

# LAYOVERS AND CARGO SHIPS: THE PROHIBITION OF INTERNET GAMBLING AND A PROPOSED SYSTEM OF REGULATION

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*Since its emergence in the 1990s, Internet gambling has grown into a \$12-billion-per-year industry. In October 2006 Congress passed the Security and Accountability for Every Port Act, which includes a provision that prohibits domestic financial institutions from moving funds to and from online casinos, all of which are located overseas. While the new law has certainly caused a major stir in the Internet gambling community, users and overseas companies are continuing to find new ways to circumvent it. In this Note, the author first gives an overview of the gambling industry and the problems it poses to gamblers and communities. The author then reviews the tactics Congress attempted to use over the last decade in fighting Internet gambling—criminalizing the operation of a gambling website, criminalizing individual gambling, and criminalizing funds transfers to and from casinos—and explains why each method fails to address, and often exacerbates, the very problems the legislation seeks to resolve. The author then proposes a new method of regulation and explores how that system could significantly reduce the problems of Internet gambling.*

## INTRODUCTION: LAYOVERS AND CARGO SHIPS

On September 29, 2006, as Friday night rolled over to Saturday morning, I looked over a sea of people submerged in blue light as they rose, fell, crashed, resurged. Behind them, diamonds splashed down the solid gold face of a waterfall a hundred feet high. I was at Tryst, quite possibly the most opulent night club in Las Vegas, a city short on neither night clubs nor opulence. Some 2400 miles away, legislators in Washington, D.C. were pushing through one last piece of legislation before a five-week recess.

About two months earlier, David Carruthers, chief executive of the Internet gambling outfit BetOnSports, deplaned at Dallas/Fort Worth International Airport for a layover on the way from Britain, where Carruthers lives, to Costa Rica, where BetOnSports is based. He was met by federal officials who arrested him on racketeering

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charges and for violations of the Wire Act of 1961 (Wire Act).<sup>1</sup> It was the first Internet gambling arrest in eight years, and only the second ever.<sup>2</sup> On news of the arrest, BetOnSports stock tumbled 16.5%<sup>3</sup> and Carruthers was fired.<sup>4</sup> Seven weeks after Carruthers's arrest, Peter Dicks, chairman of London-based Sportingbet, was arrested at John F. Kennedy International Airport in New York for violation of a Louisiana computer gambling law.<sup>5</sup> He resigned a week later after a New York judge ruled that he could return to Britain to await a hearing on his extradition to Louisiana.<sup>6</sup> Two weeks later, after New York Governor George Pataki refused to endorse the extradition request, Dicks was free;<sup>7</sup> Congress was deliberating; and I was on a plane to Las Vegas.<sup>8</sup>

When I returned to New York, I learned that, buried in the just-passed Security and Accountability for Every Port Act of 2006 (SAFE Port Act),<sup>9</sup> the first legislation ever to directly address Internet gambling had been passed.<sup>10</sup> Congress had been trying to pass such legislation for nearly a decade.<sup>11</sup> Apparently unsatisfied with arresting foreign Internet gambling executives on domestic layovers, Congress, in a bill whose purpose was to protect our ports from cargo ships carrying hazardous cargo,<sup>12</sup> illegalized the movement of funds to and from Internet casinos.<sup>13</sup>

When markets reopened the following Monday, online gambling firms listed on the London Stock Exchange suffered devastating losses. PartyGaming, the largest online gambling company, lost \$3.8 billion, sixty percent of its market capitalization; 888 Holdings lost over \$400 million, or forty-five percent of its value; and Sportingbet

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<sup>1</sup> Wire Act of 1961, 18 U.S.C. § 1084(a) (2000).

<sup>2</sup> Matt Richtel, *An Arrest in Internet Gambling*, N.Y. TIMES, July 18, 2006, at C1; see also *infra* note 115.

<sup>3</sup> Richtel, *supra* note 2. BetOnSports stock is listed on the London Stock Exchange.

<sup>4</sup> *Internet Site Dismisses Its Chief*, N.Y. TIMES, July 26, 2006, at C2.

<sup>5</sup> Matt Richtel & Thomas Crampton, *Arrest of Second Major Online Gambling Figure Is a First for State Officials*, N.Y. TIMES, Sept. 8, 2006, at C3.

<sup>6</sup> *Internet Betting Executive Is Allowed to Leave U.S.*, N.Y. TIMES, Sept. 15, 2006, at C3.

<sup>7</sup> Eric Pfanner, *Online-Gambling Shares Plunge on Passage of U.S. Crackdown Law*, N.Y. TIMES, Oct. 3, 2006, at C3.

<sup>8</sup> No law enforcement officials were waiting for me at McCarran.

<sup>9</sup> Pub. L. No. 109-347, 120 Stat. 1884.

<sup>10</sup> Jonathan Weisman, *Internet Gambling, Port Deals Reached*, WASH. POST, Sept. 30, 2006, at A8.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> E.g., Pub. L. No. 109-347, § 121, 120 Stat. at 1898-99 (requiring radiation scan of containers entering busiest U.S. ports).

<sup>13</sup> *Id.* § 802.

lost nearly \$1 billion, two-thirds of its value.<sup>14</sup> Online gambling companies announced suspension of their U.S. operations pending President Bush's signature.<sup>15</sup> PartyGaming canceled a dividend that would have been paid four weeks later.<sup>16</sup> When President Bush signed the bill, two online gambling companies, including Sportingbet, sold their U.S. operations for one dollar each.<sup>17</sup>

Over the last ten years, Internet gambling has grown into a \$12 billion industry.<sup>18</sup> While Congress failed time and again to pass legislation addressing online gambling's numerous legitimate and serious problems, Internet gambling companies proliferated overseas.<sup>19</sup> During that time, channeling funds to gambling websites became more difficult as payment services, on their own initiative, cut off access.<sup>20</sup> Gamblers, though, have shown that they will not be deterred, and continue to find new means to gamble online.<sup>21</sup>

After a decade of fruitless efforts, Congress has enacted a law that attempts to solve the problem by barring funds transfers between financial institutions and online casinos. In this Note, I argue that this law will only lead gamblers to use unregulated offshore financial institutions in their dealings with unregulated offshore online casinos. As long as gamblers can viably gamble online, they will continue to do so. To more effectively solve the problems of online gambling, I suggest a regulatory scheme involving certification of websites that screen underage users, disclose financial operations, and pay licensing fees or taxes. Websites that fail to meet these requirements would continue to be prohibited, while conforming websites would be exempt from existing legislation.

Part I provides a basic background of gambling, both generally and on the Internet. Part II describes the specific problems that Internet gambling poses. Part III summarizes the legislative attempts

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<sup>14</sup> Jim Armitage, *Net Gambling Firms Dive on Shock US Ban*, EVENING STANDARD (London), Oct. 2, 2006, at 26 ("[The PartyGaming loss] was one of the biggest one-day falls recorded by a FTSE 100 business."); Pfanner, *supra* note 7.

<sup>15</sup> Armitage, *supra* note 14.

<sup>16</sup> Press Release, PartyGaming Plc, Interim Dividend (Oct. 3, 2006), available at [http://www.partygaming.com/images/docs/061003\\_Interim\\_Dividend.pdf](http://www.partygaming.com/images/docs/061003_Interim_Dividend.pdf).

<sup>17</sup> Jane Wardell, *Online Gambling Dead? Don't Bet on It*, CHI. SUN-TIMES, Oct. 14, 2006, at 8 (also noting that directors of World Gaming resigned).

<sup>18</sup> See *infra* note 46 and accompanying text.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> See *infra* notes 131-36 and accompanying text.

<sup>21</sup> See NETeller Alternatives, Online Poker Deposit Methods for Americans & Canadians, <http://www.netelleralternatives.com> (last visited Mar. 25, 2007) (providing detailed descriptions and evaluations of gambling websites that still accept American customers, along with methods for Americans to move money back and forth from online casinos).

to address these problems, and the reasons they have been ineffective. Part IV proposes an alternative system of regulation and shows how it would succeed where Congress's approach will fail.

## I

### BACKGROUND

This Part is a snapshot of the gambling world as it existed on September 29, 2006. First it examines traditional, non-Internet gambling. Next it looks at Internet gambling more specifically. Lastly it touches on gambling's secondary effects on economies and communities and discusses the report that fueled the decade-long legislative battle against Internet gambling.

#### A. *Traditional Gambling*

Gambling is (almost) everywhere. Only two states in the nation do not allow any form of legalized gambling.<sup>22</sup> In 2005, revenues<sup>23</sup> from legal, traditional gaming were approximately \$84.7 billion.<sup>24</sup> Commercial casinos, the largest segment of the industry, brought in \$30.29 billion.<sup>25</sup> Of the eleven states that have commercial casinos, Nevada's casinos, not surprisingly, generated the lion's share of the revenues—\$11.6 billion.<sup>26</sup> State-run lotteries, currently operated in forty-one states, Puerto Rico, and the District of Columbia,<sup>27</sup> generated nearly \$16.5 billion in profits in 2005.

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<sup>22</sup> Hawaii and Utah. Martin D. Owens, Jr., *If You Can't Beat 'Em, Will They Let You Join? What American States Can Offer to Attract Internet Gambling Operators*, 10 GAMING L. REV. 26, 26 n.1 (2006).

<sup>23</sup> Revenues, or gross gaming revenues, are defined as the difference between the total amount wagered by the gambler and the total amount paid out to the player by the casino. In other words, if a gambler puts \$100 into a slot machine and eventually walks away with \$89, the casino's revenue is \$11. American Gaming Ass'n, *Is Legalized Gambling a \$600 Billion Industry or a \$50 Billion Industry*, [http://americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=11](http://americangaming.org/Industry/factsheets/general_info_detail.cfv?id=11) (last visited Jan. 9, 2007).

<sup>24</sup> American Gaming Ass'n, *Gaming Revenue: Current-Year Data*, [http://www.americangaming.org/Industry/factsheets/statistics\\_detail.cfv?id=7](http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=7) (last visited Oct. 11, 2006) (including revenues from card rooms, commercial casinos, charitable games and Bingo, Indian casinos, legal bookmaking, lotteries, and pari-mutuel wagering, but not Internet gambling).

<sup>25</sup> AMERICAN GAMING ASS'N, *STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 7* (2006), [http://www.americangaming.org/assets/files/2006\\_Survey\\_for\\_Web.pdf](http://www.americangaming.org/assets/files/2006_Survey_for_Web.pdf) [hereinafter AGA SURVEY]. Casino revenues have nearly doubled in the last decade; casino revenues in 1995 were \$16 billion. *Id.*

<sup>26</sup> *Id.* Casinos on the Las Vegas Strip alone were responsible for just over \$6 billion in revenues. *Id.* at 8.

<sup>27</sup> USA.gov, *Lottery Results*, [http://www.usa.gov/Topics/Lottery\\_Results.shtml](http://www.usa.gov/Topics/Lottery_Results.shtml) (last visited Feb. 26, 2007).

Gambling revenues are especially remarkable when compared to another popular form of entertainment—movies. In 2005, worldwide box-office receipts totaled \$23.24 billion,<sup>28</sup> *less than half* of the almost \$47 billion generated by domestic casinos and lotteries.<sup>29</sup> Domestic box-office receipts fell just shy of \$9 billion,<sup>30</sup> about twenty percent less than casino revenues in Nevada alone.

In addition to being major generators of revenue, commercial casinos have a significant and direct economic impact on the states in which they operate. In 2005, the eleven states with commercial casinos collected \$4.93 billion in gaming taxes.<sup>31</sup> Combining those taxes with the earnings from state-run lotteries, gambling gave states more than \$20 billion that year<sup>32</sup> to help fund education, infrastructure, safety, and a variety of other projects.<sup>33</sup> Casinos also employed 354,921 people in 2005,<sup>34</sup> paying them a total of \$12.6 billion in wages.<sup>35</sup>

On the other side of the equation are the gamblers themselves: 52.8 million casino customers made a total of 322 million trips to casinos in 2005, an average of just over six trips per gambler.<sup>36</sup> And, according to a recent survey, fifty-two percent of American adults played the lottery sometime within the last twelve months.<sup>37</sup> Lastly, and perhaps surprisingly, average casino visitors are wealthier,<sup>38</sup> more

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<sup>28</sup> MOTION PICTURE ASS'N, U.S. THEATRICAL MARKET: 2005 STATISTICS 5 (2006) (on file with the *New York University Law Review*).

<sup>29</sup> Further, Hollywood's revenues have hardly been as reliable as Nevada's. *See id.* at 4–5 (showing that box-office revenues, both domestic and worldwide, have been relatively stagnant over past five years).

<sup>30</sup> *Id.* at 4. This is especially impressive given that in 2005 there were 38,852 movie screens nationwide, MOTION PICTURE ASS'N, 2005 DOMESTIC THEATRICAL MARKET 1 (2005) (on file with the *New York University Law Review*), and only 268 casinos in Nevada, AGA SURVEY, *supra* note 25, at 15.

<sup>31</sup> AGA SURVEY, *supra* note 25, at 5. This is a 5.1% increase from 2004.

<sup>32</sup> *Id.* at 11–16.

<sup>33</sup> *See, e.g.*, N. Am. Ass'n of State & Provincial Lotteries, Did You Know, <http://www.naspl.org/index.cfm?fuseaction=content&PageID=41&PageCategory=38> (last visited Oct. 11, 2006).

<sup>34</sup> AGA SURVEY, *supra* note 25, at 6.

<sup>35</sup> *Id.* This figure is up 3.3% from the previous year. *Id.* By comparison, the median household income in the United States rose only 1.1% between 2004 and 2005. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 4 (2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf>.

<sup>36</sup> AGA SURVEY, *supra* note 25, at 28.

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

<sup>38</sup> Median household income for casino customers in 2005 was \$56,663, compared to \$48,997 for the U.S. population as a whole. *Id.* at 33.

educated,<sup>39</sup> and more likely to hold white-collar jobs<sup>40</sup> than the average American.

### B. Internet Gambling

The size of the online gambling industry is difficult to pin down. The websites are hosted offshore<sup>41</sup> and can be created and removed easily. Current estimates put the number of gambling websites at around 2300,<sup>42</sup> a number that has grown remarkably quickly. According to one congressman, five years ago there were fewer than fifty gambling websites.<sup>43</sup> Ten years ago, Christiansen Capital Advisors, a respected source for Internet gambling statistics, estimated that there were only thirty such sites.<sup>44</sup>

The number of online gamblers is also unclear, but similarly large and growing. Most estimates put the number of Americans gambling online between twelve and twenty million,<sup>45</sup> with American gamblers accounting for about half of the \$12 billion that will be spent gambling online this year worldwide.<sup>46</sup> Prior to the most recent legislation, industry insiders saw only blue skies in the future, estimating growth of fourteen percent per year until the end of the decade, at which time online gambling would be a more than \$25 billion industry.<sup>47</sup> By com-

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<sup>39</sup> Fifty-six percent of casino customers have at least some college education, compared to fifty-three percent of the U.S. population. *Id.*

<sup>40</sup> Forty-five percent of casino customers have white-collar jobs, compared to forty-two percent of the U.S. population. Seventeen percent of casino customers are retired, the same as the percentage of the U.S. population as a whole. *Id.*

<sup>41</sup> See 152 CONG. REC. H4989 (daily ed. July 11, 2006) (statement of Rep. Dent).

<sup>42</sup> H.R. REP. NO. 109-412, pt. 2, at 8 (2006); see also Richard Clough, *Virtual Casinos Brace for Big Hit; Gamblers Howl as Bill Awaits Enactment*, CHI. TRIB., Oct. 12, 2006, at 3 (mirroring statistics presented in Congressional Record).

<sup>43</sup> 152 CONG. REC. H4987 (daily ed. July 11, 2006) (statement of Rep. Bachus).

<sup>44</sup> Jon Swartz, *Online Gambling Sites Expect Big Payoffs*, USA TODAY, Feb. 8, 2005, at 1B.

<sup>45</sup> Ben Charny, *Web Gamblers Face New Odds*, SEATTLE TIMES, Oct. 3, 2006, at E6; AGA SURVEY, *supra* note 25, at 21 (citing survey stating that four percent of total U.S. population, or roughly twelve million people, gambles online).

<sup>46</sup> 152 CONG. REC. H4985 (daily ed. July 11, 2006) (statement of Rep. Leach).

<sup>47</sup> PARTYGAMING, ANNUAL REPORT 2005, at 28 (2006), available at [http://www.partygaming.com/annual\\_report\\_05/files/page/230/annual\\_report\\_complete.pdf](http://www.partygaming.com/annual_report_05/files/page/230/annual_report_complete.pdf) [hereinafter ANNUAL REPORT]. The Internet gambling industry is also very top-heavy. With over two thousand sites located around the globe, 152 CONG. REC. H4993 (daily ed. July 11, 2006) (statement of Rep. Hooley) (citing Mattathias Schwartz, *The Hold-Em Holdup*, N.Y. TIMES, June 11, 2006, § 2 (Magazine), at 58) (noting that sites are hosted in countries where Internet gambling is legal), one website accounted for nearly one-twelfth of total worldwide revenue. Gibraltar-based PartyGaming took in close to \$1 billion in 2005, *Busted Flush*, ECONOMIST, Oct. 7, 2006, at 77, 77 (further observing that profits in 2005 were \$293 million, up from just \$5 million in 2002); ANNUAL REPORT, *supra*, at 2 (stating revenues of \$977.7 million in 2005, up from \$30.1 million in 2002), from its 1.8 million active users. *Id.*

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parison, Internet giant Amazon.com boasted \$8.49 billion in sales in 2005.<sup>48</sup>

C. *Secondary Effects and the National Gambling Impact Study Commission Report*

Along with ever-increasing revenues, tax contributions, and employment opportunities, gambling carries with it a lot of baggage. The most frequently cited problems are addiction, an increase in crime, and substitution away from other local non-gambling industries.<sup>49</sup> I will discuss these problems and then describe the most influential study ever to address them, the National Gambling Impact Study Commission (NGISC) report.

1. *Problems*

Gambling addiction, or problem gambling, is defined by the symptoms that individuals display. While tests vary, certain common features include spending all of one's money gambling, failing in one's attempts to stop gambling, and lying about one's gambling.<sup>50</sup> The National Council on Problem Gambling estimates that about one percent of American adults fit the definition of pathological gambling, with another two to three percent showing less significant, but still serious, gambling problems.<sup>51</sup>

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at 12. Approximately eighty percent of that revenue came from the United States. Pfanner, *supra* note 7; ANNUAL REPORT, *supra*, at 3.

<sup>48</sup> Press Release, Amazon.com, Amazon.com Announces Free Cash Flow Surpassed \$500 Million for the First Time; Customers Joined Amazon Prime at an Accelerated Rate (Feb. 2, 2006), available at [http://library.corporate-ir.net/library/97/976/97664/items/181944/Q405\\_Consolidated\\_Release\\_final.pdf](http://library.corporate-ir.net/library/97/976/97664/items/181944/Q405_Consolidated_Release_final.pdf).

<sup>49</sup> See, e.g., 152 CONG. REC. H4985 (daily ed. July 11, 2006) (statement of Rep. Leach). The problems I examine are not an exhaustive list of the social ills gambling may produce, but rather an illustration of the problems that are most often referenced. Other problems could include increased suicide and divorce rates, homelessness, bankruptcy, and other financial- or debt-related issues. One significant problem that is not mentioned in this Part is underage gambling; it will be addressed at length in Part II.A, *infra*.

<sup>50</sup> See, e.g., Nat'l Council on Problem Gambling, Pathological Gambling Criteria, [http://www.ncpgambling.org/about\\_problem/about\\_problem\\_pathological.asp](http://www.ncpgambling.org/about_problem/about_problem_pathological.asp) (last visited Oct. 14, 2006) (providing ten questions gamblers can answer to evaluate gambling behavior and stating that answering affirmatively for any question could suggest gambling addiction).

<sup>51</sup> Nat'l Council on Problem Gambling, Problem Gambling Resource & Fact Sheet, [http://www.ncpgambling.org/media/pdf/eapa\\_flyer.pdf](http://www.ncpgambling.org/media/pdf/eapa_flyer.pdf) (last visited Oct. 14, 2006). Other sources support these figures. See, e.g., Ill. Inst. for Addiction Recovery, Pathological Gambling: An Addiction Embracing the Nation, <http://www.addictionrecov.org/aboutgam.htm> (last visited Oct. 14, 2006) ("Current estimates suggest that three percent of the adult population will experience a serious problem with gambling . . ."). By comparison, another prevalent form of addiction, alcoholism, is said to afflict 8.46% of American adults. Press Release, Nat'l Inst. on Alcohol Abuse and Alcoholism of the Nat'l Inst. of

Several organizations point to gambling as a direct cause of increased crime.<sup>52</sup> They cite the history of organized crime's involvement with the gambling industry, the criminal measures that problem gamblers take to feed their addiction, illegal gambling, and the street crime that crops up around casinos.<sup>53</sup> On the other hand, a number of studies suggest that there is no such connection.<sup>54</sup> These studies often point to the fact that crime rates in areas with legalized gambling are no higher than national averages and that there are no strong correlations between gambling and individualized instances of crime.<sup>55</sup>

Substitution away from other businesses is also mentioned as a possible negative secondary effect. Every dollar spent on gambling, the argument goes, is one less dollar spent on other local businesses.<sup>56</sup> However, empirical evidence seems to point the other way. One obvious case study, Las Vegas, suggests that gambling is a complement to, not a substitute for, local businesses. In fact, in recent years, non-gambling businesses in Las Vegas have been growing faster than gambling, and in many of the major casinos, non-gambling activity now generates the majority of revenue.<sup>57</sup>

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Health, Alcohol Abuse Increases, Dependence Declines Across Decade (June 10, 2004), available at <http://www.niaaa.nih.gov/NewsEvents/NewsReleases/NESARCNews.htm>.

<sup>52</sup> See, e.g., ROGER DUNSTAN, CAL. RESEARCH BUREAU, GAMBLING IN CALIFORNIA ch. XI (1997), available at <http://www.library.ca.gov/CRB/97/03/Chapt11.html> (providing history and reasons for association between gambling and crime); Citizen Link, Focus on the Family Position Statement on Gambling, <http://www.citizenlink.org/FOSI/gambling/abp/A000001159.cfm> (last visited Feb. 25, 2007) ("Gambling breeds crime. Communities that welcome gambling also welcome an increase in crime."); Nat'l Coal. Against Legalized Gambling, Crime, Corruption, and Gambling, <http://www.ncalg.org/crime%20and%20corruption.htm> (last visited Oct. 14, 2006) (linking to studies exploring connection between gambling and crime).

<sup>53</sup> E.g., DUNSTAN, *supra* note 52, at ch. XI.

<sup>54</sup> See, e.g., PUB. SECTOR GAMING STUDY COMM'N, FINAL REPORT 36-37 (2000), available at [http://iog.fsu.edu/research/Gaming\\_pdf/final.pdf](http://iog.fsu.edu/research/Gaming_pdf/final.pdf) (concluding that assumption that gambling leads to crime "appears to be based on fictional portrayals of the industry and unsubstantiated anecdotal evidence").

<sup>55</sup> For a survey of these statistics and discussion of several such studies, see Am. Gaming Ass'n, Crime, [http://www.americangaming.org/Industry/factsheets/issues\\_detail.cfv?id=23](http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=23) (last visited Oct. 14, 2006).

<sup>56</sup> Univ. of Mass. Dartmouth, Ctr. for Policy Analysis, New England Gaming Research Project, <http://www.umassd.edu/cfpa/gaming.cfm> (last visited Oct. 14, 2006) (stating that argument is based on assumption that local economies are zero sum).

<sup>57</sup> Matthew Miller, *Designing for Dough*, FORBES, June 5, 2006, at 62, 65 ("Now most new Vegas Strip resorts earn more than half of revenue from nongambling activities: shops, theaters, restaurants and trade shows."); Gary Rivlin, *Atlantic City Aiming Higher as Casinos Slip*, N.Y. TIMES, Mar. 19, 2007, at A1 ("[T]he big players in Las Vegas have long gotten more revenue from shops, high-end restaurants, shows and spas than from casino floors; last year, 59 percent of the income for casinos on the Las Vegas strip was nongambling."); Megg Mueller Schulte, *Vegas Isn't Only About the Gambling*, USA TODAY, June 22, 2004, available at [http://www.usatoday.com/travel/hotels/hotsheet/2004-06-22-hotsheet\\_x.htm](http://www.usatoday.com/travel/hotels/hotsheet/2004-06-22-hotsheet_x.htm) ("Only about half of the casino's earnings come from gambling, as



## 2. National Gambling Impact Study Commission Report

In 1996, Congress passed the National Gambling Impact Study Commission Act,<sup>58</sup> creating the NGISC. Noting that there had not been a federal study of gambling in twenty years, Congress established the NGISC to “conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States.”<sup>59</sup> The Commission was created to study a wide array of issues, including Internet gambling,<sup>60</sup> and was to submit a report of its findings and recommendations,<sup>61</sup> which it did on June 18, 1999.<sup>62</sup>

A substantial part of the NGISC report dealt with problem gambling.<sup>63</sup> The report’s estimate of the number of problem gamblers was generally consistent with the numbers presented above.<sup>64</sup> The harder task for the Commission was estimating the cost of problem gambling.<sup>65</sup> In the end, the report conservatively estimated that problem and pathological gambling costs about \$5 billion each year.<sup>66</sup> The Commission recommended funding more research on the subject, as well as requiring casinos to provide more information to gamblers and increasing casino taxation to help alleviate the costs of problem gambling.<sup>67</sup>

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opposed to 30 years ago when that figure stood at 85% . . . .”); *see also* 152 CONG. REC. H5001 (daily ed. July 11, 2006) (statement of Rep. Sweeney) (“[Horseracing] supports a large sector of small businesses . . . . During the 2005 season alone, the Saratoga Racetrack attracted 1 million people, who wagered approximately \$145 million. That equates to 1 million people in Saratoga spending \$70 million at local restaurants, stores and various other attractions.”).

<sup>58</sup> Pub. L. No. 104-169, 110 Stat. 1482 (1996).

<sup>59</sup> *Id.* §§ 2(1), 4(a)(1).

<sup>60</sup> *Id.* § 4(a)(2).

<sup>61</sup> *Id.* § 4(b).

<sup>62</sup> NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.

<sup>63</sup> *Id.* at ch. 4. The report compiled existing research and performed extensive original research. *Id.* at 4-1 to 4-3.

<sup>64</sup> *Id.* at 4-7 (stating that 2.9% of American adults met criteria for pathological or problem gambling within last twelve months, compared to 9.7% for dependence and abuse of alcohol, and 3.6% for dependence and abuse of drugs); *see also supra* note 51 and accompanying text.

<sup>65</sup> *Id.* at 4-13 (“Estimating the costs of problem and pathological gambling is an extraordinarily difficult exercise—and a subject of heated debate.”).

<sup>66</sup> *Id.* at 4-14 (citing NAT’L OPINION RESEARCH CTR. AT THE UNIV. OF CHI., GAMBLING IMPACT AND BEHAVIOR STUDY 53 (1999), available at <http://cloud9.norc.uchicago.edu/dlib/ngis.htm>). This figure is especially noteworthy because it is roughly equal to the tax revenue generated by casinos, *see supra* text accompanying note 31, meaning that the tax benefits of casinos are entirely wiped out by the social cost of problem gambling. Of course, this analysis does not account for the substantial state income generated by lotteries.

<sup>67</sup> NAT’L GAMBLING IMPACT STUDY COMM’N, *supra* note 62, at 4-19 to 4-20.

The NGISC report also detailed a number of positive effects for the community. It found that the introduction of casino gambling into a community led to increased employment and decreased welfare payments.<sup>68</sup> Further, casino workers' job quality, as measured by income and benefits, was better than comparable service-sector jobs.<sup>69</sup>

Looking to the alleged link between gambling and crime, the NGISC heard testimony from both sides of the debate.<sup>70</sup> The NGISC commissioned its own research, but the results were inconclusive—it found that “a relationship may exist between gambling activity and the commission of crime, but . . . insufficient data exists to quantify or define that relationship.”<sup>71</sup> Examining a host of other costs and benefits of gambling,<sup>72</sup> the Commission concluded that each community should make its own decision about the legalization of gambling, and strongly urged each to consider all available information before doing so.<sup>73</sup>

The portion of the NGISC report that Congress most clearly listened to and acted on was the chapter on Internet gambling.<sup>74</sup> Although Internet gambling was still nascent, the Commission was already able to see its potential for explosive growth<sup>75</sup> and its potential problems. The Commission identified underage gambling, pathological gambling, and untraceable Internet financial crimes as the crucial problems likely to result from Internet gambling.<sup>76</sup>

Even more influential than the Commission's research were its recommendations. Observing the difficulty of regulating cyberspace on a piecemeal, state-by-state basis (especially when several foreign countries already explicitly allowed Internet gambling), the NGISC concluded that controlling Internet gambling would have to be a fed-

<sup>68</sup> *Id.* at 7-8 (citing NAT'L OPINION RESEARCH CTR. AT THE UNIV. OF CHI., *supra* note 66, at 70).

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 7-12 to 7-14 (citing study that examined link between crime and pathological gambling that found “many problem and pathological gamblers steal or commit other crimes to finance their habit” but citing another study that found that “[t]aken as a whole, the literature shows that communities with casinos are just as safe as communities that do not have casinos”).

<sup>71</sup> *Id.* at 7-14.

<sup>72</sup> The report discusses financial and credit card issues, tourism, suicide, divorce, homelessness, improvements in infrastructure, tax benefits, property values, and more. *Id.* at ch. 7.

<sup>73</sup> *Id.* at 7-29 to 7-31; *see also id.* at 3-17 (“The Commission recommends to state governments and the federal government that states are best equipped to regulate gambling within their own borders with two exceptions . . .”).

<sup>74</sup> *Id.* at ch. 5.

<sup>75</sup> *Id.* at 5-1 (citing studies estimating revenues from Internet gambling in 1998 to be \$651 million, but predicting that revenues could be as high as \$10 billion by 2001).

<sup>76</sup> *Id.* at 5-4 to 5-6.

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eral effort.<sup>77</sup> When discussing ways to control Internet gambling, the NGISC always used the terms “prohibition” and “regulation” together; when giving its final recommendations, however, it dropped the option of regulation without explanation. Thus, its first recommendation was simply “that the federal government should prohibit . . . Internet gambling.”<sup>78</sup> To implement this recommendation, the NGISC suggested that the federal government develop strategies involving both Internet service providers and financial institutions. It recommended a prohibition on wire transfers to Internet gambling sites and legislation invalidating credit card debt incurred from Internet gambling. Lastly, it recommended that the President and Congress take steps to encourage foreign governments to help in the fight against Internet gambling.<sup>79</sup>

## II

### PROBLEMS SPECIFIC TO ONLINE GAMBLING

In this Part I will introduce the major problems that are specific to online gambling. I will also touch on the potential, but currently unrealized, economic benefits that online gambling could offer. The most prominent problems of online gambling are the inability to prevent underage gambling and the threat of fraud from illegitimate websites. These problems are the main reasons that online gambling, as distinct from gambling more generally, deserves specialized legal attention. Accordingly, any legislation introduced to help curb the “problem” of online gambling should at the very least address these specific concerns. This Part will address each in turn.

#### A. *Inability to Exclude Underage Gamblers*

Underage online gambling is a serious problem<sup>80</sup> that stems from the inherent difficulty in separating underage users from adults on the Internet. In traditional casinos, gamblers must present identification

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<sup>77</sup> *Id.* at 5-10 to 5-12.

<sup>78</sup> *Id.* at 5-12.

<sup>79</sup> *Id.*

<sup>80</sup> See 152 CONG. REC. H4986 (daily ed. July 11, 2006) (statement of Rep. Bachus) (stating that in last five years, one-half million young teenagers have become compulsive gamblers); *id.* at H4990 (statement of Rep. Hooley) (estimating that 1.6 million American college students gambled online in 2005); Jeffrey L. Derevensky et al., *Prevalence Rates of Youth Gambling Problems: Are the Current Rates Inflated?*, 19 J. GAMBLING STUD. 405, 406–08 (2003) (reviewing literature on relative rates of problem gaming among underage gamblers and citing NGISC study finding that rate of problem gambling could be three times as high in adolescents as in adults). *But see id.* at 408–20 (describing critiques of studies of youth problem gambling).

before gambling.<sup>81</sup> However, comparable checks are still largely absent from the online world.

Where age checks do exist, they are easy to circumvent. Most websites require only a valid credit card to begin gambling,<sup>82</sup> hardly the ideal gatekeeper.<sup>83</sup> Credit cards are increasingly available directly to individuals below the legal gambling age,<sup>84</sup> making credit card ownership an ineffective proxy for age.

Although websites could require additional forms of age verification, such checks are hardly the norm. In a recent British study, a sixteen-year-old girl used her own debit card—one that is readily available to minors—to attempt to register at thirty-seven different online gambling websites.<sup>85</sup> When registering, the girl provided truthful information about her debit card, name, and address, but lied about her age.<sup>86</sup> Of the thirty-seven websites tested, only seven prevented her from registering.<sup>87</sup>

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<sup>81</sup> Some may argue that underage gambling is more of a problem with Internet gambling because children can access the Internet anytime and anywhere. But even if there were a traditional casino on every street corner in America, making them just as accessible as online casinos, the same relative difficulty would exist in keeping underage users from gambling online. Regardless of prevalence, traditional casinos can always check identification.

<sup>82</sup> Press Release, Federal Trade Commission, FTC Warns Consumers About Online Gambling and Children (June 26, 2002), *available at* <http://www.ftc.gov/opa/2002/06/onlinegambling.htm> (describing informal survey of online gambling websites revealing that most sites have no effective mechanism for excluding minors).

<sup>83</sup> Many parents give their children access to their credit cards; for example, to use “only in emergencies.” So equipped, children are quite capable of gambling online and racking up significant debts. *See* Brian DeBose, *House Curbs Online Gambling: Bill Extends Interstate Ban to the Internet*, WASH. TIMES, July 12, 2006, at A11 (“Because of the anonymous nature of Internet transactions, many teens are gambling using their parents’ credit cards . . .”). This problem has a simple solution. Where children use a parent’s credit card, there are motivated and informed intermediaries to intervene and block further gambling: the parents themselves. Credit card bills are readily available and, presumably, a parent who notices large gambling debts building up will take swift, effective action to curb the misuse.

<sup>84</sup> *See, e.g.*, Apple Federal Credit Union, Checking Products, <https://www.applefcu.org/checking.asp> (last visited Oct. 15, 2006) (offering checking account, complete with check card, to children as young as twelve, provided parent or guardian is joint signatory on account); Libby Wells, *Card Issuers Target Teens for Latest Plastic Attacks*, BANKRATE.COM, May 8, 2000, <http://www.bankrate.com/brm/news/cc/20000508.asp> (highlighting several credit cards available to minors and describing incident in which six-year-old child applied for, and received, credit card in his own name).

<sup>85</sup> MICHAEL SMEATON ET AL., *STUDY INTO UNDERAGE ACCESS TO ONLINE GAMBLING AND BETTING SITES* (2004), *available at* <http://www.gamcare.org.uk/pdfs/StudyReportFinal.pdf> (noting that six sites restricted registration due to age verification systems and one website simply did not accept girl’s brand of debit card).

<sup>86</sup> *Id.*

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

This study illustrates the difficulty in effectively preventing minors from gambling online. Not every website needs to offer gambling to minors for the problem to persist. Determined underage users can hop from website to website until they find one that allows them to register and play.<sup>88</sup> Since each website is equally accessible and functionally similar, a system of enforcement cannot solve the problem unless it is universally adopted. As a result, under the law both before and after the SAFE Port Act, accessibility to online gambling, especially for those old enough to get their own credit cards, is virtually unchecked.

### B. Fraudulent Online Casinos

Online casinos could also create problems through fraudulent behavior. Since a user must provide financial information—even if only a credit card number—to online casinos in order to play, there is a risk that the casino could steal the user’s financial information, money, or identity.<sup>89</sup> Indeed, even online gamblers themselves question the legitimacy of online casinos. A recent survey found that fifty-five percent of regular online gamblers believe at least somewhat that online casinos find ways to cheat players.<sup>90</sup>

Granted, a casino acting in such a manner could not maintain its user base for very long; however, it would only need to deceive a small number of individuals for a short time to be profitable. Once a website’s reputation became too tarnished to attract new members, those running it could shut it down and start a new one.<sup>91</sup> Websites require little effort to set up or shut down, and the identity of the controlling individuals is not always clear.

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<sup>88</sup> See *60 Minutes: Illegal and Thriving* (CBS television broadcast Nov. 20, 2005) (transcript available at 2005 WLNR 18778197) (describing informal study in which sixteen-year-old was initially rejected when trying to register with his father’s credit card, but simply tried other sites until he was successful).

<sup>89</sup> See, e.g., *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing on H.R. 21 and H.R. 1223 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 10 (2003) [hereinafter *Hearing on H.R. 21*] (statement of John G. Malcolm, Deputy Assistant Att’y Gen., Department of Justice) (“[T]he potential for fraud connected with [Internet gambling] is far greater than in the physical realm. Online casinos . . . operate in many countries where effective regulation and law enforcement is minimal or non-existent.”).

<sup>90</sup> AGA SURVEY, *supra* note 25, at 27. Forty-six percent agree at least somewhat that people who gamble online find ways to cheat other players. *Id.*

<sup>91</sup> *Hearing on H.R. 21*, *supra* note 89, at 10 (statement of John G. Malcolm, Deputy Assistant Att’y Gen., Department of Justice) (“[O]n-line gambling establishments appear and disappear with regularity, collecting from losers and not paying winners, and with little fear of being apprehended and prosecuted.”).

While more legitimate sites are better able to retain customers and attract new ones, this is not sufficient to keep illegitimate sites out of the market. To generate business, legitimate sites rely upon their reputation for fair play.<sup>92</sup> However, given the difficulty of differentiating reliable from unreliable sites, illegitimate sites can still attract players by offering superior games, bonuses, or stakes compared to those the more legitimate sites offer.<sup>93</sup> In addition, illegitimate sites can cater to customers other sites have shut out, namely underage users. The financial illegitimacy problem would, then, compound the underage gambling problem, exacerbating the harm.

One of the best ways to restrain fraudulent activity might be for users who have been scammed to cooperate with law enforcement either to catch the perpetrators or to prevent other users from falling victim. Unfortunately, the murky legal status of online gambling has made this unlikely for two reasons. First, since casinos operate overseas for fear of punishment, domestic law enforcement agencies have neither practical nor legal ability to hold them accountable for violating American laws. Second, individual players are unlikely to volunteer information that would reveal that they have gambled online. A recent survey found that only fifty percent of online gamblers believe that online gambling is legal.<sup>94</sup> Users who doubt the legality of their own actions are unlikely to snitch; heroin users do not complain to the police when dealers supply bad product.

### C. *Loss of Tax Revenues and Employment Opportunities*

This subsection focuses not on a problem of online gambling, but rather on an opportunity forgone under the current system. As discussed above, gambling has enormous potential to contribute positively to the economy. The current regime, though, forces gambling websites overseas, shutting the American government out of the potential to reap tax revenues, licensing fees, and domestic jobs from a booming industry.

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<sup>92</sup> See *infra* note 147.

<sup>93</sup> One study uncovered an interesting tactic used to lure in new players. The researchers observed gambling websites and found that several of them had positive average paybacks during the “demo” period. Once the demo period ended, average payouts fell below 100%. Serge Sévigny et al., *Internet Gambling: Misleading Payout Rates During the “Demo” Period*, 21 *COMPUTERS HUM. BEHAV.* 153, 155–56 (2005). When a user selects a gambling website, he is making some tradeoff between the payout he expects from the website and the probability he will actually receive that payout. More illegitimate websites, then, could still receive users even if it is known that there is some higher risk of default.

<sup>94</sup> AGA SURVEY, *supra* note 25, at 26.

The NGISC confronted similar situations over the course of its studies of gambling's impact on local economies. It noted that the chief reason Las Vegas has been so successful is that its gambling revenues largely come from external sources. Thus, the city enjoys the benefits of gambling—a large influx of money—but does not have to suffer many of its harmful effects. While what happens in Vegas may, proverbially, stay in Vegas, the addiction, bankruptcy, and family strife generally leave with the gamblers.<sup>95</sup> In the Internet context, America has become the problem gambler, not the prospering casino; we bear all of the costs without receiving the benefits that would offset them. The rest of the world has become a virtual Las Vegas.

### III

#### LEGAL LANDSCAPE

Considering the scope of the online gambling industry, the body of law relating to the subject was surprisingly small before the most recent legislation. Indeed, the complete legislative treatment consisted of one law, almost a half-century old and only indirectly applicable, along with a handful of failed bills proposed over the past decade. The case law on the subject is similarly sparse.

In this Part, I will examine the three methods that Congress has attempted to use in its fight against online gambling. The first approach, criminalizing the operation of gambling websites, was effected through the Wire Act of 1961.<sup>96</sup> The second approach, imposing criminal sanctions on individual gamblers, was introduced only once, in 1997,<sup>97</sup> and was never enacted. The third and final approach is prohibiting domestic financial institutions from transacting with offshore Internet casinos. First proposed by Congress in 2003,<sup>98</sup> it failed several times before finally being successfully incorporated into the SAFE Port Act in 2006. I will analyze each approach and describe how each fails to address the problems that Internet gambling poses.

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<sup>95</sup> NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 62, at 7-17 ("Roughly 85 percent of Nevada's gambling revenues come from out-of-state tourists. Thus, Nevada receives the economic benefits of the dollars lost to gambling, while the attendant social and economic impacts of unaffordable gambling losses [fall elsewhere].").

<sup>96</sup> 18 U.S.C. § 1084 (2000).

<sup>97</sup> Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. § 3(a) (1997).

<sup>98</sup> Unlawful Internet Gambling Funding Prohibition Act, H.R. 21, 108th Cong. § 3(a) (2003); Unlawful Internet Gambling Funding Prohibition Act, S. 627, 108th Cong. § 3(a) (2003).

### A. Prohibiting Website Operation

Outlawing the operation of gambling websites was the first—and until recently, the only—method used to combat Internet gambling. It came to be used almost by default: Congress had enacted the Wire Act in 1961 as part of a series of legislation aimed at curbing book-making conducted by organized crime groups.<sup>99</sup> In relevant part, it reads: “Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission . . . of bets or wagers . . . on any sporting event or contest . . . shall be fined[,] . . . imprisoned[,] . . . or both.”<sup>100</sup> Written long before the creation of the Internet, it was obviously not intended to regulate gambling over the Internet; nonetheless, the term “wire communication facility” has been interpreted to include the Internet.<sup>101</sup>

The Wire Act’s applicability to Internet gambling has two significant limitations. First, the Act creates liability only for those “engaged in the business of betting or wagering.”<sup>102</sup> In other words, only the people running gambling websites, not individual users, violate the Wire Act. The legislative history of the Act supports this interpretation, and courts have been unwilling to extend liability to individual gamblers.<sup>103</sup> Second, the Act only applies to gambling on “any sporting event or contest.”<sup>104</sup> While it is unclear whether non-sports betting is exempt,<sup>105</sup> legislative history, both past and present, strongly suggests that the Wire Act applies exclusively to sports betting and not to poker or other casino games.<sup>106</sup>

With the emergence of Internet gambling in the late 1990s, Congress twice attempted to modernize and expand the scope of the

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<sup>99</sup> Antonia Z. Cowan, *The Global Gaming Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 251, 257 (2003) (discussing history of Wire Act).

<sup>100</sup> 18 U.S.C. § 1084(a).

<sup>101</sup> *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (defining Internet as wire facility); *see also In re Mastercard Int’l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002) (assuming, but not discussing, that Internet qualifies as wire communication facility in analysis of alleged Wire Act violation).

<sup>102</sup> 18 U.S.C. § 1084(a).

<sup>103</sup> *E.g.*, *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981) (“This bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets. . . . It does not go after the casual gambler . . . .” (quoting 107 CONG. REC. 16,534 (1961) (statement of Rep. Celler))).

<sup>104</sup> 18 U.S.C. § 1084(a).

<sup>105</sup> If “sporting” is only modifying “event,” and not “contest,” then “contest” could be construed to include essentially any form of gambling.

<sup>106</sup> *See In re Mastercard Int’l Inc.*, 132 F. Supp. 2d 468, 480–81 (E.D. La. 2001) (noting that recently introduced legislation has sought to expand Wire Act to include all forms of gambling and citing legislative history that states Act applies to “horse racing and other sporting events” (quoting 107 CONG. REC. 16,533 (1961) (statement of Rep. Celler))), *aff’d*, 313 F.3d 257 (5th Cir. 2002).



Wire Act to include all forms of online gambling. The Internet Gambling Prohibition Act of 1997 (1997 Act) would have made it illegal “for a person engaged in the business of betting or wagering to engage in that business through the Internet.”<sup>107</sup> The Internet Gambling Prohibition Act of 1999 had a similar provision,<sup>108</sup> although it included several exemptions to appease various interests.<sup>109</sup> Both bills had their share of opponents<sup>110</sup> and supporters,<sup>111</sup> and neither bill became law.<sup>112</sup>

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<sup>107</sup> Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. § 3(a) (1997).

<sup>108</sup> Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. § 2(a) (1999) (“[I]t shall be unlawful for a person engaged in a gambling business knowingly to use the Internet . . . to place, receive, or otherwise make a bet or wager . . .”).

<sup>109</sup> *Id.* (exempting state lotteries, certain lawful horseracing activities, and fantasy sports).

<sup>110</sup> The 1997 Act was opposed by state lotteries, Indian gaming interests, operators of fantasy sports leagues, horseracing websites, and the Department of Justice. *Internet Gambling Prohibition Act of 1997: Hearing on H.R. 2380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. *passim* (1998) [hereinafter *1997 House Hearings*]. While sports leagues were in favor of a bill that would prohibit Internet gambling, they felt that the inclusion of fantasy sports made this bill too broad. *Id.* at 99–101 (statement of Marianne McGettigan, Counsel, Major League Baseball Players Association).

The 1999 Act had fewer detractors, as some interests were granted exemptions in that version of the bill. Indian gaming interests were not among those exempted. S. REP. NO. 106-121, at 35 (1999) (noting that Chairman of Senate Indian Affairs Committee requested referral of bill because it restricted gaming activities under Indian Gaming Regulatory Act). Further, the Interactive Gaming Council argued for regulation of Internet gambling instead of prohibition. *Id.* at 8.

The Department of Justice opposed both bills on several grounds. First, it argued that the Wire Act could be amended to address the problem of Internet gambling. *Id.* at 19; Letter from Jon P. Jennings, Acting Assistant Attorney Gen., Dep’t of Justice, to Senator Patrick J. Leahy, Ranking Minority Member, Comm. on the Judiciary (June 9, 1999), available at <http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm>. Second, the Department of Justice argued that the functional effect of the law would be to further force Internet gambling offshore, exacerbating the enforcement problem. *1997 House Hearings, supra*, at 80, 85–87 (statement of Kevin DiGregory, Deputy Assistant Att’y Gen., United States Department of Justice). Finally, the Department of Justice argued that the 1999 Act was ineffective in addressing the problem of Internet gambling and opposed what it said were arbitrary exemptions granted to broad sections of the gambling industry. H.R. REP. NO. 106-655, at 49–50 (1999).

<sup>111</sup> Those in favor of the bills were generally groups fundamentally opposed to gambling in all its forms. *See, e.g., 1997 House Hearings, supra* note 110, at 48–50 (statement of Bernard P. Horn, Director of Political Affairs, National Coalition Against Gambling Expansion) (arguing that ban on Internet gambling would help turn tide against growing gambling industry); *see also* S. REP. NO. 106-121, at 11–20 (1999) (outlining case against Internet gambling).

<sup>112</sup> The 1997 Act passed in the Senate by a vote of ninety to ten. Ryan D. Hammer, *Does Internet Gambling Strengthen the U.S. Economy? Don’t Bet on It*, 54 FED. COMM. L.J. 103, 108 (2001–02). It was introduced and discussed in the House, but expired before reaching a vote. Elliott Almond, *Online Gambling—Borderless Betting*, SEATTLE TIMES, Jan. 24, 1999, at D1. The 1999 Act passed in the Senate unanimously. Chris Jenkins, *Gambling Bill Takes a Step*, USA TODAY, Apr. 7, 2000, at 23C. It was voted on in the

The critical flaw inherent in any attempt to criminalize gambling websites directly, regardless of the scope of gambling activities banned, is that it only can reach websites within the United States' jurisdiction. While this approach attempts to eliminate gambling websites altogether, it instead only forces them to be hosted on foreign soil. Indeed, a number of countries explicitly allow for the hosting of gambling websites,<sup>113</sup> leading many gambling websites to have moved offshore long before the introduction of the 1997 Act rather than risk liability under the ambiguous Wire Act.<sup>114</sup> While website criminalization can effectively reach those individuals brave, ignorant, or foolish enough to enter American jurisdiction,<sup>115</sup> the proliferation of gambling websites overseas under the "watchful eye" of the Wire Act is evidence itself of the Act's inadequacies.<sup>116</sup>

This movement overseas renders any ban on operating a gambling website ineffective in dealing with the problems that stem from Internet gambling. First, it does nothing to prevent underage gambling. Once a gambling website is created overseas, all gamblers—both underage and otherwise—are free to use it without consequence. Second, forcing these websites to be hosted outside of U.S. jurisdiction makes it essentially impossible for American authorities to regulate their financial legitimacy. Finally, forcing Internet casinos to be hosted and operated overseas deprives America of the potential tax revenues and employment opportunities that it might receive if the businesses were located domestically. Despite these extensive short-

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House under a suspension of the rules and fell forty-five votes short of the two-thirds majority required thereunder. James Rosen, *House Loses Bid on Net Gaming: Home-Betting Ban Falls Short in Vote*, SACRAMENTO BEE, July 18, 2000, at A1. For information about suspension of the rules, see THOMAS P. CARR, CONG. RESEARCH SERV., SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPLE FEATURES (2004), <http://www.rules.house.gov/archives/98-314.pdf>.

<sup>113</sup> See Michael McCarthy, *Feds Go After Offshore Online Betting Industry*, USA TODAY, July 19, 2006, at C6 (stating that online gaming companies locate in countries where online gaming is legal, such as England, Costa Rica, and Gibraltar).

<sup>114</sup> See *1997 House Hearings*, *supra* note 110, at 11 (statement of Bill McCollum, Chairman, Subcomm. on Crime) (noting that most online casinos are operated offshore in locales such as Caribbean islands or Costa Rica).

<sup>115</sup> For example, Jay Cohen, who ran a website that accepted bets on horseracing, was a U.S. citizen living in Antigua, where his company was based. He returned to the United States to fight charges filed against him under the Wire Act and was arrested. *United States v. Cohen*, 260 F.3d 68, 70–71 (2d Cir. 2001) (affirming conviction). For another example of a Wire Act violator being arrested upon entry into the United States, see *supra* notes 1–4 and accompanying text.

<sup>116</sup> See REPUBLICAN POLICY COMM., ILLEGAL INTERNET GAMBLING: PROBLEMS AND SOLUTIONS 2–3 (2003), available at [http://rpc.senate.gov/\\_files/CRIMEes090403.pdf](http://rpc.senate.gov/_files/CRIMEes090403.pdf) (noting Wire Act's ineffectiveness in reaching offshore Internet gambling sites).

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comings, this approach was, until very recently, the only one that carried legal force.

### B. *Prohibiting Individual Gambling*

The 1997 Act also introduced a new approach to combat Internet gambling: imposing criminal liability on individual gamblers. The Act would have made it illegal for “a person to place, receive, or otherwise make a bet or wager, via the Internet.”<sup>117</sup> Despite facial appeal, imposing liability on individual bettors would have been an ineffective approach.

In theory, this expansion of liability would punish and deter individual gamblers. Rather than shutting off Internet gambling only from the supply side—an inherent limitation of the criminalization of websites—this approach would also limit demand. Although this goal appears reasonable, it is impractical. Regulation of this type and magnitude is simply not possible on the Internet.<sup>118</sup>

Even assuming the Department of Justice was able to deal with individual gamblers, the problems of Internet gambling would remain unaddressed. Gamblers who were not caught or deterred would have no legal recourse against fraudulent online casinos because they would fear being prosecuted for their own actions.<sup>119</sup> As a result, the people in the best position to spot fraudulent behavior by gambling websites—the bettors themselves—would have no means to draw attention to the need for enforcement. Criminalizing individual online gamblers would force both the websites and the end users underground, aggravating the existing problems of an unregulated system.

### C. *Prohibiting Financial Transactions with Online Casinos*

The final approach to handling Internet gambling is prohibiting the transfer of funds from domestic financial institutions to gambling sites, a method the NGISC recommended in its 1999 report.<sup>120</sup> Congress unsuccessfully tried to implement this approach in the

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<sup>117</sup> Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. § 3(a) (1997).

<sup>118</sup> Perhaps the best evidence of this is that the Department of Justice considered it impossible to undertake such a vast enforcement project. *See 1997 House Hearings, supra* note 110, at 77, 79–80 (statement of Kevin DiGregory, Deputy Assistant Att’y Gen., United States Department of Justice) (noting that new federal Internet gambling regime would unnecessarily shift responsibilities away from states, and, further, that extending liability against individual bettors would be “both unnecessary and unwise”).

<sup>119</sup> *See supra* Part II.B (discussing users’ reactions to dubious legal status of online gambling).

<sup>120</sup> *See supra* p. 923.

Unlawful Internet Gambling Funding Prohibition Act (2003 Act)<sup>121</sup> and in the Unlawful Internet Gambling Enforcement Act of 2006 (2006 Act)<sup>122</sup> before finally successfully incorporating it into the SAFE Port Act.<sup>123</sup>

<sup>121</sup> Unlawful Internet Gambling Funding Prohibition Act, H.R. 21, 108th Cong. § 3(a) (2003); Unlawful Internet Gambling Funding Prohibition Act, S. 627, 108th Cong. § 3(a) (2003). The bill passed with strong support in the House. Justin Gest, *House Wants to Inhibit Offshore Internet Gambling*, L.A. TIMES, June 11, 2003, at A38 (reporting vote was 319 in favor and 104 against). While the Senate Committee on Banking, Housing, and Urban Affairs unanimously approved the bill, S. REP. NO. 108-173, at 1 (2003), it never reached a vote in the Senate. See *Web Casinos Surge in Value Despite US Ban Bill*, NEWCASTLE J., July 13, 2006, at 31 (noting unlikelihood that bill would reach Senate vote).

<sup>122</sup> H.R. 4411, 109th Cong. (2006). On July 11, 2006, the bill was discussed in the House for one hour. Congressmen gave anecdotes of college students' lives that had been destroyed by online gambling, e.g., 152 CONG. REC. H4991 (daily ed. July 11, 2006) (statement of Rep. Hooley), lamented the disaster of underage gambling, e.g., *id.* at H4990 (statement of Rep. Pitts), and praised the bill for giving law enforcement the necessary tools to eradicate Internet gambling, e.g., *id.* at H4985 (statement of Rep. Leach).

Opponents felt the bill was too paternalistic, e.g., *id.* at H4985 (statement of Rep. Frank) ("Now, people have said, well, some students abuse it. We should work to try to diminish abuse. But if we were to outlaw for adults everything that college students abuse, we would all just sit home and do nothing."), and warned that the law would only force gaming industries to non-cooperative countries, e.g., *id.* at H4995-96 (statement of Rep. Scott). Congresswoman Shelley Berkley, whose district includes the Las Vegas Strip, argued adamantly that the bill would be ineffective. *Id.* at H4996 ("Like it or not, Americans who wish to wager online will find a way to do so."). Some may be surprised that Las Vegas would be against an Internet gambling prohibition, figuring that gamblers might substitute away from Las Vegas and toward the Internet. Quite to the contrary, Las Vegas casinos would like nothing more than the legalization of Internet gambling, which would allow them to enter the industry and seize some of the available profits. But casinos are basically happy as long as Internet gambling is widely available; as online gambling flourishes, so does interest in gambling more generally. And for newly interested gamblers, there is no destination more desirable than Las Vegas, the national Mecca of gambling. The concurrent explosion of Internet gambling revenues and Las Vegas revenues shows their complementary nature.

The 2006 Act passed in the House by a vote of 317 to 93, but no action was taken in the Senate. THOMAS (Library of Congress), H.R. 4411, All Actions, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04411:@@L&summ2=M&> (last visited Feb. 21, 2007).

<sup>123</sup> Pub. L. No. 109-347, §§ 801-03, 120 Stat. 1884, 1952-62 (2006) (to be codified at 31 U.S.C. §§ 5361-67). Two and one half months after the 2006 Act caused a stir in the House, the House-Senate Conference Committee attached its language to the end of the SAFE Port Act and released the conference report at 9:29 p.m. on the night before a congressional recess in advance of upcoming elections. THOMAS (Library of Congress), H.R. 4954, All Actions, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04954:@@L&summ2=M&> (last visited Feb. 21, 2007); see also Pfanner, *supra* note 7 (noting efforts by Rep. Leach to add legislation just before congressional recess). The 112-page House Conference Report included no discussion of the newly added Internet gambling provisions. H.R. REP. NO. 109-711 (2006). Several members of the House scolded Leach for attaching the gambling legislation to such an important Act, knowing that it would be impossible to defeat or alter the bill on such short notice. E.g., 152 CONG. REC. H8032 (daily ed. Sept. 29, 2006) (statement of Rep. Sánchez) ("So why is there Internet gambling in our port bill?"); *id.* at H8034 (statement of Rep. Jackson-Lee) ("[I support this bill], though I am disappointed . . . that we have extraneous material, such as the Internet gam-

Rather than going after the gambling websites or the gamblers themselves, this approach attacks the source of the funds.<sup>124</sup> It prohibits gambling websites<sup>125</sup> from accepting payments from banks, credit card companies, or other similar financial institutions,<sup>126</sup> and requires the Federal Reserve Board, in consultation with the Attorney General, to create regulations requiring domestic financial institutions to block funds transfers to online casinos.<sup>127</sup> The SAFE Port Act also expressly calls for actions to be taken to enlist help from foreign jurisdictions in effectuating this regulation.<sup>128</sup>

In crafting this new approach, legislators largely conceded that direct control over gambling websites or individual gamblers was impractical. Banking institutions, though, largely located in the United States and already the subject of meticulous regulation, seemed an easier and more effective target.<sup>129</sup>

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bling, on this bill.”); *id.* at H8035–36 (statement of Rep. Lobiondo) (“I rise in support of . . . the SAFE Port Act . . . . However, I am not proud, nor do I support the decision by the leadership in the other body to attach at the last minute and without consultation, the Internet Gambling Prohibition and Enforcement Act.”). The bill passed in the House just after midnight by a vote of 409 to 2. THOMAS (Library of Congress), H.R. 4954, *supra*.

Discussion in the Senate was similar: Several senators lauded the necessary security measure, but criticized the last-minute addition of the gambling provision. For instance, Senator Joseph Lieberman stated:

This unilateral, partisan process also resulted in the eleventh hour insertion of a bill that purportedly outlaws Internet gambling but which may have unintended consequences. This issue clearly deserves more deliberation, and it is unfortunate that such a measure has been added to a critical bill designed to protect the Nation’s ports, legislation which this Congress must pass.

152 CONG. REC. S10814 (daily ed. Sept. 29, 2006) (statement of Sen. Lieberman); *see also id.* at S10815–16 (statement of Sen. Johnson) (“I have serious concerns about [the] extraneous provision that was included in the port security conference report . . . but perhaps none more so than how it became included in the port security conference report.”). With their hands tied and recess impending, the Senate approved the bill unanimously in a voice vote. Tony Batt, *Congress Passes Internet Bet Ban*, LAS VEGAS REV.-J., Sept. 30, 2006, at 4A.

<sup>124</sup> *See Proposals to Regulate Illegal Internet Gambling: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 1 (2003) [hereinafter *2003 Senate Hearings*] (statement of Richard C. Shelby, Chairman, S. Comm. on Banking, Housing, and Urban Affairs) (“Clearly, the casinos themselves are out of the reach of even Federal authorities, and can be expected to continue to flaunt U.S. law.”).

<sup>125</sup> Gambling is defined very broadly; there are very few specific exemptions. SAFE Port Act § 802(a) (to be codified at 31 U.S.C. §§ 5362(1)(E)(ix), 5362(10)(D)) (exempting activities such as fantasy sports and certain horserace betting).

<sup>126</sup> *Id.* § 802(a), 120 Stat. at 1957 (to be codified at 31 U.S.C. § 5363) (prohibiting gambling websites from accepting transmitted funds).

<sup>127</sup> *Id.* § 802(a), 120 Stat. at 1962 (to be codified at 31 U.S.C. § 5364) (setting deadline for prescription of procedures at 270 days after enactment of SAFE Port Act).

<sup>128</sup> *Id.* § 803(a), 120 Stat. at 1962 (to be codified at 31 U.S.C. § 5361).

<sup>129</sup> *See 2003 Senate Hearings, supra* note 124, at 1 (statement of Richard C. Shelby, Chairman, S. Comm. on Banking, Housing, and Urban Affairs) (“The only available means of effective interdiction is through the media by which the gambler and the casino

However, the prohibition of funds transfers between financial institutions and gambling sites only prevents underage gambling and eradicates fraud to the extent that it effectively induces financial institutions to identify and block payments to Internet casinos. Even proponents of the bill have conceded that a foolproof system is nearly impossible and that, despite the best efforts of all involved, some payments will slip through the cracks.<sup>130</sup>

Even a perfect system that prevented every payment by a domestic financial institution would be ineffective in stopping Internet gambling. Instead of entirely cutting off access to online casinos, this approach will only force gamblers to use financial services that, like the casinos, are located offshore and beyond U.S. jurisdiction.<sup>131</sup> By forcing domestic financial institutions out of the picture, this approach magnifies the existing problems of online gambling. Under this regime, unregulated offshore financial institutions replace domestic ones that are carefully regulated to prevent theft and fraud. It thus creates insecurity at the level of the financial transaction with no available mechanism to prevent or monitor fraud, theft, or money laundering—in addition to the insecurity inherent in the unregulated casinos themselves.

In fact, this is exactly what has happened. When President Bush signed the SAFE Port Act into law, reputable e-wallet services began to disappear.<sup>132</sup> One such provider, FirePay, immediately announced that it would abide by the law and began cutting off payments from

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interface—namely, through . . . the payment system provider.”); *id.* at 9 (statement of Richard Blumenthal, Att’y Gen. of Connecticut) (“If we can shut down the means of payment, the credit card, financial instruments, e-payment, and other kinds of similar financial infrastructure, we can get to the root of this problem and really have an effective enforcement mechanism . . .”).

<sup>130</sup> *Id.* at 9–10 (statement of L. Richard Fischer, Attorney, Morrison & Foerster, LLP) (“[S]ome transactions will escape the blocking mechanisms.”).

<sup>131</sup> Even before the SAFE Port Act, American Internet gamblers found alternatives abroad when domestic financial institutions voluntarily took measures to prevent payments to online casinos. *Id.* at 5 (statement of Sen. Christopher J. Dodd) (applauding CitiBank, Bank of America, Chase Manhattan Bank, and PayPal, all of which voluntarily block gambling transactions); *see also* Carolyn Said, *Super Bowl XL: Wanna Bet?*, S.F. CHRON., Feb. 4, 2006, at A1 (noting that PayPal and some banks have blocked gambling transactions, but listing viable alternatives).

<sup>132</sup> Some of the biggest and most reliable online gambling companies also voluntarily exited the U.S. market, Armitage, *supra* note 14, while other prominent sites promised to continue offering their product to U.S. customers. Chuck Blount, *On Poker: Internet Law Introduces New Era of Sour Feelings*, SAN ANTONIO EXPRESS-NEWS, Oct. 19, 2006, at 3C (noting that PartyPoker immediately froze accounts, while Pokerstars, UltimateBet, FullTiltPoker, DoysesRoom, and BoDog pledged to remain in U.S. market). Not surprisingly, these “defiant” sites experienced surges in business as the masses that had been cut off looked for a new home. Diana Marrero, *Gamblers Still Online Despite Law*, DESERET NEWS (Salt Lake City), Dec. 11, 2006, at A2 (stating that while PartyGaming’s daily visita-

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customers in the United States to online casinos.<sup>133</sup> Reputable providers that initially remained in the market were also eventually pushed to withdraw. Neteller—a British company similar to PayPal that quickly became the largest clearinghouse for Internet gambling payments after the withdrawal of American institutions—announced plans to continue business as usual, at least until regulations required under the SAFE Port Act were passed.<sup>134</sup> However, less than three months after that announcement, the two cofounders of Neteller were arrested and charged with conspiring to transfer funds in an effort to promote illegal gambling.<sup>135</sup> Almost immediately, Neteller announced it would stop moving funds from American customers to online casinos, a practice that had accounted for sixty-five percent of its business.<sup>136</sup>

It did not take long for the Internet gambling community to adapt. Once companies such as FirePay and Neteller withdrew, similar e-wallet services, such as ePassporte and Click2Pay, experienced surges in business<sup>137</sup> despite having questionable security and reliability.<sup>138</sup> Other inventive online gamblers have gotten around the restrictions by using prepaid online gift cards.<sup>139</sup>

While it is certainly possible that the new law has deterred some casual online gamblers, so far there has been more of a reshuffling than an exodus.<sup>140</sup> FirePay customers moved to Neteller and then to

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tion has dropped over sixty percent, “Full Tilt Poker has increased its number of daily players to more than 5,000 in late October from just more than 3,000 in late September”).

<sup>133</sup> Press Release, Optimal Group, Optimal Group’s FireOne Group plc Subsidiary to Cease U.S. Facing Operations (Oct. 10, 2006), available at [http://www.optimalgrp.com/press\\_room/PressReleases/Oct10\\_2006.asp?Lang=eng](http://www.optimalgrp.com/press_room/PressReleases/Oct10_2006.asp?Lang=eng). FireOne Group is FirePay’s parent company. Adam Goldman, *Judge’s Order Places Bettors’ Funds at Risk*, S. FLA. SUN-SENTINEL, Aug. 13, 2006, at 4E.

<sup>134</sup> Press Release, Neteller Plc, Update on US Position (Oct. 19, 2006), available at <http://investors.neteller.com/neteller/upload/Pressreleaseupdate19oct06Final.pdf>.

<sup>135</sup> Larry Neumeister, *U.S. Charges Firm’s Execs in Internet Gambling Case*, CHI. TRIB., Jan. 17, 2007, at 5.

<sup>136</sup> David Litterick, *Gambling Neteller Closes US Payments Service After Founders’ Arrest*, DAILY TELEGRAPH (London), Jan. 19, 2007, at 4.

<sup>137</sup> John Caldwell, *The Cyber Shot Heard ‘Round the World*, POKER PLAYER, Feb. 5, 2007, at 6, available at <http://www.pokerplayernewspaper.com/back-issues/pp070205S.pdf>.

<sup>138</sup> Christopher Costigan, *Online Gambling: ePassPorte Security Flaws Have Customers Worried*, GAMBLING911.COM, Feb. 14, 2007, <http://www.gambling911.com/Online-Gambling-ePassPorte-Security-Flaws-021407.html> (reporting user complaints of security breaches and unapproved funds transfers out of ePassporte user accounts).

<sup>139</sup> Christopher Costigan, *Online Gambling: US Customers Best Valentine’s Day Gift*, GAMBLING911.COM, Feb. 13, 2007, <http://www.gambling911.com/online-gambling-021407.html> (describing tactic, much lauded in online poker forums, of purchasing prepaid gift cards that are accepted at many online casinos).

<sup>140</sup> See *supra* note 132 (listing gambling websites that have pledged to remain operational).

ePassporte, just as users moved to Neteller after PayPal left the American market.<sup>141</sup> When regulations under the gambling bill take effect in July 2007, Internet gamblers will have found online casinos willing to serve them and e-wallets willing to transfer their funds.<sup>142</sup>

#### IV REGULATING INTERNET GAMBLING AND CONTROLLING ITS PROBLEMS

Creating a framework to stem the problems of Internet gambling is no easy task. Legal scholars, journalists, gamblers, and congressmen have all praised regulation in the abstract<sup>143</sup> but there have been very few suggestions for how such a system would actually work. How would such a system prevent underage gambling and fraud? How would it generate tax revenues? And, perhaps most importantly, why would individual gamblers and foreign online casinos willingly abide by the rules? In this Part, I present a system that begins to answer these questions. Admittedly, it is not a perfect solution; however, it would be a large improvement over the current state of affairs.

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<sup>141</sup> See Michael A. Hiltzik, *Bad Luck for Online Gaming; Shares of Net Operators Drop in London After the Senate Votes to Block Payments from the U.S.*, L.A. TIMES, Oct. 3, 2006, at C7 (describing decrease in price of shares for PartyGaming and Neteller following passage of SAFE Port Act).

<sup>142</sup> The replacement service creating the most buzz is YouTeller, a London-based company launched in March 2007 that promises to take over where Neteller left off. Allyn Jaffrey Shulman, *E-Wallets Available*, CARDPLAYER.COM, Feb. 7, 2007, [http://www.cardplayer.com/poker\\_law/article/1849](http://www.cardplayer.com/poker_law/article/1849). YouTeller's founder boasts: "We have no overseas branch in a NAFTA-country like Neteller or Citadel, so we are not affected by US legislation." *Neteller Replacement Could Be Youteller*, EYE ON GAMBLING, Jan. 31, 2007, <http://www.eog.com/news/full-article.aspx?id=17378>. For other online payment services that have appeared in the wake of the SAFE Port Act and Neteller's exit from the market, see *3 New Deposit Methods for Online Poker Players*, POKERPAGES.COM, Feb. 6, 2007, <http://www.pokerpages.com/poker-news/news/3-new-deposit-methods-for-online-poker-players-29506.htm>. See also *supra* note 21.

<sup>143</sup> See, e.g., Peter J. Schoolidge, *Gambling Blindfolded: The Case for a Regulated Domain for Gambling Web Sites*, 10 GAMING L. REV. 252 (2006) (suggesting creation of top-level domain specifically for gambling websites); Joel Weinberg, Comment, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 316-20 (2006) (describing basic aspects of proposed regulatory scheme, but not describing why it would work); Justin Berton, *Online Poker Players Face New Prohibition*, S.F. CHRON., Aug. 27, 2006, at A1 (quoting Internet poker player who stated, "I wish they were just trying to regulate us or tax us"); Editorial, *Regulate, Tax Online Poker and Everyone Wins*, ARIZ. DAILY STAR, July 14, 2006, at A8 (criticizing Congress's devotion to prohibition as solution). A top-level domain is the suffix of a web address, such as ".com" or ".org." Certified Internet gambling websites could all end in ".cas" (short for "casino"), for example. One congressman has unsuccessfully introduced legislation to create a commission that would look into the possibility of regulating Internet gambling. Internet Gambling Licensing and Regulation Commission Act, H.R. 5760, 107th Cong. §§ 3-4 (2002).



At the core of the system is the Internet Gambling Regulation Commission (IGRC), which would be created to certify gambling websites that meet certain qualifications. Among these would be an effective method for excluding underage users, full disclosure of website and financial operations (to protect against any sort of fraud), the payment of a licensing fee or tax, and the refusal to transact with financial service providers that also transact with noncertified casinos.<sup>144</sup> Operation of a gambling website in the United States without IGRC certification would be illegal,<sup>145</sup> as would fund transfers to any such site. Since offshore casinos and financial institutions are not subject to American laws, the only way to control them is to have them voluntarily abide by the regulations. I will describe how each component of the regulatory system would work and why users, foreign online casinos, and foreign financial institutions would voluntarily opt into the scheme.

#### A. *The Benefits of Certification*

As a preliminary matter, it is important to state exactly what IGRC certification would provide. Perhaps most importantly, certification would be a clear indication of reliability and legal compliance. Certified websites could be differentiated from noncertified ones in a number of ways, including creation of an exclusive top-level domain,<sup>146</sup> links to certified websites on the IGRC's website, or software on the user's computer that communicates with both the gambling website and the IGRC to verify certification.

The certification system would benefit both users and websites. Users, being able to differentiate certified from noncertified sites easily, would almost always choose certified sites;<sup>147</sup> a lack of certification would be a glaring red flag. Given the strong negative signal that noncertification would send and the resulting loss of revenue from concerned customers, foreign websites would need to certify in order

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<sup>144</sup> Other requirements could include prominently displaying the rules and house advantage for each game, providing information on problem gambling and treatment, and allowing users to self-block.

<sup>145</sup> Since the Wire Act's prohibition of online casinos has effectively excluded domestic online casinos altogether, prohibiting only a subset of American Internet casinos—that is, noncertified websites—could also be achieved. In my system, the Wire Act could be amended to exempt certified websites.

<sup>146</sup> See Scoolidge, *supra* note 143, at 262.

<sup>147</sup> There is a market for reliability. PartyGaming, the most popular online casino, *see supra* note 47, proudly displays its policing policies. PartyGaming, Responsibility, <http://www.partygaming.com/responsibility/> (last visited Oct. 20, 2006). Also, informal bodies certify websites that meet certain standards. *E.g.*, eCOGRA, <http://www.ecogra.org/default.aspx> (last visited Feb. 22, 2007); *see also supra* note 90 and accompanying text (noting that majority of gamblers consider cheating by online casinos to be problematic).

to remain competitive with the domestic casinos that inevitably will do so in order to operate legally. Domestic financial institutions, without the fear of criminal prosecution or fraudulent casinos, would have no concerns about facilitating transactions between users and online casinos. Rather than exclude all sites, as they do currently, they would single out unregulated sites.<sup>148</sup> Foreign financial institutions, looking to interact with the large market of certified casinos and American consumers, would similarly exclude noncertified sites.

There is no question that the prerequisite for these positive developments—the founding of certified domestic online casinos—would happen. American casinos, currently out of the market entirely, would gladly choose certification and regulation over outright exclusion from the market.<sup>149</sup> Then, those websites—run by recognizable American casinos, offering simple credit card payment systems, and certified by the U.S. government—would have a clear advantage over noncertified foreign competitors, which would be stuck with end-around payment schemes through international financial institutions. To remain competitive and gain access to the American market, overseas Internet gambling outfits would thus have no choice but to become certified. It is doubtful that the compliance costs would outweigh the benefits of easy access to the American market, even for foreign websites with established reliability and no fear of American criminal prosecution.

### B. *Excluding Underage Users*

The biggest open question raised by this system is how to address the problem of underage users. It is important to state initially that there are ways to verify a user's age over the Internet.<sup>150</sup> Most systems cross-reference credit card, government identification, or similar identifying information with user-provided data.<sup>151</sup> These systems

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<sup>148</sup> Most domestic financial institutions willingly cut off payments to Internet casinos long before the SAFE Port Act required them to do so. Using IGRC certification to differentiate between certified and noncertified sites, these institutions would refuse payments to noncertified sites for the same reasons they currently exclude all sites. *See supra* note 131 and accompanying text (discussing domestic financial institutions that voluntarily block gambling transactions).

<sup>149</sup> *See 60 Minutes: Illegal and Thriving*, *supra* note 88 (noting huge profits CEO of MGM/Mirage expects could be realized if legitimate U.S. casinos could enter online gambling market).

<sup>150</sup> *See, e.g.*, Integrity, <http://integrity.aristotle.com> (last visited Oct. 20, 2006) (providing identity and age verification tools for web developers).

<sup>151</sup> *Id.*

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may not be perfect, but they are largely effective,<sup>152</sup> and as technology improves, age verification will become more reliable. Under the current regime, the problem is not that it is impossible to tell who is underage; the problem is that the majority of gambling websites are not doing so.<sup>153</sup>

The IGRC would require certified sites to adopt reliable age verification technology, and, as stated above, the majority of websites would comply readily in order to gain access to the legal American market. The potential flaw in this regulatory system is that, if it proved profitable to do so, foreign sites might waive certification specifically to target underage gamblers. Shut out of certified websites, minors would then look to these overseas alternatives.

It is likely, though, that most operations would prefer the legal-age user base that comes with certification to the underage user base that comes with noncertification. As more websites took measures to prevent underage use, those that allowed minors to gamble would become more and more conspicuous. And with a gauntlet of mandated intermediaries<sup>154</sup> and government enforcers in place to differentiate between legitimate and illegitimate businesses, it would be harder for noncertified websites to fly under the radar. As the norm shifted from an open playing field to one of scrutiny and regulation, unchecked access to Internet gambling would become the exception rather than the rule; just as importantly, IGRC certification would be

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<sup>152</sup> See *supra* notes 85–87 and accompanying text (noting that underage user who used her own credit card and lied about her age was turned away by sites using effective age verification systems).

<sup>153</sup> Other age-restricted online businesses, such as cigarette and alcohol retailers, have begun to implement age verification services. Hundreds of domestic wine retailers have implemented age verification services that effectively shut out underage buyers. See, e.g., Press Release, IDology Inc., WineAmerica Selects IDlive to Provide Age and ID Verification Affinity Program (July 18, 2005), available at <http://www.idology.com/press1.html> (announcing that winery trade association with over eight hundred members selected IDology to provide age verification services for its members' wineries); IDology Inc., News Room, <http://www.idology.com/2006news.html> (last visited Feb. 22, 2006) (listing online wine retailers that have adopted IDology age verification services). Major cigarette companies have also begun to implement tighter online age restrictions. Jim Downing, *Tobacco Firm to Curb Web Sales*, SACRAMENTO BEE, July 11, 2006, at D2 (noting that Lorillard is following lead of Philip Morris in restricting underage cigarette purchases). Major delivery companies have also agreed to prevent cigarette deliveries to U.S. customers. Press Release, Office of the N.Y. State Attorney Gen. Eliot Spitzer, FedEx to Strengthen Policies Restricting Cigarette Shipments (Feb. 7, 2006), available at [http://www.oag.state.ny.us/press/2006/feb/feb07a\\_06.html](http://www.oag.state.ny.us/press/2006/feb/feb07a_06.html) (FedEx); Press Release, Office of the N.Y. State Attorney Gen. Eliot Spitzer, Leading Package Delivery Company Agrees to Stop Shipping Cigarettes to Individual Consumers (July 5, 2005), available at [http://www.oag.state.ny.us/press/2005/jul/jul05a\\_05.html](http://www.oag.state.ny.us/press/2005/jul/jul05a_05.html) (DHL).

<sup>154</sup> These intermediaries could include payment services, Internet service providers, and web hosts.

a clear line between sites that could potentially cater to underage users and sites that could not.

While American law enforcement could take measures to arrest and prosecute noncompliant domestic sites and financial institutions, international support would be required for the system to be effective worldwide.<sup>155</sup> That said, almost all foreign governments have minimum age requirements,<sup>156</sup> so it seems plausible that they would assist the United States in prosecuting foreign institutions that were flaunting U.S. law. However, most foreign jurisdictions set the minimum age for online gambling at eighteen,<sup>157</sup> and those governments may be reluctant to sanction a financial institution or online casino for catering to a clientele that would be of legal age in their country.

The United States, therefore, may need to accept a minimum age of eighteen for online gambling. As a normative issue, this might not be so bad. We frequently allow domestic eighteen-year-olds to gamble legally—for example, in state-run lotteries,<sup>158</sup> and at horse tracks<sup>159</sup> and Indian casinos.<sup>160</sup> The prime motivator for increasing the gambling age to twenty-one is the presence of alcohol in casinos.<sup>161</sup> Since online casinos obviously cannot serve alcohol to their patrons, there is no good reason to differentiate between online gambling and, for instance, state lotteries.

Even with rigorous international support, this system could not guarantee an end to underage gambling. There will always be minors who want to gamble, individuals willing to go to great lengths to set up websites that allow them to do so, and countries willing to turn a blind eye. But the impossibility of perfection is no reason to give up on a

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<sup>155</sup> See *supra* notes 130–31 and accompanying text.

<sup>156</sup> See DAVID O. STEWART, AN ANALYSIS OF INTERNET GAMBLING AND ITS POLICY IMPLICATIONS 6 (2006), available at [http://www.americangaming.org/assets/files/studies/wpaper\\_Internet\\_0531.pdf](http://www.americangaming.org/assets/files/studies/wpaper_Internet_0531.pdf) (stating that minimum gambling age in most jurisdictions is eighteen).

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., Cal. Lottery, Play Responsibly, <http://www.calottery.com/secondarynav/playresponsibly> (last visited Oct. 20, 2006) (stating that lottery players must be at least eighteen years old).

<sup>159</sup> See, e.g., Ind. Council on Problem Gaming, Inc., History of Gambling in Indiana, <http://www.indianaproblemgambling.org/HistoryofGambling.aspx> (last visited Oct. 20, 2006) (presenting Indiana state law stating that pari-mutuel gambling, often used at race tracks, is legal for those over eighteen).

<sup>160</sup> See, e.g., Mich. Gaming Control Bd., Michigan Tribal Communities with Casinos, [http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_1414\\_2183---,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2183---,00.html) (last visited Oct. 20, 2006) (listing Michigan Indian casinos and their minimum gambling ages).

<sup>161</sup> Cf. David Giacomassi et al., *An Analysis of the Relationship of Alcohol to Casino Gambling Among College Students*, 14 J. GAMBLING STUD. 135, 142–45 (1998) (observing link between drinking and behavior consistent with gambling addiction among college students).

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solution altogether. Minors smoke, drink, and go to strip clubs, but we still regulate those activities and try to use age verification and education to restrict the activities to adults.

### C. Preventing Fraud

Most Internet gambling business, by now, has gone to legitimate websites.<sup>162</sup> Newspapers and the Congressional Record describe fraud as a problem with online gambling,<sup>163</sup> but rarely do we see references to actual events. To the extent the problem exists at all, it results from a few bad apples; the major problem is that users are ill-equipped to filter out fraudulent websites. IGRC certification would provide an easy way to do so.

As part of the initial certification process, gambling websites would have to submit extensive information about their operation, from their controlling officers to their business model to the computer code that facilitates the online gaming. Just as the Securities and Exchange Commission monitors publicly traded companies,<sup>164</sup> the IGRC could require financial statements and periodically check up on online casinos to ensure that they remain legitimate. Facing the loss of certification—and thus their user base—Internet casinos would have every reason to cooperate.

The IGRC could also mobilize Internet gamblers as a worldwide police force.<sup>165</sup> Congress could create a private right of action for any online gambler defrauded by a certified website. Providing remedies for wrongful actions would incentivize users to come forward with information regarding delinquent websites, thereby pressuring online casinos to remain honest. For the private right of action to be fully effective, international support would be required, but there is no reason to suspect that foreign governments would not have the same interest in quashing fraudulent behavior. Even without international support, user reports about crooked practices would quickly disseminate and help prevent further harm.

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<sup>162</sup> See *supra* note 147.

<sup>163</sup> See *supra* Part II.B.

<sup>164</sup> See Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–III (2000).

<sup>165</sup> The idea of asking the users of a system to police the system is not new. See Lior Jacob Strahilevitz, “*How’s My Driving?*” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1717–19 (2006) (examining user feedback schemes already in existence and proposing new system in which traffic enforcement is facilitated by continuous civilian driver feedback).

#### D. Revenues

There are a number of ways for the IGRC to generate revenue. It could charge an issuance fee for certification, an annual license fee, a tax on revenues, or any combination thereof. Domestic casinos would surely give up a portion of their potential profits for the chance to enter the online market. Faced with new competition and the prospect of an expanded user base, foreign casinos would likely follow suit. Even a very modest tax rate would likely be more than enough to fund the IGRC's entire operation.<sup>166</sup> Additional funds could go to educational programs, problem gambling treatment, cooperative foreign governments, and the several states.

Some foreign websites might prefer to forgo certification, believing that the costs would outweigh the benefits. Furthermore, some users will continue to patronize these sites, whether out of habit, an unwillingness to pay any cost of certification that is passed on to the consumer, or because the user is underage. But with such clear and significant benefits<sup>167</sup> coming at such a low cost,<sup>168</sup> most consumers would choose certified sites.

Americans are sending billions of dollars to offshore Internet casinos and keeping nothing except gambling's attendant problems.<sup>169</sup> The IGRC would allow us to get a return on the staggering amount of money we put into online gambling, enabling America to put online gambling revenues to good use. We would no longer bear the burden of gambling addiction without retaining any of the revenues necessary to offset those costs.

#### CONCLUSION: THE FUTURE OF INTERNET GAMBLING

The SAFE Port Act sent waves through the Internet gambling world. But with the dust now settling, the landscape is quite familiar. Users have begun to find new ways around new problems, while the

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<sup>166</sup> See Ronald Zbleski, *Don't Ban Online Gambling; Regulate and Tax It Instead*, CHI. SUN-TIMES, July 23, 2006, at B7 (citing study claiming that taxing and regulating Internet gambling would generate \$4.3 billion in taxes per year).

<sup>167</sup> These benefits would include the permissible use of a reliable credit card instead of an offshore e-wallet, a conspicuous seal of financial reliability, and the peace of mind that comes from knowledge of government approval of one's behavior.

<sup>168</sup> At most, consumers would have to pay whatever tax rate certified casinos are charged, which could be as low as one percent. Further, this cost would not necessarily be passed on to consumers. If it is necessary to compete with international operations, domestic casinos would pay that cost out of their profits rather than pass it on to consumers. In that scenario, users could take advantage of the superior service options at domestic casinos at no additional cost.

<sup>169</sup> See *supra* note 95 and accompanying text (describing how benefits accrue to Nevada as result of legalized gambling while problems associated with gambling are generally restricted to communities where tourists who visit Nevada live).

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SAFE Port Act tries to address a global issue with individualized arrests.

The long-term picture looks a lot like the past. American gamblers who wish to gamble online will find a way to do so despite the new law's prohibitions. Foreign companies will line up to collect the \$6 billion Americans spend gambling online each year. Online casinos will continue to be subject to a hodgepodge of foreign regulation, none of which takes a firm stance on any of the important issues outlined above. Self-regulation and informal regulatory bodies may emerge as the norm, but given the success of the industry in the absence of strict, uniform rules, there is little reason to believe anything will change.

American legislators have two options for how to proceed. One is to turn a blind eye and let the online gambling world develop as it may. The other option is to legalize, regulate, and tax Internet gambling. Although not a perfect fix, regulation would go a long way toward alleviating the problems of online gambling.

Some legislators may be ideologically opposed to legalizing Internet gambling, but the truth of the matter is that it is beyond the abilities of American law enforcement to stop it. Legislators should not throw the baby out with the bath water by refusing to control manageable problems because of their disapproval of something that, as history has proven, will persist regardless of legislative impediments. Congress should take the initiative and act as a world leader in gambling regulation, working to curb underage gambling and fraud while bringing billions of dollars of revenue into the American economy. If nothing else, it would make our airports safe for layovers again.