a new and dynamic medium that is helping to develop new business ideas and has created the term "e-business." In short, it has changed the way many people do business and the way consumers purchase goods and services. One of these services happens to be entertainment and gambling is a form of entertainment. Internet gambling should be cultivated for its tax revenue and regulated to ensure that minors and compulsive gamblers are not given access to sites. Because of the global nature of the Internet, the author agrees with the Interactive Gaming Council's suggestion that federal or possibly international regulation would be better suited to on-line gambling than state regulation.⁹⁹ Although regulation of gambling has traditionally been done at the state level, on-line casinos do not adhere to traditional state and country borders and thus do not adhere themselves to traditional regulatory framework.¹⁰⁰ Due to this non-adherence to regulatory norms, internet gambling is well suited to regulation at the international level. It is a new and evolving medium and the problems it presents know no boundaries. Outdated national laws could be replaced with new, innovative regulations promulgated at the international level. However, international regulation of internet gambling would face one major obstacle: universal acceptance.¹⁰¹ Without acceptance from the entire international community, international attempts at regulating on-line gambling would prove futile. Regulation of Internet gambling

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *Letter, supra* note 57, at 4.

¹⁰⁰ See *id.*

¹⁰¹ See generally *Gambling on the Internet: The Conflict Between Technology, Policy & Law* (visited February 28, 2000), <<http://www.commerce.net/events/conference/1996/gambling/section6.html>>.

should be well thought out and reasoned, so that it develops as the medium does. Outdated existing laws should not be applied and the Internet should not be chilled as a communications device before it truly develops.

III. A RECENTLY FILED LAWSUIT IN CALIFORNIA COULD SPELL MAJOR TROUBLE FOR THE INTERNET GAMBLING INDUSTRY

A. *Providian National Bank v. Haines*¹⁰²

On June 1, 1998 Providian National bank filed suit against Cynthia H. Haines in California Superior Court, Marin County to collect over \$70,000 in debts she incurred using her VISA and MasterCard credit cards, which were issued by the bank.¹⁰³ Ms. Haines lost the \$70,000 to on-line gambling casinos that accepted her VISA and MasterCard.¹⁰⁴ On July 23, 1998 Ms. Haines filed a cross complaint against Providian National Bank, VISA International, Inc., MasterCard International, Inc., and other credit cards and issuing banks, alleging (among other things) that the debt she incurred was unenforceable and void as an illegal contract and that the credit cards and banks had participated in and profited from unfair business practices.¹⁰⁵

The cross complaint alleges that the credit card companies have given merchant accounts to various on-line casinos in exchange for a percentage of the casino's revenue (estimated at 2 to 5% of the gross revenue charged).¹⁰⁶ The cross complaint states that the VISA and MasterCard trademarks are being advertised on the on-line casino's Webster and that the merchant accounts are being used to accept illegal wagers from California residents.¹⁰⁷ The cross complaint further alleges that Ms. Haines and members of the general public of the State of California were wrongly induced by some of the Internet casinos into believing that gambling on the Internet was legal in California.¹⁰⁸ Haines alleges that she was wrongfully led to believe by some of the Internet casinos that since their web servers

¹⁰² See Cross Complaint, *supra* note 6.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*; see also CAL BUS. & PROF. CODE § 17200 (1998).

¹⁰⁶ See Cross Complaint, *supra* note 6, at 3.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 14.

were located outside the United States it was legal for her to gamble on-line, even though the gambler is located in California, where such gambling is illegal, while performing her end of the transaction.¹⁰⁹ According to Ms. Haines, other on-line casinos were silent on the issue of whether Internet gambling was legal in the United States and others "buried" their warnings of illegality on their WebPages so that a reasonable consumer would not be put on notice.¹¹⁰

The cross complaint relies heavily on California's long-standing public policy against gambling in general and gambling on credit in particular.¹¹¹ It states that the actions of the on-line casinos, the credit card companies and the issuing banks are in violation of California Penal Code provisions against gaming¹¹² and bookmaking or pool selling,¹¹³ as well as "other laws of the State of California and the United States of America."¹¹⁴ In addition, Ms. Haines claims that the conduct of the above-mentioned Cross-defendants constitutes "unfair, fraudulent and unlawful business practices, in violation of California Business and Professions Code § 17200 et seq."¹¹⁵ Ms. Haines, in her cross complaint, seeks to enforce the above statutes on behalf of herself and all consumers in California by using the "Private Attorney General" theory.¹¹⁶

The cross complaint seeks injunctive relief on behalf of Ms. Haines and the general public of the State of California as well as restitution for Haines against VISA, MasterCard and the issuing banks and money damages. The cross complaint seeks to enjoin the credit card companies and issuing banks from: (1)

¹⁰⁹ See *id.* at 14-15.

¹¹⁰ *Id.* at 15. The on-line casinos Ms. Haines claims misled her into believing on-line gambling was legal in California and accepted bets from her include: Inter-casino, Casino Fortune, Acropolis Casino, Casino Royale, Cyberthrill Casino, Fallon Casino, Island Casino, Casino of the South Pacific, Real Casino and Grand Dominican Casino. See Cross Complaint, *supra* note 6.

¹¹¹ See *id.* at 18-19, see *infra* Section III. B.

¹¹² See Cross Complaint, *supra* note 6, at 18; see also CAL. PENAL CODE § 330.

¹¹³ See Cross Complaint, *supra* note 6, at 18; see also CAL. PENAL CODE § 337(a).

¹¹⁴ See Cross Complaint, *supra* note 6, at 18; see also *infra* Section II. B. (discussing the applicability of the Federal Interstate Wire Act, the Travel Act and the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1084, 1952 and 1955 respectively, to gambling on the Internet).

¹¹⁵ *Id.* at 18-19.

¹¹⁶ See *id.* at 20, see also CAL. CIV. PROC. CODE § 1021.5.

providing merchant accounts to on-line gambling casinos that provide Internet gambling to residents of California; (2) allowing on-line gambling casinos that do business in California to accept VISA or MasterCard on their websites; (3) allowing on-line gambling casinos that do business in California to accept VISA or MasterCard on their website unless they post in clear and conspicuous language where credit card information is input by the consumer, that on-line gambling is illegal in California; (4) charging, assessing, collecting or attempting to collect any debts or charges that Haines incurred while gambling on the Internet.¹¹⁷ Haines also seeks declaratory relief that all alleged gambling on credit transactions she entered into are void as illegal an against public policy and thus, unenforceable and that all or part of the debts on the credit cards were not authorized by her.¹¹⁸

B. *Public Policy Against Contracts for Gambling on Credit*

A basic premise of contract law is that the consideration for a contract must be legal. At common law the courts would not enforce a contract that was based on unlawful consideration.¹¹⁹ This common law theory was brought over to the United States from England and has been codified by the States.¹²⁰ One common law principle that was codified in England and subsequently in America is the public policy against judicial enforcement of gambling debts.¹²¹ This principle is deeply rooted in our Anglo-American judicial system and dates back to at least 1710, where it was codified in the Statute of Anne.¹²² The Statute of Anne made gambling debts "utterly void, frus-

¹¹⁷ See Cross Complaint, *supra* note 6, at 26.

¹¹⁸ See *id.* at 27.

¹¹⁹ Illegal or unlawful consideration has been defined as: "[a]n act which if done, or a promise which if enforced would be prejudicial to the public interest or contrary to law." BLACK'S LAW DICTIONARY 307 (6th ed. 1990).

¹²⁰ See CAL. CIV. CODE § 1607 ("The consideration of a contract must be lawful within the meaning of Section 1667"); see also CAL. CIV. CODE § 1667 ("That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals.")

¹²¹ See *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 648 (Cal. Ct. App. 1993).

¹²² See *id.* at 648.

trate and of none effect, to all intents and purposes whatsoever.”¹²³

The underlying principle is easy to grasp: the government of England and later, the United States did not feel it was in the public interest to open the courts and the judicial process to people who engaged in illegal contracts. Since gambling was thought to be immoral and reprehensible it was made illegal by the Statute of Anne.¹²⁴ Since gambling was made illegal, a gambling debt could not be collected on in the courts and a contract extending credit for the purpose of gambling was unenforceable. The principle that is harder to grasp is the fact that while the public and the government’s attitude towards gambling has evolved over the years, the law in many states has not evolved with it and this may cause results in some cases that seem inequitable.

The *Haines* cross complaint states that there is strong public policy in California against gambling in general and in particular enforcement of contracts for gambling on credit.¹²⁵ Indeed, upon visiting the website of Ms. Haines’ attorney, and clicking on the icon for more information on the online gambling case, one comes across the following quote highlighted in a box: “Did you know that under California law gambling debts are unenforceable? Click here to read the California Court of Appeal’s decision.”¹²⁶ By clicking on this box with the wording the visitor is given a printable version of *Metropolitan Creditors Service of Sacramento v. Sadri*,¹²⁷ the most recent case that stands for Haines’ public policy argument against the enforceability of gambling debts.¹²⁸

In *Metropolitan Creditors*,¹²⁹ the plaintiff, a resident of California, racked up \$22,000 worth of gambling debts at Caesar’s

¹²³ *Id.* at 648 (citing 9 Anne, ch. 14, § 1) (1710).

¹²⁴ *See id.*

¹²⁵ *See* Cross Complaint, *supra* note 6, at 3-4; *see also* CAL. BUS. & PROF. CODE § 19801(a) (1998) (“The longstanding public policy of this state disfavors the business of gambling . . . nothing herein shall be construed, in any manner, to reflect a legislative intent to relax those prohibitions.”).

¹²⁶ *See Online Gambling Case Information* (visited Feb. 5, 1999) <<http://www.techfirm.com/newpage5.htm>> at 1 [hereinafter “Techfirm”].

¹²⁷ 19 Cal. Rptr. 2d 646 (Cal. Ct. App. 1993).

¹²⁸ *See id.*; *see also* Techfirm, *supra* note 126, at 1.

¹²⁹ *See supra* note 127.

Tahoe casino in Nevada.¹³⁰ He wrote two checks and executed two notes of indebtedness totaling \$22,000 and received casino chips in return.¹³¹ He subsequently lost all the chips playing baccarat and then stopped payment on the checks and notes, which were drawn on his personal account at a Redwood City, CA bank.¹³²

There is a Nevada statute which makes credit instruments evidencing gambling debts and the underlying debt legal and enforceable if owed to persons licensed in that state.¹³³ For some reason, instead of suing in Nevada under this statute, Caesar's attempted to collect the debts by assigning the claims to Metropolitan Creditors (a collection agency), who filed suit in California municipal court.¹³⁴ That court entered judgment for debtor and Metropolitan appealed.¹³⁵ Superior court affirmed and certified the case for transfer to the Court of Appeal.¹³⁶

In announcing that California has "always had a strong public policy against judicial enforcement of gambling debts, going back virtually to the inception of statehood,"¹³⁷ the *Metropolitan Creditors* Court outlined the history of judicial interpretation of this public policy. The earliest case to test the public policy against enforcement of gambling debts was *Bryant v. Mead*.¹³⁸ In *Bryant*, the defendant lost \$4,000 playing cards at an unlicensed gaming house in San Francisco.¹³⁹ The defendant paid the casino owner with two checks, which he later stopped payment on.¹⁴⁰ The Court, in refusing to enforce the debt, stated that "[w]agers, which tend to excite a breach of the peace, or are contra bonos mores, or which are against the prin-

¹³⁰ *See id.* at 647.

¹³¹ *See id.* at 647.

¹³² *See id.* at 647.

¹³³ *See id.* at 647; *see also* NEV. REV. STAT. § 463.368 (1983). (This statute gives a cause of action to licensed casino operators in Nevada to pursue gambling debts in state court. Before this law was enacted gambling debts were unenforceable in Nevada). *See, e.g.*, *West Indies v. First National Bank of Nevada*, 67 Nev. 13 (Nev. 1950).

¹³⁴ *Metropolitan Creditors v. Sadri*, 19 Ca.Rptr.2d 646, 647 (Cal. Ct. App. 1993).

¹³⁵ *See id.* at 646.

¹³⁶ *See id.*

¹³⁷ *See id.* at 648.

¹³⁸ 1 Cal. 441 (Cal. 1851).

¹³⁹ *See id.*

¹⁴⁰ *See id.*

ciples of sound policy, are illegal; and no contract arising out of any such illegal transaction, can be enforced."¹⁴¹ Licensed gaming houses were permitted by statute at the time, but the Court stated that even if plaintiff were licensed, it would not have upheld the contract.¹⁴²

The rule against judicial enforcement of gambling debts was extended to licensed gaming houses two years later, in *Carrier v. Brannan*.¹⁴³ The court commented that it was satisfied that the practice of gambling is vicious and immoral and harmful to society at large.¹⁴⁴ The Court noted that the legalization of gambling itself did not legalize gambling debts.¹⁴⁵ The Court reasoned that:

The legislature, finding a thirst for play so universally prevalent . . . has attempted to control it . . . by imposing restrictions and burdens upon persons carrying on this kind of business. The license simply operates as a permission, and removes or does away with the misdemeanor which existed at common law, without changing the character of the contract.¹⁴⁶

Thus, we see the California Supreme Court making a critical distinction between gambling itself and the enforceability of contracts for gambling on credit. Almost 150 years later, its reasoning is still sound: simply because the legislature finds that a segment of the population engages in games of chance, it does not follow that the courts must open their doors to enforcement of contracts based on consideration which is contrary to the established public policy and morals of the community.¹⁴⁷

In a more recent case, *Hamilton v. Abadjian*,¹⁴⁸ the California Supreme Court once again upheld *Bryant*,¹⁴⁹ *Carrier*,¹⁵⁰ and

¹⁴¹ *Id.* at 444.

¹⁴² *See id.* ("Such license should not be construed as conferring a *right* to sue for a gaming debt, but as a *protection* solely against a criminal action.") *Id.* (emphasis in original).

¹⁴³ 3 Cal. 328 (Cal. 1853).

¹⁴⁴ *See id.* at 329.

¹⁴⁵ *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.*, *Union Collection Co. v. Buckman*, 150 Cal. 159 (Cal. 1907) (restating the rule of *Bryant* and *Carrier* in statutory terms). "[U]nder the settled law of this state the consideration for such notes was *contra bonos mores* and unlawful." *Id.* at 161.

¹⁴⁸ 30 Cal.2d 49 (Cal. 1947).

¹⁴⁹ 1 Cal. 441 (Cal. 1851).

Union Collection Co.,¹⁵¹ and stated the public policy rule against enforcement of contracts for gambling on credit in terms even more analogous to the *Haines*¹⁵² case.¹⁵³ The defendant in *Hamilton* stopped payment on checks he had given to a Las Vegas casino totaling \$11,450.¹⁵⁴ In refusing to enforce the debt the Hamilton Court reasoned: "The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his act cannot recover on the check."¹⁵⁵ The *Metropolitan Creditors*¹⁵⁶ court stated that the *Hamilton* rule was "on all fours" with its case and announced that if *Hamilton* still reflects public policy, it precludes enforcement of Sadri's gambling debts in the State courts.¹⁵⁷ The *Hamilton* rule seems to be on all fours with the *Haines*¹⁵⁸ case as well. Ms. Haines was extended credit by various Internet casinos through the use of her credit cards for gambling.¹⁵⁹ The Internet casinos then participated in the game with her, thus making the contract for credit against the public policy of California, void and unenforceable.

The *Metropolitan Creditors* Court then turned to the question of whether or not the public policy of California still disfavored gambling and gambling on credit.¹⁶⁰ The Court noted that since *Hamilton*¹⁶¹ was decided Nevada made enforceable by statute credit instruments evidencing debts to licensed gambling operators.¹⁶² The Court considered this point inconsequential, however, because the public policy of California and

¹⁵⁰ 3 Cal. 328 (Cal, 1853).

¹⁵¹ 150 Cal. 159 (Cal. 1907).

¹⁵² See Cross Complaint, *supra* note 6.

¹⁵³ See *Hamilton*, 30 Cal.2d 49.

¹⁵⁴ See *id.* at 50.

¹⁵⁵ *Id.* at 51; accord *Braverman v. Horn*, 88 Cal. App. 2d 379, 381 (Cal. Ct. App. 1948).

¹⁵⁶ *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 649 (Cal. Ct. App. 1993).

¹⁵⁷ *Id.* at 649, 650.

¹⁵⁸ See Cross Complaint, *supra* note 6.

¹⁵⁹ See *id.*

¹⁶⁰ See *Metropolitan*, 19 Cal. Rptr. 2d 646 at 650.

¹⁶¹ See *Hamilton v. Abadjian*, 30 Cal. 2d 49 (Cal. 1947).

¹⁶² See *Metropolitan*, 19 Cal. Rptr. 2d 646, 650; see NEV. REV. STAT. § 463.368, *supra* note 133.

not that of Nevada was at issue.¹⁶³ The point of consequence for the Court was that since the rule announced in *Hamilton*,¹⁶⁴ “the people of California have demonstrated increased tolerance for gambling through the passage, by initiative measure, of the California State Lottery Act of 1984.”¹⁶⁵ The Court agreed that this and other forms of legalized gambling are evidence that “California’s historical public policy against gambling has been substantially eroded.”¹⁶⁶

The public policy against gambling in California, as in most states, has been substantially eroded over time. But it does not necessarily follow that public policy against gambling on credit has also eroded.¹⁶⁷ In California this is true because the rule against enforcing gambling debts has never depended on the gambling itself being illegal.¹⁶⁸ The fact that one was licensed to run a gaming house did not confer the right to use the courts to enforce gambling debts.¹⁶⁹ This public policy argument is not unique to California, as courts in several other jurisdictions have also concluded that a change in public policy towards gambling itself (through legalized forms of gambling, for example), is not inconsistent with a continued public policy against gambling on credit.¹⁷⁰

A good example of another jurisdiction making the distinction between gambling and gambling on credit is *King International Corp. v. Voloshin*.¹⁷¹ In this case defendant stopped payment on a check he gave to a licensed casino in Aruba, in

¹⁶³ See *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 650 (Cal. Ct. App.1993).

¹⁶⁴ 30 Cal. 2d 49 (Cal.1947).

¹⁶⁵ *Metropolitan Creditors*, 19 Cal. Rptr. 2d 646; see CAL. GOV. CODE § 8880 et seq.

¹⁶⁶ *Metropolitan Creditors*, 19 Cal. Rptr. 2d 646.

¹⁶⁷ See *id.* at 651.

¹⁶⁸ See *id.*

¹⁶⁹ See *Bryant v. Mead*, 1 Cal. 441 (Cal. 1851); *Carrier v. Brannan*, 3 Cal. 328; *Hamilton v. Abadjian*, 30 Cal.2d 49 (Cal.1947).

¹⁷⁰ *Metropolitan Creditors* 19 Cal. Rptr. 2d at 651-652, citing *Carnival Leisure Industries, Ltd. v. Aubin*, 938 F.2d 624, 626 (5th Cir. 1991) [Texas]; *Resorts International, Inc. v. Zonis*, 577 F. Supp. 876, 878-879 (D.C. 3rd, 1984); *Rose, Gambling and the Law - Update 1993*, 15 HASTINGS COMM. & ENT. L.J., 93. “Even while legal gambling spreads throughout the country, the public policy of virtually every state makes legal gambling debts unenforceable, treating a casino marker the same as a contract for prostitution.” *Id.* at 95.

¹⁷¹ 366 A.2d 1172 (Conn. Super. Ct. 1976).

exchange for gambling chips and the casino owner sued him in Connecticut.¹⁷² The court refused to enforce the debt, stating that even though Connecticut had embraced certain forms of gambling, the state had “never deviated from its ancient prohibition of gambling on credit.”¹⁷³ The court relied on possible problems in extending credit to compulsive gamblers as well as other reasons for the continued public policy against gambling on credit.¹⁷⁴ This type of reasoning is sound and in the author’s opinion easily extended to gambling over the Internet. If states are justifiably concerned about extending credit to people who are gambling in licensed, regulated casinos, that concern can only be amplified when the gambling is taking place over the Internet.

C. Full Faith and Credit, Comity and the Judgment/Cause of Action Distinction

The public policy of the forum becomes the pivotal question in the cases discussed in Section III B above because they involved the enforcement of intra-state and sister state causes of action, as opposed to sister state or foreign judgments. The United States Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state . . .”¹⁷⁵ A forum state must give full faith and credit to a sister state judgment, regardless of the forum state’s public policy regarding the underlying claim.¹⁷⁶ In contrast, the forum state may refuse to entertain a lawsuit on a sister state cause of action if enforcement of the action would be contrary to the strong public policy of the forum state.¹⁷⁷

California’s public policy exception to enforcement of an out of state cause of action is, like most states, narrow in scope.¹⁷⁸

¹⁷² See *id.*

¹⁷³ *Id.* at 1174.

¹⁷⁴ See *id.* at 1174-1175.

¹⁷⁵ U.S. CONST. art. IV, § 1.

¹⁷⁶ See *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 648 (Cal. Ct. App. 1993) citing *Fauntleroy v. Lum*, 210 U.S. 230 (1908); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 117 (1971) [hereinafter RESTATEMENT].

¹⁷⁷ See *Metropolitan*, 19 Cal. Rptr. 2d at 648; see RESTATEMENT, *supra* note 176 at § 90; see *Harrah’s Club v. Van Blitter*, 902 F.2d 774, 777 (9th Cir. 1990).

¹⁷⁸ *Metropolitan Creditors*, 19 Cal. Rptr. 2d at 646.

It applies only where the out of state law violates recognized standards of morality and the general interests of California citizens.¹⁷⁹ This approach to out of state causes of action was first announced in 1918 by Justice Cardozo, who explained that courts should not refuse to enforce such actions unless applying the foreign law “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”¹⁸⁰

The above approach to sister state causes of action is comparable to the enforcement of a foreign nation *judgment*. In California, a foreign nation judgment is not entitled to full faith and credit, while a sister state judgment would be. “Like a sister state cause of action, a foreign nation judgment may be refused enforcement if the underlying cause of action is contrary to the public policy of California.”¹⁸¹

The application of this standard may not be as cut and dried as it sounds, however. For example, in *Crockford’s Club Ltd. v. Si-Ahmed*,¹⁸² an English casino obtained a default judgment in England against a California resident who had passed bad checks to them for gambling chips.¹⁸³ The casino then obtained a default judgment in California and the defendant appealed.¹⁸⁴ The court rejected defendant’s argument that since gambling debts are unenforceable in California, the court should not enforce the foreign judgment.¹⁸⁵ In rejecting this argument, the court stated:

[i]n view of the expanded acceptance of gambling in this state as manifested by the introduction of the California lottery and other innovations, it cannot seriously be maintained that enforcement of said *judgment* “is so antagonistic to California public policy interests as to preclude the extension of *comity* in the present case.”¹⁸⁶

¹⁷⁹ *Id.* at 648-649 *citing* *Wong v. Tenneco, Inc.* 702 P.2d 570 (Cal. 1985); *see also* *Knodel v. Knodel*, 537 P.2d 353 (1975).

¹⁸⁰ *Id.* at 648, *quoting* *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (N.Y. 1918).

¹⁸¹ *Id.* at 650; *see* CAL. CIV. PROC. CODE § 1713.4, subd. (b)(3); *see* RESTATEMENT at § 117, cmt. c.

¹⁸² 203 Cal. App. 3d 1402 (1998).

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.* at 1406.

¹⁸⁶ *See id.* at 1406, *quoting* *Wong v. Tenneco, Inc.*, 703 P.2d 570 (Cal. 1985) (emphasis added).

This case was distinguished by the court in *Metropolitan Creditors*¹⁸⁷ on the basis that it did not make the “critical distinction between public acceptance of gambling itself and California’s deep-rooted policy against enforcement of gambling debts—that is, gambling on credit.”¹⁸⁸ It was also distinguished based on the fact that it did not mention any of the cases on point with the public policy argument, but simply held that since the State had expanded its acceptance of gambling, enforcing the English judgment would not offend public policy.¹⁸⁹ The author suggests that it can be distinguished based on the fact that it was a foreign judgment. It does not take a huge leap of faith to come to this conclusion when there is almost 150 years of precedent denying both California and sister state causes of action for enforcement of gambling on credit contracts. *Crockford’s Club* was decided as it was for comity reasons. The court did not even mention the applicable case law regarding the public policy. It saw a foreign judgment and decided to give it full faith and credit, which it did not have to do. The bottom line for both sister state Internet casinos and foreign country Internet casinos: if you want to collect gambling debts from a California citizen, get a valid judgment first.¹⁹⁰ And if you are an operator of an Internet casino in a foreign country, you must rely on the court applying comity principles and ignoring long-standing public policy considerations against the enforcement of contracts for gambling on credit.

IV. CONCLUSION

The cases discussed in Section II. A. are evidence of a jurisdictional quagmire, with courts struggling to apply theories and tests based largely on geographic lines that do not exist in Cyberspace. As it stands now, the area of personal jurisdiction

¹⁸⁷ See *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 649-651 (Cal. Ct. App. 1993).

¹⁸⁸ See *id.* at 651.

¹⁸⁹ See *id.* at 650, citing *Crockford’s Club Ltd. v. Si-Ahmed*, 203 Cal. App. 3d 1402 (1988).

¹⁹⁰ See *Metropolitan Creditors*, 19 Cal. Rptr. 2d. at 653. (“If a licensed owner of a Nevada casino wishes to recover on a check or memorandum of indebtedness given by a California resident under such circumstances, the owner will have to obtain a Nevada state court judgment . . . which will then be entitled to full faith and credit in California regardless of our public policy.”).

over the Internet can best be described as inconsistent, with the rules being different depending on which Circuit suit is filed in. The law can not be relied on by those involved in electronic commerce via the Internet. The same advertisement or website that is "passive" in one area of the country, may be found to be purposeful availment in another. The Circuits are in disagreement and it is time for the matter to be resolved, in this author's opinion. The Supreme Court should resolve the split in the Circuits and provide some clarity to this area of the law.

The analysis of the Interstate Wire Act,¹⁹¹ the Travel Act,¹⁹² and the Crime Control Act¹⁹³ in Section II. B. shows that these statutes, which were originally enacted to combat the widespread effect of illegal gambling and aimed primarily at organized crime within this country, are applicable to owners or operators of Internet casinos, many of which reside outside of the United States. Internet casinos are covered by all three statutes and people who visit these virtual casinos are covered under the Travel Act.¹⁹⁴ The key problem for the federal government in combating on-line gambling will be obtaining jurisdiction over international defendants and the hazy question of enforcing United States laws abroad.

The discussion in Section II. C. concludes that Internet gambling should be cultivated for its tax revenue and regulated to ensure that minors and compulsive gamblers are not given access to sites. Because of the global nature of the Internet, the author agrees with the Interactive Gaming Council's suggestion that federal or possibly international regulation would be better suited to on-line gambling than state regulation.¹⁹⁵ Although regulation of gambling has traditionally been done at the state level, on-line casinos do not adhere to traditional state and national borders and thus do not adhere themselves to traditional regulatory framework.¹⁹⁶ Due to this non-adherence to regulatory norms, Internet gambling is well suited to regulation at the international level. It is a new and evolving medium and the

¹⁹¹ 18 U.S.C. § 1084 (1994).

¹⁹² 18 U.S.C. § 1952 (1994).

¹⁹³ 18 U.S.C. § 1955 (1994).

¹⁹⁴ See 18 U.S.C. § 1084 (1994); 18 U.S.C. § 1952 (1994); 18 U.S.C. § 1955 (1994).

¹⁹⁵ See *Letter*, *supra* note 57, at 4.

¹⁹⁶ See *id.*

problems it presents know no boundaries. Outdated national laws could be replaced with new, innovative regulations promulgated at the international level. Perhaps the United Nations could attempt to ensure that minors are not allowed access to Internet gambling sites through the Convention On the Rights of the Child.¹⁹⁷ However, international regulation of internet gambling would face one major obstacle: universal acceptance.¹⁹⁸ Without acceptance from the entire international community, international attempts at regulating on-line gambling would prove futile. Regulation of Internet gambling should be well thought out and reasoned, so that it develops as the medium does. Outdated existing laws should either be revised or modernized, or not applied to the Internet at all.

The discussion in Section III leads the author to conclude that the plaintiff in Haines¹⁹⁹ has more than a leg to stand on; she has almost 150 years of precedent and long-standing, strong public policy grounds to stand on. For her to lose her case, the court would have to abandon this precedent and fly in the face of the doctrine of *stare decisis*.²⁰⁰ Time and time again, the California courts have been asked to abandon their public policy against gambling on credit, and each time they have refused, most recently in 1993.²⁰¹ If they will not enforce contracts for gambling on credit made in person, it is reasonable to believe they will be even more reluctant to enforce those made in cyberspace. This author predicts Ms. Haines will win her case and send shock waves throughout the Internet gambling industry.

¹⁹⁷ See *General Assembly Commemorates Tenth Anniversary of Convention On Rights of Child* (visited February 28, 2000) <<http://www.un.org/News/Press/docs/1999>>. "The Convention, adopted in 1989 and now the most broadly ratified United Nations Treaty, recognizes the particular vulnerability of children and brings together in one comprehensive code, benefits and protection for children concerning all categories of human rights." *Id.*

¹⁹⁸ See *Gambling on the Internet: The Conflict Between Technology, Policy & Law* (visited February 28, 2000) <<http://www.commerce.net/events/conference/1996/gambling/section6.html>>.

¹⁹⁹ See Cross Complaint, *supra* note 6.

²⁰⁰ *Stare decisis* has been defined as: "To abide by or adhere to decided cases; to stand by precedent and not to disturb settled point." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

²⁰¹ See *Metropolitan Creditors v. Sadri*, 19 Cal. Rptr. 2d 646, 648 (Cal. Ct. App. 1993).

If on-line casinos cannot accept credit cards from citizens of certain states, the industry would appear to be doomed.²⁰²

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²⁰² See Beer, *supra* note 6.