

THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006: THE PITFALLS OF PROHIBITION

*Lisa Boikess**

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*Lisa Boikess is an associate in the New York office of Ropes & Gray, LLP. She prepared this paper for Professor Jerome H. Skolnick's Regulation of Vice seminar at New York University School of Law. She would like to thank Ames Grawert, Lindsey Greer, and the journal staff for their assistance in editing this Note.

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INTRODUCTION

Fostering an often heated economic and moral debate, gambling proves to be a complex “vice.”¹ Although it constitutes a lucrative source of revenue for both federal and state governments, many perceive gambling as a morally bankrupt activity and argue that it undermines this country’s Puritan work ethic and results in serious harm to oneself and one’s family.² Despite these concerns, states have continued to legalize the practice over the past fifty years, contributing to its widespread expansion and increased social acceptance.³

1. See generally JEROME H. SKOLNICK, *HOUSE OF CARDS: THE LEGALIZATION AND CONTROL OF CASINO GAMBLING* 89 (1978) [hereinafter SKOLNICK, *HOUSE OF CARDS*]. “Vices such as gambling . . . may be both gratifying and wicked.” Jerome H. Skolnick, *The Social Transformation of Vice*, 51 *LAW & CONTEMP. PROBS.* 9, 10 (1988) [hereinafter Skolnick, *Social Transformation*]. Vice is defined as “[a] moral fault or failing; especially, immoral conduct or habit, as in the indulgence of degrading appetites; customary deviation in a single respect, or in general, from a right standard, implying a defect of natural character, or the result of training and habits; a harmful custom; immorality; depravity; wickedness; as, a life of vice; the vice of intemperance.” See WEBSTER’S REVISED UNABRIDGED DICTIONARY 1608 (1913).

2. SKOLNICK, *HOUSE OF CARDS*, *supra* note 1, at 9; Skolnick, *Social Transformation*, *supra* note 1, at 10. Jeremy Bentham also argues that heavy risk taking, which is characteristic of gambling, is morally wrong on utilitarian principles. *Id.*; see also J. BENTHAM, *THEORY OF LEGISLATION* 102–03 (1876).

3. SKOLNICK, *HOUSE OF CARDS*, *supra* note 1, at 11; Skolnick, *Social Transformation*, *supra* note 1, at 11 (“[I]n 1964, no state lotteries existed in the United States, but

This trend toward regulation halted sharply in 2006 when President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which created an overall ban on Internet gambling.⁴ The UIGEA broadly defines “unlawful Internet gambling” as acts in which individuals “place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet, where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made.”⁵

With an ongoing debate over the societal effects and meaning of this supposed vice, the Act’s complete ban on Internet gambling raises the question whether regulation would constitute a more effective means of controlling the activity. A sharp divide exists between social conservatives and libertarians on the connotation of Internet gambling: is it a social evil distinguishable from casino gambling, or is it a libertarian right?⁶ Critics of the UIGEA embrace the normative presumption that the Internet is itself libertarian, because it encourages free speech among consenting adults.⁷ However, social conservatives,

today [in 1988] twenty-six are in operation. They are endorsed by both Democrats and Republicans.”). Today, there are lotteries in forty-one states and in Puerto Rico. See Lottery-Data.com, <http://www.lottery-data.com/> (last visited Jan. 12, 2008). As of 1987, thirty-four states allowed pari-mutuel betting on horse racing and fifteen allowed it on dog racing. See Skolnick, *Social Transformation*, *supra* note 1, at 19. By late 2003, forty-three states had legalized gambling on thoroughbred horse racing, forty-two states on intertrack wagering, and twenty-five states on off-track wagering. See William A. Taggart & Jacqueline Wilks, *Gambling in the American States: “Finding Some Action” Has Never Been Easier*, 9 GAMING L. REV. 3, 4 (2005). As of 2004, thirty-five states had legalized slot machines. Dennis Cauchon, *Slots Prove Lucky for Many States*, USA TODAY, July 25, 2004, available at http://www.usatoday.com/news/nation/2004-07-25-slots_x.htm.

4. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802(a), 120 Stat. 1884, 1952, 1961 (2006) (codified at 31 U.S.C. § 5361).

5. *Id.* at § 802(a), 120 Stat. at 1955.

6. This Note defines “social conservative” as anyone whose political beliefs are right of center on social issues and who supports greater governmental control of vice. This note defines “libertarian” as anyone whose political beliefs are left of center on social issues and who does not support governmental control of vice. This Note defines “moderate libertarian” as anyone whose political beliefs are to the left of center on social issues but not as far left as libertarians and who supports limited governmental control of vice.

7. For example, the free speech presumption of the Internet has significantly affected U.S. obscenity law. The Child Online Protection Act of 1998 (COPA) regulated children’s Internet access but was unconstitutional due to its infringement on the rights of adults. 47 U.S.C.A. § 231 (1998); *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251–52 (2003) (holding that COPA’s definition of “material that is harmful to minors” was not narrowly tailored to achieve the government’s compelling interest in protecting minors from harmful material and thus failed strict scrutiny

such as Representative James Leach of Iowa, support government restraints on Internet gambling due to its supposed addictiveness and immorality.⁸ Yet, the most persuasive viewpoint is the one espoused by moderate libertarians, such as Charles Murray⁹ and George Will,¹⁰ in favor of regulation. This view presents a marked departure from the traditional libertarian view against any government interference.¹¹ Murray and Will argue that even if Internet gambling encourages solitary gambling, which, like drinking alcohol alone, is evidence of addictiveness,¹² the failure of the federal government to successfully prohibit alcohol should underscore the pitfalls of prohibition.¹³

This Note argues that the UIGEA has reignited policy debates about the government's involvement with vice, pitting social conservatives against moderate libertarians and leading to concerns about the Act's effectiveness. Explaining that enforcement of the Act will be difficult and likely ineffective, this Note contends that the UIGEA will lead to dire economic, criminal, and cultural consequences. As a result, this Note suggests that various regulatory schemes will provide a

under the First Amendment). The Supreme Court in *American Civil Liberties Union v. Ashcroft* was especially concerned with the breadth of COPA which penalized publishers for making improper material available to minors on the Internet but also impermissibly burdened a wide range of speech otherwise protected for adults. *Id.* at 253. The only remaining limitation on adult Internet access and use is through the Child Pornography Prevention Act of 1996 (CPPA) which only bans actual rather than virtual child pornography. 18 U.S.C. § 2252A (2006); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002).

8. See 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006).

9. Murray is an influential conservative policy writer.

10. Will is an American Pulitzer Prize-winning, newspaper columnist, journalist, and author.

11. "Libertarians believe the answer to America's political problems is the same commitment to freedom that earned America its greatness: a free-market economy and the abundance and prosperity it brings; a dedication to civil liberties and personal freedom that marks this country above all others; and a foreign policy of non-intervention, peace, and free trade as prescribed by America's founders." See Libertarian Party, The Libertarian Party on Today's Issues, <http://www.lp.org/issues> (last visited Oct. 11, 2008).

12. WebMD, Alcohol Abuse Health Center: Topic Overview, Feb. 23, 2007, <http://www.webmd.com/mental-health/alcohol-abuse/alcohol-and-drug-problems-topic-overview> ("Symptoms of an alcohol problem include personality changes, blackouts, drinking more and more for the same 'high,' and denial of the problem. A person with an alcohol problem may gulp or sneak drinks, drink alone or early in the morning, and suffer from the shakes.").

13. Charles Murray, Op-Ed., *The G.O.P.'s Bad Bet*, N.Y. TIMES (LATE ED.), Oct. 19, 2006, at A27; George F. Will, *Prohibition II: Good Grief: When Government Restricts Americans' Choices, Ostensibly for Their Own Good, Someone is Going to Profit from the Paternalism*, NEWSWEEK, Oct. 23, 2006, at 78 (arguing that the UIGEA will be as ineffective as alcohol prohibition, provoking imaginative evasions such as payment methods beyond the reach of Congress).

more comprehensive, enforceable, and effective means of both policing Internet gambling and preserving individual rights.

Part I introduces the events contributing to the passage of the UIGEA, summarizes the legislative history, and describes the text of the new law. Part II outlines the policy debate between social conservatives and libertarians regarding the Internet gambling prohibition. Part III discusses the effects of the UIGEA and questions its overall enforceability. Lastly, Part IV recommends two alternatives to a ban on Internet gambling: (1) an act similar to Great Britain's Gambling Act of 2005, which would regulate Internet gambling through a licensing regime, and (2) a top level domain name regime¹⁴ for licensed gambling websites to differentiate regulated sites from unregulated ones. Ultimately, a regulatory scheme, similar to these two examples, will prove superior to an overall ban on Internet gambling and remedy the many flaws presented by the UIGEA.

I.

THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

A. *Events Contributing to the Passage of the UIGEA*

The driving forces culminating in the Act's passage included: (1) the Department of Justice's (DOJ) determination that online gambling was illegal under the Wire Act, 18 U.S.C. §1084, (2) recent indictments under the Wire Act of overseas online gambling owners as a consequence of this determination, (3) political maneuvering by Congressional representatives to disassociate themselves from the Jack Abramoff scandal,¹⁵ and (4) a surprising alliance between opposing interest groups, such as casinos and social conservatives, to preserve

14. A "domain name" is "a sequence of usually alphanumeric characters ([such] as Merriam-Webster.com) that specifies a group of online resources (as of a particular company or person) and that forms part of the corresponding Internet addresses." Merriam-Webster Online, Domain Name, <http://www.merriam-webster.com/dictionary/domain%20name> (last visited Nov. 13, 2007). The domain name acts as a proxy for IP addresses. See Markus Muller, *Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 709, 714 (2005) (arguing that neither property nor intellectual property law principles support the claim that the U.S. owns the worldwide Internet). "The last part of each domain name, e.g., 'com', indicates the Top-Level-Domain (TLD) the domain name belongs to The second-to-last part of a domain name, e.g. berkeley in www.berkeley.edu, is called second level domain and indicates the subdomain berkeley in the TLD.edu." *Id.* A top level domain name regime would impose a unique TLD (as opposed to "com") to demarcate licensed gambling sites.

15. Jack Abramoff was implicated in a scandal to buy support from House conservatives against the Internet Gambling Prohibition Act. See *infra* Part I.A.3.

their economic and cultural interests. Beginning with a brief historical account of the rise of online gambling, Part I analyzes these factors, why they led to the Act's passage, and how they ultimately shaped the development of the UIGEA.

1. *History of Online Gambling*

Internet gambling exploded in the last decade with the proliferation of gambling magazines, television shows, and online gambling communities.¹⁶ Poker became especially popular with many new gambling sites teaching users how to play for free.¹⁷ Televised poker tournaments and the rise of poker celebrities continue to drive the poker phenomenon.¹⁸ Stories of online poker players becoming champions in the World Series of Poker, a national tournament dominated by poker professionals, motivate amateur players to bet online in the hopes of acquiring fame, fortune, and professional status.¹⁹

Online gambling first appeared in 1995 with "free" games, where users played with imaginary money.²⁰ Soon, users were able to play for prizes and make bets using credit cards and wire transfers.²¹ By 1999, bettors could open an account with the New York Racing Association, make bets via telephone, and use the Internet to provide wagering information.²² Online sportsbooks²³ initially transmitted odds information via the Internet, but in 1997, websites such as the World Sports Exchange (WSE) began allowing bettors to place wagers.²⁴

16. Alan Schmadtke, *Are All Bets Off-Line? New Law Makes It Riskier to Wager on the Web*, ORLANDO SENTINEL (FINAL ED.), Nov. 12, 2006, at C9.

17. *Id.*

18. *Id.*

19. Chris Moneymaker won the 2003 World Series of Poker and took home \$2.5 million in prize money. CNN.com, *Mr. Moneymaker Nets \$2.5m Poker Prize*, May 24, 2003, <http://www.cnn.com/2003/US/West/05/24/offbeat.poker.win.ap/>. He was the first person to win the World Series by qualifying on the Internet. *Id.* Greg Raymer was the 2004 World Series of Poker winner and also received the entry fee to the tournament by winning an online poker gambling tournament. Fossilmanpoker.com, Greg Raymer: The Fossilman 2004 WSOP Champion—FAQs, Nov. 12, 2007, <http://www.fossilmanpoker.com/faqs.htm>. He is now a representative of PokerStars.com, the website that sent both him and Chris Moneymaker to the World Series of Poker. *Id.*

20. DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET* 178 (University of Nevada Press 2005).

21. *Id.*

22. *Id.* at 178–79.

23. An online sports book is bookmaking or the "gambling practice of determining odds and receiving and paying off bets on the outcome of sporting events" transmitted via the Internet. Encyclopedia Britannica Online, Bookmaking, <http://www.britannica.com/eb/article-9080660> (last visited Jan. 12, 2008).

24. SCHWARTZ, *supra* note 20, at 179.

The WSE established its operations in Antigua, because it is illegal to establish an online sports betting operation in the United States (U.S.).²⁵ By 1998, the success of this organization spurred twenty-five legal and licensed sportsbooks to register in Antigua.²⁶ Other countries, such as Liechtenstein, Costa Rica, the Isle of Man, and some Caribbean nations also became hosts to gambling websites.²⁷

As more nations joined the online gambling industry, it became clear that regulation of these entities was necessary to preserve the integrity of the game. In response, the U.S. and the United Kingdom (U.K.) founded two separate self-governing bodies. In 1996, the U.S. founded the first of these governing bodies, the Interactive Gaming Council (IGC).²⁸ The council developed a code of conduct for regulatory compliance, dispute resolution, and financial transaction processing.²⁹ Adherence to this code is still necessary to receive the IGC seal of approval.³⁰ In 2003, another organization, known as the E-Commerce and Online Gaming Regulation and Assurance (eCOGRA), incorporated in the U.K. to regulate online casinos.³¹ eCOGRA developed a set of standards called the eCOGRA Generally Accepted

25. *Id.* The Internet gambling industry established sites in Antigua to avoid corporate taxes as a corollary benefit unrelated to legality. *Id.* at 178.

26. *Id.* at 180.

27. *Id.* at 180–81.

28. *Id.* at 195.

29. *Id.* The Code of Conduct requires that IGC members who are issued a gaming license from a sovereign jurisdiction provide evidence of this license and operate within its scope. Each IGC member must make its online gambling systems available for inspection by any legitimate gaming commission or governmental authority and post its confidentiality practices and procedures. Testimony of Sue Schneider, “*Internet Gambling: Good Gambling or Bad Bet?*” [hereinafter Interactive Gaming Council], July 12, 2001 at 8, <http://financialservices.house.gov/media/pdf/071201sc.pdf>. IGC members are required to install controls in order to detect and remove fraud and to retain detailed transaction records which will be accessible to any gaming commission or governmental authority. *Id.* Members must also limit access to minors and compulsive gamblers and ensure that there is adequate financing available to pay out winners and maintain ongoing operations. *Id.*

30. SCHWARTZ, *supra* note 20, at 195. To receive the seal of approval, applicants must adhere to the Code of Conduct, prove to be in good standing for a qualified period of time, and pass a comprehensive due diligence check. Interactive Gambling Council, *supra* note 29, at 10.

31. eCOGRA, Welcome to eCOGRA.org, <http://www.ecogra.org/default.aspx?OP=P> (last visited Jan. 12, 2009). See, e.g., Peter J. Schoolidge, *Gambling Blindfolded: The Case for a Regulated Domain for Gambling Web Sites*, 10 GAMING L. REV. 252, 261 (2006); Keith Furlong, *Gaming Continues as an Internet Success Story: Despite Obstructions from the U.S. Government, the Industry Uses Self-Regulation to Fill the Void Left by Governmental Inaction*, 9 GAMING L. REV. 211, 213 (2005).

Practices (eGAP) and currently issues seals of approval for sites that adhere to them.³²

The eGAP standards are more specific and extensive than the IGC's Code of Conduct and require online casinos to protect players by providing minimum security requirements for the receipts from and payments to players, retaining records of player transactions exceeding ten-thousand dollars or euros, and placing controls and virus scanners on information systems.³³ The standards also ensure "fair and responsible" gaming by restricting underage play via legal disclaimers, warnings, and filters on the website.³⁴ The standards further address problem gambling³⁵ through player self-exclusion³⁶ for a minimum of six months or a seven day minimum "cooling off" exclusion option.³⁷ Finally, the standards meet their objective of ensuring that players are playing games that are "independent and fair" by reconciling payout percentages³⁸ and ensuring the statistical indepen-

32. eCOGRA, eGAP Seal Requirements, <http://www.ecogra.org/egap.aspx?OP=P> (last visited Jan. 12, 2009). Online gambling operators may be awarded the Safe and Fair Seal of Approval under the following circumstances: "The operator and their respective software providers share the eCOGRA vision toward fair and responsible gaming, and have and prove the highest level of integrity; the operator and their respective software providers comply with the eCOGRA Generally Accepted Practices; and the operator and the software providers are approved by eCOGRA's Independent Directors." eCOGRA, Approved Operator Requirements, <http://www.ecogra.org/membership.aspx?Page=2&OP=O> (last visited Jan. 12, 2009).

33. eCOGRA, GENERALLY ACCEPTED PRACTICES (eGAP): CASINOS 3, 5, 6 (2007), <http://www.ecogra.org/eCOGRA%20GAP%20-%20Casinos%20-%20Approved%2026%20September%202007.doc>.

34. *Id.* at 9.

35. The eCOGRA Generally Accepted Practices do not explicitly define "problem gambling." For purposes of this Note, "problem gambling" refers to irresponsible gambling. *Id.* at 29.

36. The eCOGRA Generally Accepted Practices do not explicitly define "player self-exclusion." For purposes of this Note, the term "player self-exclusion" references when "a player has requested an exclusion due to a gambling addiction." *Id.* at 9–10. When a player requests an exclusion, operators must "take reasonable steps to ensure that the player does not receive any promotional materials during the exclusion period." *Id.*

37. *Id.* at 9. One rule in the eGAP Standards states that "self-exclusion due to a gambling addiction must be for a minimum period of 6 months." *Id.* In addition, a seven day minimum "cooling off" period for problem gamblers may be imposed by the site operator instead of by the gambler himself. *Id.* The site operator can exclude a player for a longer period of time at his or her discretion. *Id.*

38. The "payout percentage" is the "theoretical/estimated percentage of each amount wagered that the players should win." *Id.* at 43. "The actual percentage will approximate the theoretical percentage after a large number of games are played." *Id.* Reconciling the payout percentage thus means ascertaining whether the actual winnings are approximating the theoretical winnings.

dence of games.³⁹ The anti-money laundering provisions and probity checks of eGAP address some of the criminal consequences of online gambling by (1) prohibiting cash-funded accounts, (2) retaining verification documents for a minimum period of five years, (3) requiring a formal, documented process to transfer funds between player accounts, and (4) mandating that operators have a legal license to operate in their respective jurisdiction.⁴⁰ However, enforcement of this scheme is fairly weak; the standards require only voluntary compliance and limit punishment to the mere removal of the violator's certificate of approval.⁴¹

By 2002, the number of gambling websites rose to 1,800, an increase from forty in 1996.⁴² The advent and dissemination of high-speed Internet through broadband connections contributed greatly to this increase.⁴³ Starting in 2000, high-speed Internet enabled gamblers to participate in "live" games, which fostered their popularity.⁴⁴ Land-based casinos, seeing the success of offshore betting websites, ventured into jurisdictions where online gaming was permitted.⁴⁵ For example, the MGM Mirage opened an online site in 2001 with a casino based in the Isle of Man.⁴⁶ The site restricted real money bets to visitors from six countries, not including the U.S.⁴⁷ Although the venture was unprofitable, the MGM Mirage hoped that it would show the feasibility of Internet gambling regulation.⁴⁸ In 2003, MGM Mirage shut down its online casino due to a hostile and unclear political cli-

39. *Id.* at 15. Statistical independence means that the odds of each event, i.e., winning or losing, are unrelated to each other.

40. *Id.* at 21, 23.

41. Furlong, *supra* note 31, at 213–14.

42. SCHWARTZ, *supra* note 20, at 184.

43. As of August 2003, eighty-seven percent of U.S. Internet users had access at home and thirty-one percent of these users had a broadband connection. Mary Madden, *America's Online Pursuits: The Changing Picture of Who's Online and What They Do*, PEW INTERNET AND AMERICAN LIFE PROJECT 4, Dec. 22, 2003, http://www.pewinternet.org/pdfs/PIP_Online_Pursuits_Final.PDF. As of June 2006, there were 181 million broadband subscribers worldwide. OECD, OECD Broadband Statistics to June 2006, Oct. 13, 2006, http://www.oecd.org/document/9/0,2340,en_2649_34223_37529673_1_1_1_1,00.html. The U.S. has the largest total number of broadband subscribers in the Organisation for Economic Co-operation and Development (OECD) at fifty-seven million subscribers, which represents thirty-one percent of all broadband connections in the OECD. *Id.*

44. The online population expanded from 86 million Americans in March 2000 to 126 million in August 2003. Madden, *supra* note 43, at 3.

45. SCHWARTZ, *supra* note 20, at 185.

46. *Id.*

47. *Id.*

48. *Id.*

mate in the U.S. and abroad.⁴⁹ Despite this political turmoil, the online gambling industry received an estimated twelve billion dollars in wagers by 2005 and their success spurred social conservatives to seek the passage of the UIGEA to quell this business.⁵⁰

2. *State and Federal Response to Online Gambling*

a. *Attempts at Regulation*

As the online gambling industry grew, some states considered legislation to seize upon its popularity. In 2001, Nevada passed a bill to license online gambling within the state.⁵¹ However, this bill would become effective only after the federal government decriminalized online gambling and the Gaming Control Board promulgated license requirements.⁵² In 2002, New Jersey considered establishing an Internet Gaming Study Commission to appraise the social and economic effects of legalizing Internet gambling in New Jersey.⁵³ Some states

49. Letter from Interactive Gaming Council to the National Conference of State Legislators of Gaming States (Dec. 3, 2003), *reprinted in* LEGALIZED GAMBLING 96, 97 (David M. Haugen, ed., 2006) [hereinafter Interactive Gaming Council Letter].

50. Peter Gumbel, *How the U.S. is Getting Beat in Online Gambling*, TIME, Nov. 28, 2005, available at <http://www.time.com/time/globalbusiness/article/0,9171,1132818,00.html>.

51. See SCHWARTZ, *supra* note 20, at 197; see also Assemb. B. 466, 2001 Leg., 71st Sess. (Nev. 2001), NEV. REV. STAT. ANN. § 463.750 (LexisNexis Supp. 2003) (authorizing the state gambling commission to adopt regulations governing the licensing and operation of “interactive gaming” under certain conditions). “‘Interactive gaming’ means the conduct of gambling games through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards, debit cards or any other instrumentality, to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. The term does not include the operation of a race book or sports pool that uses communications technology approved by the board pursuant to regulations adopted by the commission to accept wagers originating within this state for races or sporting events.” Assemb. B. 466, 2001 Leg., 71st Sess. (Nev. 2001).

52. See SCHWARTZ, *supra* note 20, at 197; see also Assemb. B. 466, 2001 Leg., 71st Sess. (Nev. 2001), NEV. REV. STAT. ANN. § 463.750(2) (LexisNexis Supp. 2003) (“The commission may not adopt regulations governing the licensing and operation of interactive gaming until the commission first determines that: (a) Interactive gaming can be operated in compliance with all applicable laws; (b) Interactive gaming systems are secure and reliable, and provide reasonable assurance that players will be of lawful age and communicating only from jurisdictions where it is lawful to make such communications; and (c) Such regulations are consistent with the public policy of the state to foster the stability and success of gaming.”).

53. See SCHWARTZ, *supra* note 20, at 198; see also Assemb. J. Res. 34, 2002 Leg., 210th Sess. (N.J. 2002) (The resolution was reintroduced in 2004. Assemb. J. Res. 66, 2004 Leg., 211th Sess. (N.J. 2004)). This bill established “a 21 member Internet Gaming Study Commission composed of Legislators, Executive Branch officials and members of the public . . . [to] conduct a thorough and comprehensive study of the

also tried to educate the public on the social costs of Internet gambling. For example, in December, 2005, New Jersey proposed Senate Bill 2878 to establish an Internet gambling public awareness campaign.⁵⁴

The media's focus on the social costs of Internet gambling soon caused a negative government response.⁵⁵ Despite the increasing popularity of this form of gambling, state and federal authorities took legal action against the online gambling industry, foreshadowing the passage of the UIGEA.⁵⁶ Some state prosecutors targeted gambling websites for having assets and employees in the U.S., despite the fact that these websites maintained computers in jurisdictions where Internet gambling was legal.⁵⁷ These successful actions largely relied

current status, prevalence, and growth of Internet gaming; investigate the amount of money wagered through Internet gaming by State residents and [nation-wide] . . . ; review the extent and opportunities for gaming in the mid-Atlantic region; analyze the impact of Internet gaming on the economic growth and financial stability of the horse racing industry, the casinos and the lottery in this State; review the means available and actions taken here in this State and nationwide to control or end illegal Internet gaming through law enforcement; investigate the impact on this State of the legalization of Internet gaming in other States or nations; and determine the appropriateness, manner and impact of permitting Internet gaming in this State by law." *Id.*

54. S.B. 2878, 211th Leg., 2nd Sess. (N.J. 2005); N.J. STAT. ANN. § 5:12-76.1 (Supp. 2006) (establishing an Internet gambling public awareness campaign in order to promote awareness among the general public of issues related to Internet gambling). "The public awareness campaign shall include the development and implementation of public awareness and outreach efforts to inform the public about Internet gambling, including, but not limited to, the following subjects: (1) the legal status of Internet gambling in New Jersey; (2) the fact that Internet gambling is unregulated by New Jersey, and that the fairness and integrity of Internet gambling cannot be guaranteed by the State; (3) the risks of being defrauded of potentially large amounts of money when gambling on the Internet; (4) the risks of identity theft when using personal identification or financial information to gamble on the Internet; (5) special risks for underage and problem gamblers when gambling on the Internet; and (6) access to services for problem gamblers, including contact information for the Council on Compulsive Gambling." N.J. STAT. ANN. § 5:12-76.1(1)(b).

55. SCHWARTZ, *supra* note 20, at 181.

56. *See, e.g.,* People ex rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S. 2d 844, 850–52 (N.Y. Sup. Ct. 1999) (holding that the placing of bets from New York via the Internet constitutes gambling activity within the state and is prohibited by state law and the Wire Act, despite the location of the online gambling company's server in Antigua, where Internet gambling is legal); *United States v. Cohen*, 260 F.3d 68, 70–71 (2d Cir. 2001) (finding that the Wire Act prohibited sports bets placed via Internet or telephone).

57. SCHWARTZ, *supra* note 20, at 183. For example, in 1999, New York state prosecuted the World Interactive Gaming Corporation (WIGC) and seized their assets. *Vacco*, 714 N.Y.S. 2d at 850. WIGC was a Delaware corporation that maintained corporate offices in New York and wholly owned GCC, an Antiguan subsidiary corporation which acquired a license from the government of Antigua to operate a land-based casino. *Id.* at 847. GCC installed computer servers in Antigua that permitted users world-wide to gamble from their home computers. *Id.* GCC promoted its ca-

on the Wire Act, which, as described below, courts have interpreted in various ways when applied to Internet gambling.

b. Prosecution Under the Wire Act

The Wire Act, under § 1084(a), criminalizes betting using a wire communication facility to transfer bets or information assisting in placing bets on any sporting event or contest in interstate or foreign commerce.⁵⁸ It also criminalizes “the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers . . .”⁵⁹ Violators face a fine or imprisonment of not more than two years, or both.⁶⁰ However, § 1084(b) of the Wire Act provides a safe harbor which exempts (1) the “transmission . . . of information for use in the news reporting of sporting events . . .” and (2) the “transmission of information assisting in the placing of bets . . . on a sporting event . . . from a State or foreign country where betting on that sporting event . . . is legal into a State or foreign country in which such betting is legal.”⁶¹

The court first applied the Wire Act to Internet gambling in 2001 in *United States v. Cohen*.⁶² The United States Court of Appeals for the Second Circuit found Jay Cohen, the President of WSE, criminally liable under the Wire Act, 18 U.S.C. § 1084.⁶³ He was convicted of running a sports betting operation that served U.S. citizens.⁶⁴ The Second Circuit applied § 1084(a) to sports betting⁶⁵ and did not apply the § 1084(b) safe harbor to bets made from New York and accepted in Antigua because sports betting is not legal in New York.⁶⁶ The

sino nationally through its website, on the Internet, and in a national gambling magazine. *Id.* New York residents viewed these promotions and gambled through the website, easily circumventing the site’s controls to deny access to residents of states where land-based gambling is prohibited. *Id.* The court held that the “[t]he act of entering the bet and transmitting the information from New York via the Internet [was] adequate to constitute gambling activity within the New York state” and was sufficient to give a New York Court subject matter jurisdiction. *Id.* at 850.

58. 18 U.S.C. § 1084(a) (2006).

59. *Id.*

60. *Id.*

61. *See* § 1084(b).

62. *Cohen*, 260 F.3d at 78; *see* SCHWARTZ *supra* note 20, at 204–05.

63. *Cohen*, 260 F.3d at 78. Jay Cohen was sentenced to twenty-one months in prison. Matt Richtel, *An Industry that Dares Not Meet in the Country of its Best Customers*, N.Y. TIMES, May 17, 2004, at C4.

64. *Cohen*, 260 F.3d at 78.

65. *Id.* at 75–76.

66. *Id.* at 73–74; N.Y. Const. art. I, § 9 (“no . . . bookmaking, or any other kind of gambling [except for state-operated lotteries and pari-mutuel betting on horse races]

transmissions from customers directing WSE to place bets from customer accounts in Antigua also did not fall within the § 1084(b) safe harbor, because the transmissions were not limited to mere information that assisted in placing of bets but were bet transmissions, *per se*.⁶⁷ According to the court, these transmissions were the equivalent of placing bets once WSE accepted the bet.⁶⁸ The court's reasoning sharply restricted the abilities of overseas companies to interact with U.S. residents to place sporting bets via the Internet.

In 2002, the Fifth Circuit reinterpreted the Wire Act and limited the statute's application to gambling on sporting events and contests, holding that any debts incurred through non-sports Internet gambling were enforceable.⁶⁹ The DOJ, however, still maintained that all Internet gambling was illegal under the Wire Act⁷⁰ and prosecuted American broadcasters and online media in order to discourage them from airing Internet gambling ads.⁷¹ In response, the Internet gambling industry filed a complaint for a declaratory judgment against the DOJ for violation of their First Amendment right to free speech.⁷² Instead of becoming a test case to establish a First Amendment right

shall hereafter be authorized or allowed within this state.”). N.Y. Gen. Oblig. L. § 5-401 (“All wagers, bets or stakes, made to depend on any race, or upon any gaming by lot or change, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.”).

67. *Id.* at 74–75. The District Court judge was held to have correctly charged the jury as follows: “If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084.”

68. *Id.*

69. *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002). “Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.” *Id.* at 263.

70. Letter from John G. Malcolm to the Nat'l Ass'n of Broadcasters (June 11, 2003), available at <http://ww2.casinocitypress.com/ExhibitAtoComplaint.pdf> [hereinafter NAB Letter].

71. Bruce Zagaris, *U.S. Authorities Seize Advertising Funds for Overseas Online Casinos*, 20 INT'L ENFORCEMENT L. REP. 353, 354 (2004); Matt Richtel, *Lawsuit Claims Free Speech for Online Casino Ads*, N.Y. TIMES, Aug. 23, 2004, at C3.

72. Complaint at 2, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Aug. 7, 2004), available at <http://ww2.casinocitypress.com/ComplaintFiledon8-9-04.pdf>. In its complaint, Casino City argued that the advertisements it accepted were neither misleading nor related to unlawful activity. *Id.* at 3. The online gambling company further asserted that it did not knowingly accept any payments derived from illegal gambling proceeds from gamblers located in the United States. *Id.* Casino City claimed that the DOJ's issuance of “numerous subpoenas” to the media for Internet gambling advertisements, along with an intimidating letter to the National Association of Broadcasters, was creating a reasonable fear of imminent prosecution and resulting in a chilling effect upon free speech. *Id.* at 2–3.

to gamble online as the online gambling industry had hoped, the district court dismissed the complaint for lack of standing.⁷³ The trend of strong government action against gambling websites continued, paving the way for a new, more expansive anti-gambling law.⁷⁴

3. *Jack Abramoff Scandal*

In addition to hostile American courts, the online gambling industry also faced a harsh political atmosphere. Support for online gambling waned, paving the way for the passage of the UIGEA, after many Congressional representatives sought to avoid any association with convicted lobbyist Jack Abramoff, an online gambling supporter.⁷⁵ In 1999, eLottery Inc., a company that wanted to sell state lottery tickets online, hired Abramoff to lobby vigorously against the

73. Ruling at 7, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 15, 2005), available at <http://pdf.online.casinocity.com/DismissalRulingandOrder.pdf>; see Notice of Appeal at 1, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Apr. 12, 2005), available at <http://pdf.online.casinocity.com/NoticeOfAppeal.pdf>. This appeal was dismissed by the court on Feb. 14, 2006. Dismissal of Appeal, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 14, 2006). In the February 15th ruling, the Middle District of Louisiana found that Casino City lacked standing to assert its First Amendment claim, because it failed to allege that its intended activities were prohibited by statute and to demonstrate that it would be subject to a credible threat of prosecution. Ruling at 11–12, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 15, 2005), available at <http://pdf.online.casinocity.com/DismissalRulingandOrder.pdf>. Casino City claimed that its activities were legal and the company was never served with a subpoena nor did it receive a target letter from the DOJ advising the company that it was the subject of a criminal investigation. *Id.* at 3, 11. The court also found that even if Casino City did establish standing, it did not have a claim for a First Amendment violation because if the company was prosecuted, it would be for illegal gambling activities. *Id.* at 13. “It is well-established that the First Amendment does not protect the right to advertise illegal activity.” *Id.* at 14. After Casino City’s appeal was dismissed, online gambling sites continued to advertise through educational sister sites. For example, prior to the UIGEA, PartyPoker.com established an educational website, called PartyPoker.net, to teach users how to play poker and also to advertise PartyPoker.com.

74. For example, in 2006, a federal grand jury issued a 22-count indictment against the founder of BetOnSports, P.L.C. Gary Stephen Kaplan, CEO David Carruthers, media director Peter Wilson, and others. Gambits, *News in Brief About the Gaming World*, 10 GAMING L. REV. 341, 341 (2006). Government agents arrested David Carruthers while he was on a layover at the Dallas-Fort Worth International Airport on July 17, 2006. *Id.* The Eastern District of Missouri then issued a temporary restraining order requiring BetOnSports PLC to stop taking sports bets from U.S. players. *Id.* This aggressive action by the DOJ marked the culmination of its Wire Act enforcement efforts.

75. Matt Richtel & Heather Timmons, *The Gambling is Virtual; the Money is Real; U.S. May Push its Crackdown, but Internet Casinos Won't Die Easily*, N.Y. TIMES, July 25, 2006, at C1 [hereinafter *Gambling is Virtual*].

Internet Gambling Prohibition Act,⁷⁶ a 1999 House bill to amend the Wire Act to specifically prohibit Internet gambling.⁷⁷ Emails revealed that Abramoff told eLottery to write a check in June 2000 to Rev. Louis P. Sheldon's Traditional Values Coalition (TVC).⁷⁸ Abramoff also routed eLottery money to a company of Ralph Reed, the former head of the Christian Coalition, using two intermediaries in order to obscure the source.⁷⁹ Although Abramoff's perceived efforts to buy support from House conservatives against the anti-gambling bill succeeded and the Internet Gambling Prohibition Act died in Congress in July 2000, his corrupt activities only strengthened his opponents.⁸⁰

In addition, after receiving \$82 million from Indian tribal casinos in exchange for lobbying and public affairs work, Abramoff and Michael Scanlon, a former aide to former House Majority Leader, Representative Tom DeLay, were charged with grossly overbilling four of their tribal clients and secretly splitting the profits.⁸¹ They also allegedly gave gifts and made campaign donations to legislators in return for votes or legislative support.⁸² On January 3, 2006, Abramoff pled guilty to three felony counts—conspiracy, fraud, and tax evasion, involving charges from his lobbying activities on behalf of Native American tribes.⁸³ After the deluge of negative exposure for Abramoff's transgressions, online gambling supporters associated with him were afraid that they too would be perceived as corrupt. Given the involvement of several key House members in these very public scandals (and the fact that he helped kill prior anti-Internet gambling legislation), it is not surprising that the UIGEA was successful in the House as representatives sought to distance themselves from Abramoff's affairs.⁸⁴

76. Susan Schmidt & James V. Grimaldi, *How a Lobbyist Stacked the Deck*, WASHINGTON POST, Oct. 16, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/15/AR2005101501539.html>.

77. H.R. 3125, 106th Cong. (1999). This bill was never enacted and died in the House in 2000. *Id.*

78. Schmidt & Grimaldi, *supra* note 76, at A01.

79. *Id.*

80. *Id.*

81. Charges at 1, *United States v. Abramoff*, (D.D.C. Jan. 3, 2006), http://www.npr.org/documents/2006/jan/abramoff_charges.pdf.

82. *Id.*

83. *Id.* Abramoff was convicted again for charges arising from a deal to buy Sun-Cruz Casinos from Konstantinos Boulis and sentenced in March 2006 to nearly six years in prison. MSNBC.com, *Abramoff Gets 5 Years, 10 Months in Fraud Case: Lobbying in Latest Washington Corruption Scandal Sentenced in Miami*, Mar. 29, 2006, <http://www.msnbc.msn.com/id/12066674/>.

84. *Gambling is Virtual*, *supra* note 75, at C1 (explaining that the success of the UIGEA in the House was due largely to "lawmakers wanting to distance themselves

4. *Voluntary Action of Major U.S. Credit Card Companies and Banks*

Around the same time as state regulatory attempts to address Internet gambling and the proliferation of Wire Act prosecutions against Internet gambling operators, the online gambling industry faced other major setbacks, as private entities were already attempting to restrict online gambling. In the absence of government action, major U.S. credit card companies and banks tried to curb the growing trend of Internet gambling by blocking credit card transactions. Their efforts were not effective.⁸⁵

Prior to the passage of the UIGEA, gamblers transferred funds by uploading them to the gambling website before they made bets or played the games offered. While European gamblers could fund their accounts by credit or debit card and have their winnings cashed out directly to the card, American gamblers had already become blocked from using their credit or debit cards.⁸⁶ Large credit card issuers used codes to deny authorization for Internet gambling transactions, and U.S.-based banks stopped accepting gambling websites as merchants.⁸⁷ The success of these restrictions caused gaming analysts to lower 2003 projections for the online gaming industry.⁸⁸ These efforts were still not enough to curb the growth of Internet gambling as a number of electronic money services offered accounts to fund online gambling and many gamblers also paid by check or wire transfer.⁸⁹ Yet, these blocking policies later became the mechanism by which the UIGEA would ban online gambling.⁹⁰

from the corruption scandal involving the convicted lobbyist Jack Abramoff and his association with Indian casinos.”).

85. In the wake of the DOJ’s actions against various online gambling websites, major American credit card companies, credit card issuers, and banks voluntarily implemented blocking policies. U.S. GEN. ACCOUNTING OFFICE, *INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES*, GAO-03-89 4 (2002), <http://www.gao.gov/new.items/d0389.pdf> [hereinafter, GAO REPORT].

86. GAO REPORT, *supra* note 85, at 4; *see also*, *Gambling is Virtual*, *supra* note 75, at C1.

87. GAO REPORT, *supra* note 85, at 4, 20–25.

88. *Id.* at 4.

89. *Id.* at 4, 30.

90. *See infra* Part I.C.2; Peggy Peterson, *President Bush Enacts Leach Internet Gambling Law*, Gov’t Press Releases, Oct. 13, 2006. The regulations issued under § 5364 of the UIGEA require each designated payment system to identify and block or otherwise prevent restricted transactions. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802(a), 120 Stat. 1884, 1958 (to be codified at 31 U.S.C. § 5363).

B. Legislative History

1. Prior Bills

Although the increase in state regulatory action to address Internet gambling, the Abramoff scandal, and the onslaught of Wire Act prosecutions made the UIGEA seem inevitable, the Act did not have an easy path to becoming law. Since 1997, a series of bills had languished in Congress. Senator Kyl introduced the Internet Gambling Prohibition Act in 1997 to amend the Wire Act, outlaw online betting specifically, and punish individual bettors.⁹¹ The bill passed in the Senate but died in the House due to Abramoff's vigorous lobbying efforts.⁹² In 1999, Senator Kyl introduced an updated version of the bill, which removed penalties for individual bettors and permitted online horse race and lottery betting.⁹³ It again passed in the Senate before its defeat in the House in July 2000.⁹⁴ On February 16, 2006, Representative Bob Goodlatte introduced the Internet Gambling Prohibition Act, H.R. 4777, to amend the Wire Act and to expand and modernize the prohibition against interstate gambling to include Internet gambling.⁹⁵ However, this bill died in the House in September 2006, paving the way for the current law.⁹⁶

Perhaps the combination of these judicial and legislative failures and ethical scandals⁹⁷ led Congress to introduce an entirely new bill in 2005 and in 2006. The Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, introduced by Representative Leach, proposed

91. S. 474, 105th Cong. (1997); Schmadtke, *supra* note 16, at C9.

92. *Id.*

93. *Id.*

94. S. 692, 106th Cong. (1999); Schmidt & Grimaldi, *supra* note 76, at A01.

95. H.R. 4777, 109th Cong. §§ 1, 3 (2006).

96. *Id.*

97. For example, a bill introduced by Representative Leach in 2000 preventing the use of certain bank instruments for Internet gambling also failed despite the fact that it introduced a new law apart from the Wire Act. H.R. 4491, 106th Cong. §§ 1, 3 (2000). A bill creating a federal commission to study Internet gaming and to explore regulation similarly died in the House in 2002. See Press Release, Congressman John Conyers, Jr., Conyers Introduces Internet Gambling Regulation Bill (Nov. 19, 2002), http://www.house.gov/judiciary_democrats/Internetgamblingintropr111902.pdf; SCHWARTZ, *supra* note 20, at 198. In May 2006, Representative Porter introduced the Internet Gambling Study Commission Act, H.R. 5474, to create a commission to study the proper response to the growth of Internet gambling, including the possibility of regulation. H.R. 5474, 109th Cong. §§ 1, 3 (2006). It was killed by the passage of the Unlawful Internet Gambling Enforcement Act of 2006. *Id.*; see also, *In re Master Card International Inc.*, 313 F.3d 257, 262–63 (5th Cir. 2002) (limiting the Wire Act to include only sports betting). The ethics scandal refers to the Jack Abramoff controversy discussed in Part I.A.3.

making credit card companies the primary enforcer of the law⁹⁸ and was approved by the House on July 11, 2005 by a vote of 317-93.⁹⁹ It provided a forecast of legislative tools to come.¹⁰⁰

2. *H.R. 4954: UIGEA Develops Through Unusual Interest Group Coalitions*

After many failed attempts to pass legislation against Internet gambling,¹⁰¹ the Unlawful Internet Gambling Enforcement Act of 2006 was attached to the end of the SAFE Port Act and shuffled through Congress.¹⁰² The purpose of the SAFE Port Act was to improve maritime and cargo security through enhanced layered defenses.¹⁰³ Within the SAFE Port Act, unlikely allies formed in support of the UIGEA. Las Vegas and Atlantic City casinos banded together with their competition, Indian tribal casinos and horse race-tracks,¹⁰⁴ as well as with their nemesis, the state attorneys general.¹⁰⁵ Another unlikely alliance existed between casinos and religious and social conservatives and family groups, who had often lobbied against gambling.¹⁰⁶ While some casino operators did not desire an online

98. H.R. 4411, 109th Cong. § 2 (2005); 109th Cong. §§ 1, 3 (2006).

99. *See, e.g.*, Peterson, *supra* note 90; Gambits, *supra* note 74, at 341.

100. The Unlawful Internet Gambling Enforcement Act of 2005 formed the basis of the Unlawful Internet Gambling Enforcement Act of 2006 in that it sought to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling and other purposes. H.R. 4411, 109th Cong. § 2 (2005). These enforcement mechanisms were implemented in the UIGEA of 2006 after the 2005 bill languished in the Senate all summer and eventually died there. *Id.*; 109th Cong. §§ 1, 3 (2006). It became moot with the passage of the Unlawful Internet Gambling Enforcement Act of 2006. 109th Cong. §§ 1, 3 (2006).

101. *See* discussion *supra* Part I.B.1.

102. *See* 152 CONG. REC. H8026-04 (Sept. 29, 2006). It was supported by Representative Leach, Senate Majority Leader Bill Frist, the Speaker of the House, Representative Peter King, and House Majority Leader John Boehner. *Id.* at H8029, H8035. The UIGEA was passed in the House by a vote of 409 to 2 and was piloted through the Senate by Majority Leader Frist. Jonathan Braude, *Stacked Deck?*, DAILY DEAL, Oct. 9, 2006.

103. SAFE Port Act, Pub. L. No. 109-347, 120 Stat. 1884, 1884 (2006). The SAFE Port Act is also known as the Security and Accountability For Every Port Act of 2006. SAFE Port Act, Pub. L. No. 109-347, § 1, 120 Stat. 1884, 1884 (2006) (codified at 6 U.S.C. § 901).

104. The Center for Responsive Politics claims that the racing industry, which is exempted under the UIGEA, has contributed more than \$3 million to lawmakers, presidential candidates and federal Political Action Committees since 2000 and more than half has gone to Republicans (the dominant party supporting this bill). Kate Phillips, *Interest Groups Lining Up to Lobby on Web Gambling*, N.Y. TIMES, July 4, 2006, at A11.

105. Peterson, *supra* note 90.

106. *Id.*; 152 CONG. REC. H8026-04 at H8029 (Rep. Leach asserting that the UIGEA is one of the most important pieces of family legislation ever considered by Con-

gambling ban because they did not want to support a censorious government, the vast majority of casinos were willing to risk paternalism so long as it was not directed at their own operations.¹⁰⁷ As a result, casinos were pitted against their former allies, such as moderate libertarians like Charles Murray, who implied in an op-ed in the *New York Times* that the law was “stupid.”¹⁰⁸

Sports interest groups such as the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB) supported the bill because of their concern regarding the integrity and financial success of sporting events.¹⁰⁹ These groups also lobbied for the Act to exempt fantasy sports leagues, since these leagues can be credited with spurring interest in various sports such as football, basketball, and baseball.¹¹⁰ Financial services groups lobbied for the UIGEA because Internet gambling was a growing cause of debt collection problems for banks and the consumer credit industry.¹¹¹

In spite of this wide range of support, several representatives were disturbed that this law was added to the SAFE Port Act at the

gress); see also Marcus Armytage, *Bookmakers Wary Over Web Tangle*, DAILY TELEGRAPH, Sept. 18, 2006, at 29 (claiming that casino lobbying against Internet gambling on the basis that it brings an addictive behavior into the home is hypocritical).

107. Will, *supra* note 13, at 78.

108. Murray, *supra* note 13, at A27.

109. 152 CONG. REC. H8026-04 at H8029. Although betting on collegiate sports is outlawed in every state except Nevada, gambling within this one state has still managed to corrupt many games outside of the state, resulting in game rigging or point shaving. Donald L. Barlett and James B. Steele, *Throwing the Game*, TIME, Sep. 17, 2000, available at <http://www.time.com/time/magazine/article/0,9171,55103-1,00.html>. For example, a Northwestern University running back purposefully fumbled the football on the goal line to prevent his team from beating the point spread and to ensure his win of a \$400 wager. *Id.* In 2003, Adrian McPherson, a former Florida State quarterback, pled guilty to a misdemeanor charge of betting on college and professional sports via a Costa-Rican based online gambling site. Tom Weir, *Online Sports Betting Spins Out of Control*, USA TODAY, Aug. 22, 2003, reprinted in LEGALIZED GAMBLING 78, 79 (David M. Haugen, ed. 2006). Some of the games on which he bet were ones in which he played. *Id.* Furthermore, the University of Michigan released a study saying that nearly half of the male athletes in the survey admitted wagering on college sports. *Id.* The study indicated that one of every twenty players shaved points, bet on their own games, or leaked insider information about players to gamblers. *Id.* Perhaps, a similar effect may occur as a result of the UIGEA's ban on online gambling where online sports gambling in other countries which legalize it manages to corrupt games inside the U.S.

110. Phillips, *supra* note 104.

111. See, e.g., 152 CONG. REC. H8026-04 at H8029; Peterson, *supra* note 90.

last minute.¹¹² Representative Edward Markey, a Democrat, criticized the Internet gambling law for having nothing to do with ports and not even mentioning riverboat gambling.¹¹³ He further described the law as the product of “political pork that the Republican Party in secret has put together.”¹¹⁴

Yet, the long, embattled legislative history of the UIGEA and the harsh political and legal climate surrounding its passage foreshadowed the decision to institute a ban on online gambling rather than an increase of regulatory restrictions. This decision was more specifically the result of political maneuvering away from the Jack Abramoff scandal, blatant logrolling by Congress in attaching it to a popularly supported but completely unrelated port security bill, and a testament to the harsh stance of the DOJ and some states against online gambling.

C. *Summary of the New Law*

I. *Overview*

On October 23, 2006, President Bush signed the UIGEA, later codified into Chapter 53 of Title 31 of the United States Code. The effects of the Act have reverberated throughout the world.¹¹⁵ Many online gaming companies and online gamblers were surprised by the Act, because of its last-minute attachment to the Safe Port Act.¹¹⁶ After all, the government’s stark prohibitionist stance was in sharp contrast to the recent explosion of Internet gambling in the U.S. and the international trend toward regulation.¹¹⁷

While the Internet Gambling Prohibition Act, H.R. 4777,¹¹⁸ proposed amending the 1961 Wire Act to include Internet gambling, the

112. Representatives Sanchez, Jackson-Lee, Berkley, Markey, Paul, Lobiondo, and Porter all complained about the incongruent addition of the Unlawful Internet Gambling Enforcement Act of 2006 to the SAFE Port Act. 152 CONG. REC. H8026-04 at H8032–37.

113. *Id.* at H8035.

114. *Id.*

115. The UIGEA caused an estimated \$8 billion in losses for the industry within a week of its passage. Will, *supra* note 13, at 78.

116. 152 CONG. REC. H8026-04. The President did not even mention the Act when he signed it into law. CNN.com, *Bush Signs Port Security Bill*, Oct. 13, 2006, <http://www.cnn.com/2006/POLITICS/10/13/bush.ports.ap/index.html> (last visited Nov. 22, 2008). See *supra* Part I.B.2.

117. Gambling Act of 2005, available at <http://www.opsi.gov.uk/acts/acts2005/20050019.htm#aofs> (last visited Nov. 23, 2009) (establishing a locally-administered licensing structure for land-based and online gambling).

118. H.R. 4777, 109th Cong. (2006).

UIGEA does not strengthen or weaken the Wire Act.¹¹⁹ Instead, it adds a new subchapter to Title 31 of the United States Code¹²⁰ and criminalizes the processing of payments for Internet gambling.¹²¹ The Act preserves state jurisdiction over intrastate gambling and regulates payment systems to cut off monetary transfers to Internet gambling websites.¹²² It also allows state and federal authorities to file injunctions against individuals who violate this law.¹²³ Finally, the UIGEA encourages international cooperation in law enforcement efforts against illegal Internet gambling and money laundering.¹²⁴

2. *Text of the UIGEA*

While the UIGEA¹²⁵ will not change existing federal or state law or tribal-state compacts on gambling,¹²⁶ the Act does take a prohibitionist approach by banning American financial institutions from processing the payments of overseas payment processors known to conduct business with casinos.¹²⁷ In response to unsuccessful prior attempts to regulate online gambling, the main purpose of the UIGEA is to provide a new means of enforcing Internet gambling laws to address the negative impact of online gambling on debt collection by banks and the consumer credit industry.¹²⁸ The new law follows the National Gambling Impact Study Commission's 1999 recommendation to prohibit wire transfers to online gambling websites or to the banks which represent them.¹²⁹ By prohibiting gambling websites from processing payments through American financial institutions, the Act is able to target how Internet gambling is primarily funded—through the personal use of credit cards, wire transfers, and payment system instruments.¹³⁰

To effectively delineate what forms of online activity the law prohibits, the UIGEA defines a “bet or wager” as “the staking or risk-

119. Schmadtke, *supra* note 16, at C9.

120. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802(a), 120 Stat. 1884, 1952 (2006) (codified at 31 U.S.C. § 5361).

121. *Id.* at 1957, 1961; Peterson, *supra* note 90.

122. § 802(a), 120 Stat. at 1952–53; Peterson, *supra* note 90.

123. § 802(a), 120 Stat. at 1959; Peterson, *supra* note 90.

124. § 802(a), 120 Stat. at 1962; Peterson, *supra* note 90.

125. The Act is codified in Title 31 of the United States Code in Sections 5361 through 5367. § 802(a), 120 Stat. at 1952, 1961.

126. *Id.* at 1952–53.

127. Richtel & Timmons, *Gambling is Virtual*, *supra* note 75, at C1; § 802(a), 120 Stat. at 1957.

128. *Id.*

129. § 802(a), 120 Stat. at 1957.

130. *Id.*

ing by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement, or understanding that the person or another person will receive something of value in the event of a certain outcome.”¹³¹ However, a bet or wager does not include any game or contest which does not require its participants to stake or risk anything of value other than their personal efforts or which has free points redeemable only for participation in the sponsor’s games.¹³² These games include fantasy sports or educational games, which the UIGEA does not prohibit provided that they comply with several requirements.¹³³

The UIGEA carves out significant exceptions to the definition of “unlawful Internet gambling.”¹³⁴ For example, intrastate transactions do not constitute unlawful Internet gambling when (1) the bet or wager is initiated, received, or otherwise made exclusively within a single state and (2) the bet or wager and the method by which it is made is expressly authorized by the state’s law.¹³⁵ Intra-tribal transactions are also exempt from the UIGEA.¹³⁶ Online betting on horseracing permitted by the Interstate Horseracing Act is legal under the UIGEA only in states where gambling on horseracing is legal.¹³⁷

131. *Id.* at 1953. A bet or wager includes but is not limited to “the purchase of a chance or opportunity to win a lottery or other prize,” and any instructions or information regarding the establishment or movement of funds by the bettor in, to, or from an account with the business of betting or wagering. *Id.* However, a bet or wager is not (1) any activity governed by or exempt from regulation under the securities laws or the Commodity Exchange Act, (2) any over-the-counter derivative instrument, (3) any contract of indemnity, guarantee or insurance, or (4) any transaction with an insured depository institution. *Id.*

132. *Id.*

133. *Id.* at 1954. Representative Leach of Iowa stated that the law would restrict fantasy sports games to some extent with bans on betting on individual teams or players. Phillips, *supra* note 104; *Humphrey v. Viacom*, 2007 U.S. Dist. LEXIS 44679, *30 (D.N.J. 2007) (noting that fantasy sports leagues such as those operated by the defendants are specifically excluded by the UIGEA). Educational games teach a skill. An example is pokerstars.net which teaches participants how to play poker.

134. § 802(a), 120 Stat. at 1955.

135. *Id.* The state’s law must include age and location verification requirements reasonably designed to block access to minors and persons located outside of the state along with data security standards to prevent such unauthorized access. *Id.* Intrastate transactions also must not violate the Interstate Horseracing Act, the Professional and Amateur Sports Protection Act, the Gambling Devices Transportation Act, and the Indian Gaming Regulatory Act. *Id.* If the above conditions are met, online gambling may be permissible in a state such as Nevada, where gambling is legal. Braude, *supra* note 102.

136. § 802(a), 120 Stat. at 1955–56.

137. Interstate horseracing allowed under the Interstate Horseracing Act is not considered to be unlawful Internet gambling, but it may still be prohibited under state law. *Id.* at 1956. The exception for interstate horseracing does not preempt any state law prohibiting gambling. *Id.*

The drafters of the UIGEA sought to effectively enforce the ban by punishing the acceptance of any financial instrument for “unlawful Internet gambling.” The Act states that “no person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling credit, or the proceeds of credit . . . an electronic fund transfer . . . any check, draft or similar instrument, or the proceeds of any other form of financial transaction. . . . [described] by regulation, which involves a financial institution as a payor or financial intermediary.”¹³⁸

To implement this prohibition, the Act required the Secretary of the Treasury and the Board of Governors of the Federal Reserve System (FRS), in consultation with the Attorney General, to propose regulations within nine months of the Act’s enactment.¹³⁹ Although these regulations were proposed on October 4, 2007, they were not implemented at the time of publication.¹⁴⁰ The proposed regulations require each “designated payment system”¹⁴¹ to identify and block or otherwise prevent restricted transactions by establishing policies and procedures reasonably designed to do so.¹⁴² A “financial transaction

138. *Id.* at 1957. The term “business of betting or wagering” does not include the activities of a financial transaction provider such as a bank or credit card agency nor does it include any interactive computer service or telecommunications service. *Id.* at 1955.

139. *Id.* at 1958 (“Before the end of the 270-day period beginning on the date of the enactment of this subchapter, the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations . . .”). These regulations were proposed in the October 4, 2007 notice of joint proposed rulemaking and subsequent notice and comment period. 72 Fed. Reg. 56680, 56682 (Oct. 4, 2007). However, the proposed text of 12 C.F.R. Part 233 and 31 C.F.R. Part 132 have not yet been codified.

140. *See infra* note 142.

141. “Designated payment systems” are defined in the proposed rules as including automated clearing house systems, card systems, check collection systems, money transmitting businesses, and wire transfer systems with several explicit exceptions for system operators, check clearing houses, the paying/originator’s bank, any collecting or returning bank and any intermediary bank. *See* 72 Fed. Reg. at 56697.

142. § 802(a), 120 Stat. at 1955–58. Designated payment systems must establish policies and procedures reasonably designed to identify and block restricted transactions. *Id.* They can achieve this goal by using codes in authorization messages or by other means. *Id.* The Secretary and Board of Governors of the FRS are mandated to include in their regulations: (1) examples of policies and procedures reasonably designed to identify and block restricted transactions, (2) alternative means for payment systems to identify and block restricted transactions, (3) exemptions for certain restricted transactions or designated payment systems if it is not reasonably practical to identify and block such transactions, and (4) measures to prevent transactions that are not unlawful Internet gambling as listed in § 5362(10) from being blocked or prohibited. § 802(a), 120 Stat. at 1958. The Secretary and FRS Board of Governors have complied with this mandate as shown by the proposed rules in the October 4, 2007 Federal Register. 72 Fed. Reg. at 56682, 56685–93. “The regulation being proposed

provider” (e.g., creditor, financial institution, credit card issuer) shall be deemed in compliance with the Secretary of the Treasury and Federal Reserve System’s proposed regulations if it relies on the identification and blocking policies of a designated payment system that complies with these rules.¹⁴³ Furthermore, a financial transaction provider will not be liable to any party if it complies with the designated payment system’s policies and procedures and identifies and blocks a transaction that is a restricted transaction or that it reasonably believes is a restricted transaction.¹⁴⁴

In order to curb Internet gambling more effectively than prior attempts under the Wire Act, both civil and criminal remedies may be imposed for violations of the UIGEA.¹⁴⁵ Civil remedies include temporary restraining orders, preliminary injunctions, or injunctions against any person to prevent or restrain a restricted transaction.¹⁴⁶ However, civil remedies are limited for certain entities. Penalties for interactive computer services include merely removing an online site or a hypertext link to an online site violating this law.¹⁴⁷ Furthermore,

by the Agencies in this notice: (i) Sets out definitions for terms used in the regulation; (ii) designates payment systems that could be used by participants in connection with, or to facilitate, a restricted transaction; (iii) exempts certain participants in certain designated payment systems from requirements of the regulation; (iv) requires the participants performing non-exempt functions in a designated payment system to establish and implement policies and procedures reasonably designed to prevent or prohibit restricted transactions, such as by identifying and blocking such transactions; (v) provides non-exclusive examples of policies and procedures for non-exempt participants in each designated payment system; and (vi) sets out the regulatory enforcement framework.” 72 Fed. Reg. at 56682. Examples of policies and procedures reasonably designed to prevent or prohibit restricted transactions, include due diligence procedures, remedial options such as fines, restricted access or closing customer accounts, procedures to monitor and analyze payment patterns, transaction and merchant/business category codes, and cross-border transaction policies with other countries. 72 Fed. Reg. at 56688–890.

143. § 802(a), 120 Stat. at 1958–59.

144. *Id.* at 1959. Thus, a financial transaction provider who blocks a legal transaction will not be liable so long as it has a reasonable belief that it was a restricted transaction. *Id.*; Christopher Costigan, *Internet Gambling Bill Q & A*, Gambling 911.com, Oct. 14, 2006, <http://www.gambling911.com/Internet-Gambling-Bill-Q&A-101406.html> (stating that under the new Act, there will be no criminal penalties lodged against banking institutions) [hereinafter *Q & A*]. Section 5364 is to be enforced exclusively by the Federal functional regulators and the Federal Trade Commission. § 802(a), 120 Stat. at 1959.

145. § 802(a), 120 Stat. at 1959–60.

146. *Id.*

147. *Id.* at 1960. Although the interactive computer service does not have an affirmative obligation to monitor its service or look for violations of § 5363, it will not be entitled to limited relief if it falls under § 5367. *Id.* at 1960–61. According to § 5367, the interactive computer service will receive full civil and criminal penalties as outlined under §§ 5365 and 5366, if it has (1) actual knowledge and control of bets and

financial transaction providers are exempt from proceedings initiated by the U.S. Attorney General or any state attorney general in order to prevent or restrain a restricted transaction.¹⁴⁸ Criminal penalties for accepting any financial instrument for unlawful Internet gambling include fines under title 18, imprisonment for up to five years, and/or permanent injunctions against individuals enjoining them from “making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers.”¹⁴⁹ While this Act does not go after individual Americans who engage in unlawful Internet gambling, there are states that will prosecute online gamblers.¹⁵⁰

The Act further strives to produce an effective ban by outlining what the U.S. should do when deliberating with any foreign country on money laundering, corruption, and crime issues.¹⁵¹ Cooperation by foreign governments should be encouraged and advanced by the U.S., through information sharing and other methods, in order to identify whether Internet gambling operations are being used for criminal activity.¹⁵² The U.S. should also encourage the Financial Action Task Force on Money Laundering to study the extent to which Internet gambling is being used to launder money.¹⁵³ Section 803(b) further requires the Secretary of the Treasury to send an annual report to Congress on any deliberations between the U.S. and other countries on issues involving Internet gambling.¹⁵⁴ Since there have yet to be any reports filed under this Act, it remains to be seen how well the ban

wagers and (2) (a) operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers are made or (2) (b) owns or controls or is owned or controlled by any person who operates, manages, directs, or supervises the unlawful Internet website. *Id.* at 1961.

148. *Id.* at 1961. It is an open question whether overseas payment processors such as NETELLER would be exempt from UIGEA enforcement proceedings as a “financial transaction provider.” See Michael D. Schmitt, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 398 (2008).

149. *Id.*

150. For example, Washington has made Internet gambling a felony. I. Nelson Rose, *Washington State Makes It a Felony To Play Poker Online*, 10 GAMING L. REV. 339, 339 (2006).

151. § 803(b), 120 Stat. at 1962.

152. *Id.*

153. *Id.* The Financial Action Task Force on Money Laundering is an intergovernmental body which was created during the 1989 G-7 Summit in Paris and whose purpose is to develop and promote national and international policies to combat money laundering and terrorist financing. Financial Action Task Force, About the FATF, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1_00.html (last visited Jan. 14, 2009). The FATF currently has thirty-four members. *Id.*

154. *Id.*

will curb the negative social, political, economic and criminal consequences of Internet gambling.

II.

POLICY DEBATE ON INTERNET GAMBLING PROHIBITION

A. *Social Consequences of Online Gambling*

The House debates, along with other debates between social conservatives and moderate libertarians, indicate that serious policy concerns heavily shaped the decision to ban online gambling. Social conservatives in favor of the UIGEA argued that online gambling compromises family values and exacerbates underage gambling and addiction by gamblers of all ages.¹⁵⁵ Several studies bolstered their argument. An American Psychiatric Association advisory on Internet gambling addiction found that “gambling as a phenomenon among minors is two to four times more common than among adults.”¹⁵⁶ Another study revealed that an estimated 1.6 million of 17 million American college students gambled on the Internet last year, primarily playing poker.¹⁵⁷ A study by the University of Connecticut Health Center further found that one out of every four of the one hundred and sixty online gamblers in the study fit the clinical definition of a pathological gambler.¹⁵⁸ Perhaps the most salient example of the consequences of compulsive Internet gambling for college students is that of Greg Hogan Jr.¹⁵⁹ Hogan, a 19-year-old sophomore at Lehigh University, robbed a bank in a desperate attempt to pay back his \$7,500 online gambling debt.¹⁶⁰ Conservatives use the combination of these statistics along with such striking anecdotal evidence to suggest an epidemic of online gambling addiction among college students.

155. See 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006) (discussing the detriments of online gambling: the ease of losing money so quickly at such a young age, its addictiveness, and its deleterious effects on the unity of the American family).

156. Ryan D. Hammer, *Does Internet Gambling Strengthen the U.S. Economy? Don't Bet on It*, 54 FED. COMM. L.J. 103, 122 (2001).

157. Mattathias Schwartz, *The Hold-'Em Holdup*, N.Y. TIMES (LATE ED.), June 11, 2006, (Magazine), at 52.

158. *Id.* Pathological gambling is “a pattern of gambling characterized by lack of control, ‘chasing’ of losses, lies, and illegal acts.” Nancy M. Petry & Christopher Armentano, *Prevalence, Assessment, and Treatment of Pathological Gambling: A Review*, 50 PSYCHIATRIC SERVICES 1021, 1021 (1999), available at <http://psychservices.psychiatryonline.org/cgi/content/full/50/8/1021>.

159. Schwartz, *supra* note 157.

160. *Id.*

Although the fear of online gambling access to individuals under age twenty-one¹⁶¹ is legitimate, moderate libertarians contend that regulation is effective at deterring this sector of society. Many websites use credit card information (where not blocked by American financial institutions) to screen out underage gamblers.¹⁶² To prevent underage gamblers from stealing credit card information from adults, some websites use credit reporting databases which match credit cards and taxpayer identification numbers to verify the user.¹⁶³ Other methods of age verification include biometrics, age verification software, and geo-positioning software.¹⁶⁴ These techniques have already proven effective in some European nations that regulate Internet gam-

161. The gambling age is state-regulated and ranges from eighteen to twenty-one depending on the type of gambling. Cornell University Law School Legal Information Institute, *Gambling Law: An Overview*, <http://topics.law.cornell.edu/wex/gambling> (last visited Jan. 14, 2009). “For example, in New Jersey, an 18-year-old can buy a lottery ticket or bet on a horse race, but cannot enter a casino until age 21.” *Id.* One reason for this distinction between casino gambling and pari-mutuel betting is that “casino gaming is usually associated with the availability of alcoholic beverages.” I. Nelson, Rose, *Minimum Legal Age to Place a Bet*, *Gambling and the Law*, 1 April 27, 2001, <http://www.gamblingandthelaw.com/agechart.html> (last visited Jan. 14, 2009). Thus, most states require gamblers in a casino to be 21 years old. *Id.*

162. Hammer, *supra* note 156, at 122.

163. *Id.*

164. Interactive Gaming Council, *supra* note 29, at 98. Biometrics is “the measurement and analysis of unique physical or behavioral characteristics (as fingerprint or voice patterns) especially as a means of verifying personal identity.” Merriam-Webster Online, *Biometrics*, <http://www.merriam-webster.com/dictionary/biometrics> (last visited Jan. 14, 2009). The Safe and Secure Internet Gambling Initiative, a gambling advocacy group, says age verification through third-party systems like those run by the Social Security Administration and Department of Motor Vehicles databases could prevent underage gambling when coupled with questions about credit history and physical copies of identification documents. K.C. Jones, *Online Gambling Proponents Want Age Verification Software*, *INFORMATIONWEEK*, Aug. 8, 2007, available at <http://www.informationweek.com/news/internet/showArticle.jhtml?articleID=201305023>. Age verification software is often used in identity card scanning devices to determine if the cardholder is underage. Geopositioning software is capable of calculating accurate, three-dimensional geographic coordinates. HighBeam Research, *BAE Systems to provide geopositioning software for DoD applications*, June 13, 2005, <http://www.highbeam.com/doc/1G1-133607058.html>.

bling.¹⁶⁵ Iris and fingerprint recognition and a central registry of players to be banned are still in progress.¹⁶⁶

Although regulation can restrict minors' access to Internet gambling sites, empirical data makes it difficult to deny the addictiveness of online gambling. The 1999 National Gambling Impact Study "Final Report" found that the "the high-speed instant gratification of Internet games and the high level of privacy they offer may exacerbate problem and pathological gambling."¹⁶⁷ In his introduction of the UIGEA, Representative Leach even noted that "Internet gambling is crack cocaine for gamblers."¹⁶⁸ The especially addictive nature of online gambling is distinguishable from gambling at land-based casinos and was a significant factor in the passage of legislation targeted at Internet gambling.

Some conservatives warn that we cannot ignore the social costs of Internet gambling. Online gambling contributes to crime, bankruptcy, and gambling disorders that, in turn, negatively affect the gambler, his or her friends or family, and society at large.¹⁶⁹ Social costs also include physical and mental health problems, the necessity of unemployment benefits, criminal activity, suicide, bankruptcy, and domestic violence.¹⁷⁰ Like land-based casinos, Internet gambling is also

165. "There is clear evidence that steps taken by regulated Internet gambling operators to ensure the age and identification of every online gambler has gone a long way to minimize the threat of underage gambling in the U.K." said Andrew Poole, managing director for GamCare Trade Services. *Regulated Internet Gambling and Age-Verification Technologies Effective in Combating Underage Internet Gambling*, PR NEWswire, Aug. 7, 2007, available at <http://news.corporate.findlaw.com/prnewswire/20070807/07aug20070923.html>. GamCare Trade Services is a U.K.-based organization owned by the charity GamCare, which is committed to addressing the social impacts of gambling. *Id.*

166. Interactive Gaming Council, *supra* note 29, at 98. Fingerprint recognition involves the use of a scanner to identify a person through the unique pattern of ridges present on his or her fingerprint. NAT'L SCI. AND TECH. COUNCIL, COMM. ON TECH., COMM. ON HOMELAND AND NAT'L SEC., SUBCOMM. ON BIOMETRICS, FINGERPRINT RECOGNITION (2006), <http://www.biometrics.gov/Documents/FingerprintRec.pdf>. Iris recognition is the process of recognizing a person by analyzing the random pattern of the iris. NAT'L SCI. AND TECH. COUNCIL, COMM. ON TECH., COMM. ON HOMELAND AND NAT'L SEC., SUBCOMM. ON BIOMETRICS, IRIS RECOGNITION (2006), <http://www.biometrics.gov/Documents/IrisRec.pdf>.

167. NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT, at 5-5 (1999), <http://govinfo.library.unt.edu/ngisc/reports/5.pdf>.

168. 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006).

169. Hammer, *supra* note 156, at 120-21. "For example, gambling-related debts ranging from \$38,000 to \$113,000 have been reported in the literature, and up to 60 percent of pathological gamblers commit illegal acts to support gambling." PETRY & ARMENTANO, *supra* note 158, at 1021.

170. Hammer, *supra* note 156, at 12; *Nat'l Gambling Impact Study Final Report: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong. 1 (1999) (statement

more likely to invite assessments of moral blameworthiness than a lottery, because it is programmed to induce further gambling.¹⁷¹

Despite these dire effects, the aforementioned moral and social costs of online gambling are similar to regulated land-based gambling, and thus more stringent regulation—not prohibition—should similarly be used to curb them. The failure of alcohol prohibition has revealed the ineffectiveness of an outright ban on popular vices.¹⁷² The preoccupation of social conservatives with minor access and addictiveness also ignores the fact that the typical American Internet gambler is male, under forty years old, college-educated, and more affluent than the average citizen.¹⁷³ This profile is often the last to be targeted by paternalistic laws.¹⁷⁴ Promulgating a paternalistic law such as the

of Hon. Ben Nighthorse Campbell, Chairman of the Comm. on Indian Affairs), *available at* <http://www.ngisc.gov>. “Pathological gambling is also associated with health consequences, including high rates of insomnia, gastrointestinal disorders, cardiac problems, high blood pressure, and headaches.” PETRY & ARMENTANO, *supra* note 158, at 1021. Approximately fifty percent of gamblers have substance use disorders. *Id.* Obsessive-compulsive disorder, attention-deficit disorder, anxiety disorders, and depressive disorders occur frequently in pathological gamblers, and some studies suggest that these disorders share a physiological substrate with pathological gambling. *Id.* Gamblers face an increased risk for suicide as studies show that between forty-eight and seventy percent of pathological gamblers contemplate suicide and thirteen to twenty percent attempt suicide. *Id.*

171. Skolnick, *Social Transformation*, *supra* note 1, at 24–25. *But cf.* Mark Griffiths, *Opinion: Are Lottery Scratchcards a “Hard” Form of Gambling*, *E-GAMBLING: THE ELECTRONIC JOURNAL OF GAMBLING ISSUES*, Dec. 2002, at 4–5, *available at* <http://www.camh.net/egambling/archive/pdf/EJGI-issue7/EJGI-issue7-opiniongriffith.pdf>. (“A number of papers written from a psychological perspective describe how and why scratchcards may be potentially addictive . . . Like slot machines, scratchcards have a short payout interval (i.e., only a few seconds separate the initial gamble and the winning payment) and rapid event frequency (i.e., the time gap between each individual gamble is very short if people engage in continuous play). This means that the loss period is brief with little time given over to financial considerations, and more importantly, winnings can be used to gamble again almost immediately.”).

172. Will, *supra* note 13, at 78; see also the discussion on U.S. alcohol prohibition *infra* Part II.C.2.

173. Holly Thomsen, *New AGA Survey Offers In-Depth Profile of U.S. Internet Gamblers: Report Also Reveals Significant Growth Across Entire Industry*, *AMERICAN GAMING ASSOC. PRESS ROOM*, May 8, 2006, http://www.americangaming.org/Press/press_releases/press_detail.cfv?id=391.

174. “Benevolent paternalism once ‘protected’ women from the supposed rigors of property ownership, for example, certain occupations, and even jury duty. Whether enduring child protective laws benefit or oppress children remains to be seen. More importantly, the benevolent, protective role the state assumes toward children nonetheless neglects to secure even minimal sustenance and nurture for children.” BETTY W. TAYLOR, SHARON RUSH, & ROBERT JOHN MUNRO, *FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY* 1, 434 (1999). The U.S. also has a history of paternalistic social policies directed at the poor. For example, in welfare policy, adults are increasingly required to work or stay in school if they want to receive government assistance. Lawrence M. Mead, *Telling*

UIGEA is an exception that is not only unusual but also unlikely to provide the ultimate remedy for the negative effects of online gambling.

B. *Economic Consequences of Online Gambling*

While socially conservative individuals may point to the negative social effects of online gambling, moderate libertarians claim that it is better for society to avoid government intrusion. Banning, rather than regulating, Internet gambling unduly restricts consumer freedom¹⁷⁵ and eliminates valuable tax revenue to the government, along with jobs and business opportunities.¹⁷⁶ For example, once the UIGEA passed, several international publicly traded online gaming companies went out of business after losing billions of dollars in revenue.¹⁷⁷ By regulating online gambling, the U.S. could become involved in this lucrative billion dollar business through either public or private gambling companies.

Not only does the UIGEA ban sacrifice potential profits for a moral stand but, if interpreted too strictly,¹⁷⁸ it will also cost the U.S. important informational benefits. Prohibition eliminates forms of online gambling that benefit the U.S. economy by providing better information through market-making.¹⁷⁹ For example, Tradesports.com and Intrade.com make markets for predicting political, financial, economic, and other current events which yield more accurate forecasts

the Poor What to Do, FINDARTICLES.COM, Summer, 1998 at 1, available at http://findarticles.com/p/articles/mi_m0377/is_n132/ai_20913161. Paternalism can also be seen in policy toward the homeless, where shelters increasingly set rules for their residents, and in education, where states have instituted tougher standards for school children. *Id.*

175. Robert Hahn & Paul Tetlock, *Short Odds for Ignorance*, N.Y. TIMES, Oct. 9, 2006, at A17.

176. *See, e.g.*, 152 CONG. REC. H8026-04, H8037 (Sept. 29, 2006) (statement of Rep. Porter); Will, *supra* note 13, at 78.

177. The stock of the largest online-gambling business, PartyGaming, which is based in Gibraltar, lost about \$5 billion in market value after Congress passed the UIGEA. Will, *supra* note 13, at 78. World Gaming PLC, a British company, lost about ninety-five percent of its revenue and \$8 billion in market value because of the UIGEA. *Id.*

178. For example, a strict interpretation of the UIGEA may extend the ban to market-making sites which may otherwise be considered as within the Act's educational exemption. *See* § 802(a), 120 Stat. at 1954; *see* discussion *supra* note 133; *see* discussion *infra* note 180.

179. Hahn & Tetlock, *supra* note 175. To ascertain which information market contracts should be protected, Hahn and Tetlock propose an "economic purpose" test, instead of a general ban which Internet poker games and lotteries would not pass. *Id.*

than polling methods and can improve decision-making by governments, nonprofit organizations, and the private sector.¹⁸⁰

In support of the argument for regulation rather than prohibition, moderate libertarians may also point to the fact that unregulated online gambling does not offer the same economic benefits as regulated U.S. land-based casinos, which provide jobs and tax revenues and legally protect bettors.¹⁸¹ With billions of dollars gambled each year on unregulated websites, state governments are forced to compete with online gambling sites for gaming revenue.¹⁸² Similar to the regulation of land-based casinos, regulation of Internet gambling sites could recoup this substantial loss of tax revenue.

Internet gambling is not without financial costs: it poses a growing debt collection problem for banks and the consumer credit industry, one that moderate libertarians argue can be solved without a categorical ban.¹⁸³ Compulsive Internet gamblers may accumulate large debts that become unrecoverable to credit card companies, which then yield higher interest rates and fees for non-Internet gamblers as a consequence.¹⁸⁴ While voluntary actions by credit card companies and banks prior to the passage of the UIGEA helped alleviate this problem,¹⁸⁵ compulsive gamblers are still finding ways to incur serious debts and defaults.¹⁸⁶ For example, many gamblers who were blocked from using their credit cards use “e-wallets” such as ClearPay and NETeller through overseas payment processors.¹⁸⁷ Thus, the UIGEA’s ban has sacrificed revenue to the government,

180. *Id.* “If you visit TradeSports.com, you can bet on Hillary Clinton’s chances of becoming the next president: a contract purchased for \$1.91 would yield \$10 if she wins—implying that the senator has about a 1 in 5 chance of winning.” *Id.* Intrade is a trading service similar to TradeSports.com that allows members to trade political, financial, current and similar event futures directly with each other. *About Intrade*, <http://www.intrade.com/> (last visited Jan. 14, 2009). Its market data has predictive value and is used by “governments, [more than] 100 global media organizations, central banks, investment houses, universities, the military, private traders, consultancies, and public individuals.” *Id.*

181. See Hammer, *supra* note 156, at 118.

182. SCHWARTZ, *supra* note 20, at 182 (arguing that state governments adopt the position that “the entire system of wagering is inherently fraudulent” because they compete with Internet gaming sites for gaming revenue). See, e.g., Hammer, *supra* note 156, at 118; Will, *supra* note 13, at 78; Matt Richtel & Heather Timmons, *U.S. Tries to Pull the Plug on Online Casinos But the Law’s Reach is Still a Question*, INT’L HERALD TRIB., July 2005, at 10 [hereinafter *U.S. Tries to Pull Plug*].

183. See 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006); see also Hammer, *supra* note 156, at 120.

184. Hammer, *supra* note 156, at 120.

185. See *supra* Part I.A.4.

186. Schwartz, *supra* note 157, at 52.

187. Weir, *supra* note 109.

while failing to eliminate the problems posed by compulsive gambling. Moreover, elimination of the credit card and bank payment option perpetuates the use of overseas payment processors, who cannot be regulated by the U.S. and can cause further negative economic and even criminal effects.¹⁸⁸

C. Criminal Consequences of Online Gambling

1. Risk of Money Laundering from Online Gambling

In addition to driving compulsive gamblers to commit theft to support their habit and pay their debt,¹⁸⁹ social conservatives also claim that online gambling facilitates money laundering on both legitimate and complicit Internet gambling sites.¹⁹⁰ Law enforcement officials believe that the “volume, speed and international reach of Internet transactions and the fact that many Internet gambling sites are located offshore” promote anonymity and difficult jurisdictional issues which foster misuse.¹⁹¹ Gambling sites are frequently located in areas with weak or nonexistent supervisory regimes.¹⁹² In addition, several online gambling websites have tried to circumvent the credit card coding system through factoring,¹⁹³ a process that enables money laundering by disguising the true source of funds from law enforcement officials.¹⁹⁴

Despite these concerns, money laundering actually proves quite rare in Internet gambling:¹⁹⁵ financial and gaming officials do not

188. See I. Nelson Rose, The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed, *GAMBLING AND THE LAW*, 2006 http://www.gamblingandthelaw.com/columns/2006_act.htm (recognizing that there is no way for the U.S. to regulate overseas payment processors). Without the ability to regulate overseas payment processors, it is more difficult to prevent money laundering and other criminal activity affecting U.S. gamblers.

189. See discussion *supra* notes 159–60.

190. See, e.g., GAO REPORT, *supra* note 85, at 34; Peterson, *supra* note 90.

191. GAO REPORT, *supra* note 85, at 35.

192. *Id.*

193. *Id.* at 36. The “Rules for Visa Merchants: Card Acceptance and Chargeback Management Guidelines” prohibits “factoring” or “depositing transactions for a business that does not have a valid merchant agreement.” VISA U.S.A., *CARD ACCEPTANCE AND CHARGEBACK MANAGEMENT GUIDELINES FOR VISA MERCHANTS 10* (2007) available at http://usa.visa.com/download/merchants/card_acceptance_guide.pdf. Factoring is also defined as “an approved merchant processing the (credit card) sales of a non-approved business through their merchant services account.” Mark Wilson, *What is Factoring?*, *BUSINESS KNOW HOW*, <http://www.businessknowhow.com/money/factoring.htm> (last visited Jan. 14, 2009).

194. GAO REPORT, *supra* note 85, at 36.

195. *Id.* at 35. As of 2002, the Federal Bureau of Investigation had open only two cases involving Internet gambling as a venue for money laundering activities. *Id.* One U.S. law enforcement official stated that the lack of adjudicated cases involving

even view money laundering as a threat.¹⁹⁶ They believe that broad anti-money laundering programs or credit card coding systems can detect potential money laundering through Internet gambling.¹⁹⁷ Furthermore, industry gaming officials caution that Internet gambling could become *more* vulnerable to money laundering in the wake of the UIGEA's passage as American financial institutions block the payment of Internet gambling through credit cards.¹⁹⁸ Other forms of electronic payments such as "e-wallets" have replaced credit cards but unfortunately lack the same level of recordkeeping or transaction limits.¹⁹⁹ New payment methods appeal to Internet gamblers, because they are secure and have lower transaction costs, anonymity, and speed.²⁰⁰ These qualities also make them an ideal vehicle for money laundering.²⁰¹ Several electronic gambling schemes, such as player-to-player wagering, have also made enforcement of the Act and identifying gamblers more difficult.²⁰² This form of wagering allows individuals to place bets directly with other bettors, without a bookmaker monitoring the betting action, and increases the risk of money laundering and other illegal activities.²⁰³

Social conservatives, however, have legitimate fears of fraudulent betting sites. Some sites lack credibility, because they do not pay customers when they win, perpetuate identity theft, make unauthorized credit card charges, skim money from their own accounts, and give the operator an unfair advantage by altering the software.²⁰⁴ Online gambling sites may be particularly vulnerable to these fraudulent practices due to their low start-up costs and easy access to cheap servers and simple software.²⁰⁵ This enables online gambling websites to

money laundering through Internet gambling websites was particularly because of the lack of industry oversight or regulations. *Id.*

196. *Id.* at 37.

197. *Id.*

198. *Id.* at 38.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. See SCHWARTZ, *supra* note 20, at 182; see also John G. Malcolm, *Internet Gambling Is a Serious Problem, Testimony Before the Senate Comm. on Banking, Housing, and Urban Affairs* (Mar. 18, 2003), reprinted in *THE INTERNET: OPPOSING VIEWPOINTS* 61, 63 (James D. Torr ed., 2005).

205. *Prepared Statement of John G. Malcolm Deputy Assistant Attorney Gen. Criminal Div. Before the Senate Comm. on Banking, Housing and Urban Affairs: Subject-Gambling on the Internet*, (Mar. 18, 2003), reprinted in *THE INTERNET: OPPOSING VIEWPOINTS* 61, 63 (James D. Torr ed., 2005).

appear and disappear after collecting from losers without paying winners.²⁰⁶

Yet, a ban would not only shut down fraudulent betting sites but would also eliminate legitimate sites and perpetuate the problem of disreputable black market sites. Furthermore, a ban constitutes an overbroad solution to a problem that is not strictly limited to online betting; gambling, whether by hand or machine, is also quite susceptible to cheating.²⁰⁷

2. *Risk of Organized Crime from Implementing the UIGEA Ban*

Although fraudulent gaming sites do require regulatory attention, the social conservative solution of an overall ban ignores the pitfalls observed from attempts at prohibition. Banning online gambling carries a substantial risk of failure, since as Prohibition in the 1920s demonstrated, a ban will not eliminate demand.²⁰⁸ In fact, Prohibition increased the attractiveness of alcohol to a younger demographic by making it “a glamour product associated with excitement and intrigue.”²⁰⁹ The implementation of high prices and the substantial profits made during Prohibition was an incentive for sellers to try to market their products to nondrinkers, which they accomplished with some success.²¹⁰ Prohibition shows that a paternalistic law such as the UIGEA may actually encourage “good” citizens to break it, confident that they are not doing anything morally wrong.²¹¹ For example, during Prohibition many Americans and recent immigrants drank defiantly “with a sense of high purpose.”²¹² This trend can already be seen as the number of members in the Poker Players Alliance, an organization dedicated to promoting and protecting poker, doubled to

206. *Id.*

207. SCHWARTZ, *supra* note 20, at 186. For example, on June 7, 2007, four men were arrested in Atlantic City when they organized a private game in a luxurious upstairs room rigged with miniature hidden cameras aimed at their cards. Helen Kennedy, *Dirty Poker Game Bust. Expert Used Spy Cams, Earpiece in N.J., Say Cops*, NY DAILY NEWS, July 26, 2007, at News 15. One of the four conspirators was alleged to have whispered what the players were holding to an accomplice at the table wearing a hidden earpiece. *Id.* Meanwhile, another conspirator was using a laptop inside and running the odds on each deal of the cards. *Id.* The men also marked the cards. *Id.*

208. Will, *supra* note 13, at 78; Murray, *supra* note 13, at A27.

209. Mark Thornton, *Policy Analysis: Alcohol Prohibition Was a Failure*, CATO INSTITUTE, July 17, 1991, available at <http://www.cato.org/pubs/pas/pa-157.html>.

210. *Id.*

211. Murray, *supra* note 13, at A27.

212. “Men were drinking defiantly, with a sense of high purpose, a kind of dedicated drinking that you don’t see much of today.” Thornton, *supra* note 209.

more than 75,000 since the U.S. House of Representatives voted to ban online poker.²¹³

Libertarians and conservatives alike can fear that a ban will create an organized crime black market for Internet gambling, akin to the rise of bootlegging during Prohibition.²¹⁴ Since courts will not enforce illegal contracts, owners and patrons of Internet gambling would have to rely on organized crime members to enforce contracts and resolve disputes.²¹⁵ The actions of organized crime members could have implications for the types of crimes committed. For example, the organized crime members of the online gambling black market could foster violent crimes in a way similar to the mobsters of Prohibition's black market.²¹⁶ As a result, a ban may have the unintended effect of increasing the number of individuals convicted of crimes with victims (burglaries, robberies, and murders) instead of decreasing the number of prisoners charged with gambling-related crimes.²¹⁷

In addition, with the government unable to tax the revenue generated from black market activity, Internet gambling profits would benefit organized crime and cost the government substantially in potential tax revenue.²¹⁸ Gamblers in the black market would also be more exposed to disreputable offshore betting sites without the heavy marketing of bigger, more legitimate online gambling companies to dominate the market.²¹⁹ Finally, online gambling sites would have to rely on disreputable third party payment processors located in countries with lax banking laws, which therefore would perpetuate the risk of fraud inherent in black markets.²²⁰

213. PR Newswire, *Poker Players Alliance Membership Surges as Online Gambling Legislation Moves Forward*, ONLINE CASINO NEWS, July 29, 2006, available at http://www.onlinecasino-news.com/20060729/poker_players_alliance_membership_surges_as_online_gambling_legislation_moves_bbdb.aspx.

214. See 152 CONG. REC. H8026-04, H8036 (Sept. 29, 2006) (statement of Rep. Paul).

215. *Id.*

216. The number of violations of Prohibition laws and violent crimes against persons and property increased throughout Prohibition as crime became organized through mafias participating in the underground economy or black market of alcoholic goods. Thornton, *supra* note 209.

217. *Id.*

218. *Id.*

219. Costigan, *Q & A*, *supra* note 144.

220. *Id.*

D. International Consequences of a Ban

1. Risk of WTO Sanctions

One major international concern of the UIGEA ban is the fear—popular among moderate libertarians—that, based on the World Trade Organization (WTO) Ruling on April 7, 2005, the U.S. could face sanctions from the WTO for violating the General Agreement on Trade in Services (GATS).²²¹ GATS appears to apply to laws banning online gambling, since the U.S. subjected all of its federal, state, and local gambling regulations to the WTO's rules when it agreed to submit every recreational service "except sporting" to WTO regulation.²²² The U.S., under GATS, has a commitment to grant full market access to gambling and betting services.²²³ The WTO Appellate Body found that the Wire Act, Travel Act, and Illegal Gambling Business Act were inconsistent with this commitment of specific market access because they prohibited one, several, or all means of cross-border delivery of Internet gambling.²²⁴ A federal law explicitly banning Internet gambling would likewise violate this commitment, since foreign websites would not be able to legally access the American market.

However, there is a strong argument that a gambling ban can avoid WTO sanctions because it falls under the GATS exception for public morals.²²⁵ In order to invoke this exception, the U.S. must prove that the ban is "necessary to protect public morals or to maintain public order."²²⁶ To prove the necessity of the ban, the U.S. can present evidence of the link between online gambling and crime, compul-

221. WORLD TRADE ORGANIZATION, REPORT OF THE APPELLATE BODY, UNITED STATES-MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/AB/R (2005), available at http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf [hereinafter APPELLATE BODY REPORT]; see also I. Nelson Rose, *U.S. Ignores Deadline in WTO Fight with Antigua*, 10 GAMING L. REV. 225, 225–26 (2006). Representative Porter thinks that regulation would prevent sanctions by the WTO because of current inconsistencies in U.S. Internet gambling policy. See 152 CONG. REC. H8026-04, H8037 (Sept. 29, 2006) (statement of Rep. Porter). "GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization." World Trade Organization, The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Jan. 14, 2009).

222. Rose, *U.S. Ignores Deadline*, *supra* note 221, at 225.

223. APPELLATE BODY REPORT, *supra* note 221, at 74–75, 123.

224. *Id.* at 45–46, 80–81, 89, 124.

225. *Id.* at 124–25.

226. *Id.* at 125.

sive gambling, and underage gambling.²²⁷ With respect to the UIGEA, the U.S. would be able to avoid another pitfall that it faced in the WTO dispute settlement with Antigua, chiefly that the ban cannot discriminate against foreigners to protect its local businesses.²²⁸ A general ban such as the UIGEA would not discriminate against foreigners, since it would prohibit *both* domestic and foreign organizations from engaging in Internet gambling with American citizens. Thus, the risk of WTO sanctions appears to be minimal, although foreign retribution for closing the U.S. Internet gambling market may still occur in other ways.

2. Risk of Ignoring the International Trend of Regulation

Over eighty countries allow gambling in some form.²²⁹ Given the fact that such a significant number of countries have chosen to regulate rather than ban gambling, the UIGEA ban contravenes the trend of international wagering. Italy, Belgium, France and the U.K. have all opted to regulate, rather than ban, Internet gambling.²³⁰ For

227. Rose, *U.S. Ignores Deadline*, *supra* note 221, at 226.

228. *Id.* An example of a law that does discriminate in this way is the Interstate Horseracing Act (IHA). The IHA waives three anti-gambling laws to allow parimutuel betting on horseracing by phone or computer for certain domestic firms in states where it is already legal to place and accept bets. *Id.* Thus, the IHA does not apply the ban on remote gambling equally to domestic and foreign companies. *Id.*; *see also* APPELLATE BODY REPORT, *supra* note 221, at 126. Antigua and Barbuda requested a WTO panel to be established in order to address their claim that U.S. measures which affected the cross-border supply of gambling and betting services, cumulatively prevented the supply of gambling and betting services from another WTO Member to the United States on a cross-border basis. World Trade Organization, Dispute Settlement: Dispute DS285 United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Jan. 14, 2009).

229. Phillips, *supra* note 104, at A11.

230. Simon Packard & Amy Wilson, *Web Gambling Sites Raise Stakes in Europe as U.S. Enforces Ban*, BLOOMBERG, Oct. 24, 2006. Italy will permit companies to offer online lotteries, bingo, and betting on sports or games of skill in 2007. *Id.* However, the E.U. has criticized Italy's first online gambling regulation because of (1) the prohibitive cost of the license, (2) the requirement for operators to connect their systems to the government central database, and (3) the requirement for operators to reach a specific level of betting turnover in order to be eligible to request a license. *News: EU Criticises Italy's First Online Gambling Regulation*, GAMBLINGPLANET.ORG, Apr. 28, 2008, http://www.gamblingplanet.org/GPNews_280408a. The U.K. began licensing private Internet gambling sites in September 2007. *Id.* While Belgium is working to change its gambling laws and may issue Internet gambling licenses as soon as 2009, Austria already allows private companies to offer sports betting. *Id.*; *Belgium preparing to embrace internet gambling?*, Reviewed-Casinos.com, July 15, 2008, http://www.reviewed-casinos.com/casino_news/1507086.php (last viewed Oct. 12, 2008). The new gambling legislation would also permit foreign Internet gambling operators to offer their services in Belgium. *If the Belgian Parliament Adopts New Gambling*

example, France will begin issuing licenses for online betting operators beginning in the second half of 2009.²³¹ The French licensing regime will be similar to the licensing regime of the U.K., discussed in Part IV of this Note, in that it will prohibit underage gambling and regulate problem gambling, as well as restrict advertising and control money laundering.²³² The European Union (E.U.) is encouraging other members who open their markets to remove any measures that protect domestic companies.²³³ Although the E.U. has failed to reach an agreement to eliminate national barriers to providing gambling services across its members,²³⁴ it told Austria to cease discrimination against international bookmakers and casinos.²³⁵ Poland also received a warning for taxing foreign lottery winnings more than domestic jackpots.²³⁶ According to E.U. Internal Market Commissioner Charlie McCreevy, eight E.U. members may be added to a list of seven which are facing legal action for refusing to open their betting markets.²³⁷ It is uncertain whether the E.U. would impose similar sanctions to non-E.U. countries, such as the U.S., for similarly failing to open their betting markets.

In addition to avoiding international backlash, another argument in favor of U.S. regulation of Internet gambling is that in the past, the U.S. has followed progressive international trends involving behavior perceived as a vice. For example, while homosexuality was believed to be a criminal vice in *Bowers v. Hardwick*,²³⁸ it was overturned by

Legislation in 2008, Foreign Internet Gambling Operators Will Also be Allowed to Offer Their Services in Belgium, REUTERS, Feb. 22, 2008, <http://www.reuters.com/article/pressRelease/idUS106437+22-Feb-2008+BW20080222>. France recently agreed with the E.U. to regulate Internet gambling and open up the market and has established a licensing regime for online gambling. *News: First Online Betting Permits in France in 2009?*, GAMBLINGPLANET.ORG, June 9, 2008, http://www.gamblingplanet.org/GP_news_090608a (last visited Oct. 12, 2008) [hereinafter *First Online Betting Permits*].

231. *First Online Betting Permits*, *supra* note 230.

232. *Id.*

233. Packard & Wilson, *supra* note 230.

234. *Id.*

235. *Id.* The E.U. issued this warning to France and Austria on October 12, 2006. *Id.* Prior to its June 2008 decision to open its gambling market, France strictly regulated money games and increased the fines on international firms that advertised in France. *Id.*

236. *Id.*

237. Pete Harrison, *Online Gaming Firms Look East After U.S. Ban*, REUTERS U.K., Oct. 3, 2006, available at <http://go.reuters.co.uk/newsArticle.jhtml?type=internetNews&storyID=13676180>.

238. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (holding that there is no fundamental right for homosexuals to engage in acts of consensual sodomy) *overturned* by *Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court in *Bowers* held that the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is

the landmark case of *Lawrence v. Texas*, which held that statutes which criminalized consensual, homosexual sex acts violated the Due Process clause of the Fourteenth Amendment.²³⁹ Justice Kennedy's majority opinion relied heavily on two decades of jurisprudence from the European Court of Human Rights, interpreting the fundamental right to respect for one's private life.²⁴⁰ Kennedy's opinion rejected the reasoning of the previous case of *Bowers v. Hardwick*²⁴¹ and used European precedent to discredit the foundations of *Bowers* and to establish a new interpretation of the Fourteenth Amendment's application to homosexuality.²⁴² Similarly, the U.S. could examine the methods of regulation employed by other Western countries such as the U.K. in order to establish a new regime to better address the negative effects of online gambling. Thus, following a progressive international trend regarding another "vice"—Internet gambling—would not only be a rational step for the U.S. but would also help to avoid negative political consequences.

The debate between moderate libertarians and social conservatives indicates that although the political consequences of banning online gambling are uncertain under GATS, and the social costs of Internet gambling are substantial, the criminal and economic effects of prohibition show that it is not the most efficient solution. Ultimately, looking to European trends toward regulation and learning from the destructive effects of U.S. alcohol Prohibition is the best response to effectively control the negative consequences of Internet gambling.

immoral and unacceptable provided a rational basis for its law outlawing consensual sodomy even in the privacy of one's home. *Id.* at 196.

239. *Lawrence*, 539 U.S. 558, 559 (2003).

240. *Id.*

241. In *Bowers*, Justice White's majority opinion asserted that "[n]o connection between family, marriage, and procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent." 478 U.S. at 191. His reasoning further relied on a historical analysis of negative American attitudes toward homosexual sodomy and on a slippery slope argument that the recognition of sodomy as a fundamental right would lead to the acceptance of bigamy and incest. *Id.* at 192–94, 196.

242. Daniel Smith, *Continental Drift: The European Court of Human Rights and the Abolition of Anti-Sodomy Laws in Lawrence v. Texas*, 72 U. CIN. L. REV. 1799, 1800 (2004). Justice Kennedy used the European Court of Human Rights jurisprudence to show that several different jurisdictions had rejected *Bowers*'s reasoning. *Lawrence*, 539 U.S. 558, 567–78 (2003). The ECHR decisions in *Modinos*, *Norris*, and *Dudgeon* displayed a twenty-year tradition in that court of respect for privacy in consensual, private, sexual relationships. *Id.* at 576–77. Justice Kennedy also cited an amicus curiae brief submitted on *Lawrence*'s behalf by the United Nations High Commissioner of Human Rights and other international human rights law groups to show that the privacy right recognized in *Dudgeon* had "been accepted as an integral part of human freedom in many other countries." *Id.* at 577.

III.

INEFFECTIVENESS OF THE NEW LAW

A. *Industry Losses Have Not Stopped the Growth of International Internet Gambling*

Since the passage of the UIGEA, the online gambling industry has suffered a major setback.²⁴³ While the CEO of BetOnSports, David Carruthers, was still in the U.S. awaiting trial, his company floundered and eventually exited the U.K. stock exchange.²⁴⁴ The Board of Directors of BetOnSports is currently complying with a permanent injunction issued by the United States District Court for the Eastern District of Missouri.²⁴⁵ The injunction orders BetOnSports to cease trade in the U.S., close its Costa Rican and Antiguan operations, and agree to a plan with the DOJ for its Antiguan subsidiary to pay customers based on money recovered.²⁴⁶

BetOnSports is not the only online gambling company to leave the U.S. market. BetCorp froze all U.S. betting accounts and PartyPoker.com temporarily stopped serving American gamblers.²⁴⁷ After the UIGEA passed, the stock of the largest online-gambling company, PartyGaming, declined fifty-eight percent and lost five billion dollars

243. Will, *supra* note 13, at 78.

244. Release Order, *United States v. BetOnSports*, No. 4:06-CR-00337 (E.D. Mo. Aug. 16, 2006), available at www.westlaw.com; Gambling911, *Defendant Fakes Heart Attack After New York City Gambling Bust*, Nov. 15, 2006, <http://www.gambling911.com/New-York-City-Gambling-Bust-111506.html> (last visited Nov. 22, 2006) [hereinafter *Defendant Fakes Heart Attack*]; see also BETonSPORTS.com, BETonSPORTS PLC Update, <http://www.betonsports.com/> (last visited Nov. 23, 2008).

245. BETonSPORTS.com, BETonSPORTS PLC Update, <http://www.betonsports.com/> (last visited Jan. 14, 2008).

246. *Id.*

247. See, e.g., Gambling911.com, *Gambling911.com Looks to Fill Void Left by PartyPoker Which Announced Departure from US Online Poker Market*, Oct. 6, 2006, <http://www.gambling911.com/PartyPoker-US-Online-Poker-100606.html>; Gambling911.com News Wire, *BetCorp Announcement Expected Today Regarding Bodog Takeover of BetWWTS*, Nov. 15, 2006, <http://www.gambling911.com/BetCorp-Bodog-111506.html> (last visited Nov. 23, 2009). Although many American gamblers still use PartyPoker.com, the website maintains in its Terms and Conditions of Use section that individuals may gamble on this site at their own risk. PartyPoker.com, Terms and Conditions of Use, Oct. 24, 2007, https://secure.partyaccount.com/about/legal—information—s.do#Legality_of_Use_of_theServices (“You may only use the Services if you are 18 years of age or over (or such other minimum legal age in your jurisdiction) and it is legal for you to do so according to the laws that apply in your jurisdiction. . . . You understand and accept that the Group is unable to provide you any legal advice or assurances and that it is your sole responsibility to ensure that at all times you comply with the laws that govern you and that you have the complete legal right to use the Services.”).

in market value in one day.²⁴⁸ PartyGaming then suspended all real-money gaming activities to U.S. customers²⁴⁹ and has since lost seventy-five percent of its revenue.²⁵⁰ Other Internet gaming companies have faced similar losses.²⁵¹ After the Act's passage, the Internet gambling industry lost approximately eight billion dollars, which included more than 2,300 websites with over half of its business in the U.S.²⁵²

Despite these significant financial losses, countries such as Great Britain are trying to foster interest in international regulation of the industry outside of the U.S.²⁵³ Since most of the public Internet gambling companies trade on the London Stock Exchange, Great Britain has lost more than \$7.6 billion in the market value of online gambling stocks on its Exchange.²⁵⁴ In response to this loss, many online gambling companies are discussing mergers with each other and exploring markets outside of the U.S.²⁵⁵ For example, Interactive Gaming Holdings announced a move into South Asia after a deal with Curacao-licensed Maharajah Club.²⁵⁶ After disposing of its U.S. market, PartyGaming PLC is now trying to expand internationally.²⁵⁷ It is looking primarily in Europe, where the U.K., Italy, and Belgium have

248. Will, *supra* note 13, at 78.

249. Jane Wardell, *UK Gambling Sites Fold After U.S. Ban*, SUNDAY TIMES (W. AUSTRAL.), Oct. 15, 2006.

250. Packard & Wilson, *supra* note 230.

251. World Gaming PLC's directors resigned as it plunged 88 percent, since it received 95 percent of its revenue from American gamblers. See, e.g., Will, *supra* note 13, at 78; Wardell, *supra* note 249. The day after the Act was signed into law, SportingBet PLC and Leisure & Gaming PLC both sold their U.S. operations for \$1. Wardell, *supra* note 249. Shortly after SportingBet's sale, its CEO, Peter Dicks resigned. Phineas Lambert, *SportingBet Abandons U.S. Market*, DAILY DEAL, Oct. 16, 2006. Empire Online Ltd. also left the U.S. market and lost sixty-five percent of U.S. revenue, but it still managed to distribute \$.017 per share dividends. Ran Rimon, *Empire Online Closes U.S. Activity*, GLOBES ONLINE, Oct. 15, 2006. It is using cash reserves to invest in activity aside from online gambling, since CEO Noam Lanir does not see a future for Internet gambling in light of the new law. *Id.*

252. Will, *supra* note 13, at 78. The industry lost \$7 billion of market value in one day after Congress passed the Act on September 30, 2006. Packard & Wilson, *supra* note 230.

253. Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES (LATE ED.), Nov. 1, 2006, at C3.

254. *Id.*

255. *Id.*

256. Pete Harrison, *Online Gaming Firms Look East After U.S. Ban*, REUTERS U.K., Oct. 3, 2006, available at <http://go.reuters.co.uk/newsArticle.jhtml?type=internetNews&storyID=13676180> (last updated Nov. 22, 2006).

257. Packard & Wilson, *supra* note 230; see also Roger Blitz & Tom Braithwaite, *PartyGaming To Press On with Sports Betting*, FINANCIAL TIMES, July 21, 2006.

opted to regulate, rather than outlaw, Internet gambling.²⁵⁸ The gambling market of E.U. members is especially lucrative and is valued at approximately seventy billion dollars.²⁵⁹ Traditional casino companies in Asia and the U.S. are also considering buying online gambling sites in order to enter the European market.²⁶⁰ Although the UIGEA caused the online gambling industry to lose billions of dollars, Internet gambling companies have already begun taking steps to recoup their losses.

B. Enforcement Issues

Despite the fact that online gambling companies can no longer advertise in the U.S.,²⁶¹ there are dozens of gambling websites emerging to serve American gamblers.²⁶² The industry appears to be splitting into one side of London-based companies pulling out of U.S.-centered operations and one side of private offshore companies based in the Caribbean that are continuing to reach American customers through third parties.²⁶³

For example, immediately after the passage of the UIGEA, online gamblers continued to use VegasPoker247, a Costa Rica-based web-

258. *Id.*

259. Packard & Wilson, *supra* note 230.

260. *See, e.g.,* Timmons & Pfanner, *supra* note 253, at C3; *Election Round Up: Veteran Iowa Congressman Leach Loses Bet on Internet Gambling*, CREDIT UNION J., Nov. 13, 2006.

261. Even prior to the passage of the Unlawful Internet Gambling Enforcement Act of 2006 much advertising by the online gambling industry had been blocked. Anne Lindner, Comment, *First Amendment as Last Resort: The Internet Gambling Industry's Bid to Advertise in the United States*, 50 ST. LOUIS U. L.J. 1289, 1294 (2006). In granting the DOJ's motion to dismiss for lack of standing, the district court stated that even if Casino City did have standing, it did not have a valid First Amendment claim to advertise Internet gambling, since this advertising misleads the reader by falsely portraying the image that Internet gambling is legal. Ruling at 7, 13–15, *Casino City, Inc. v. United States Dep't of Justice*, No. 04-557-B-M3 (M.D. La. Feb. 15, 2005), available at <http://pdf.online.casinocity.com/DismissalRulingandOrder.pdf>. The UIGEA codifies the DOJ's view that online gambling sites are illegal and there is no First Amendment right to advertise illegal activity. *Id.*; *see also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 567 (1980). In 2007, Microsoft, Yahoo, and Google agreed to a \$31.5 million settlement for federal civil allegations that they had accepted illegal gambling ads although they claimed that they had stopped taking these ads years ago. *Internet Giants Settle U.S. Case on Gambling Ads*, N.Y. TIMES, Dec. 20, 2007, at C5 (“[T]he Department of Justice has advised that online gambling is illegal in the United States, and ads to promote it are improper.”).

262. Sites such as Gambling911.com are looking to fill PartyPoker's shoes and serve the U.S. market. Gambling911.com, *supra* note 247; Wardell, *supra* note 249.

263. Wardell, *supra* note 249 (describing the effect of the UIGEA on the online gambling industry).

site licensed in Canada that offered online games for money.²⁶⁴ It was able to reach American customers since the U.S. government lacks control over the international banking systems that many of its payment providers operate within.²⁶⁵ Overseas payment providers such as ClearPay and NETeller allow gamblers to set up “e-wallets.”²⁶⁶ These e-wallets make it easy to transfer money from American bank accounts to international financial institutions and then to gambling sites.²⁶⁷ However, the proliferation of these “e-wallets” may perpetuate opportunities for money laundering and fraud via Internet gambling and further the need for more effective enforcement.²⁶⁸

The banking industry has already made it clear that they cannot police all online gambling transactions.²⁶⁹ There are several ways to circumvent credit card policies and transaction coding systems of banks and credit card associations.²⁷⁰ Online gambling companies can enter erroneous merchant category codes for their transactions, misrepresent their business activities, or engage in factoring to disguise the true source of funds.²⁷¹ Although credit card companies can use their fraud monitoring systems to identify potential Internet gambling transactions, they have acknowledged that their monitoring efforts may not capture all of these transactions and cannot always identify where the transactions took place.²⁷² Thus, the banking industry may

264. *Id.* (“One company, Costa Rica-based, Canadian-licensed VegasPoker247, said it was confident that it would be able to continue offering online games for money.”). Internet searches reveal that VegasPoker247.com has merged with AbsolutePoker.com, and VegasPoker247.net (an educational site) is still operating.

265. *Id.*

266. *See, e.g.,* Weir, *supra* note 109, at 79; Schmadtke, *supra* note 16, at C9.

267. Murray, *supra* note 13, at A27.

268. GAO REPORT, *supra* note 85, at 38 (“[Industry gaming officials] explained that credit cards would likely be replaced by newer forms of electronic payments that might not be subject to the same level of record keeping or transaction limits as credit cards and could thus be more susceptible to money laundering.”). Overseas payment providers such as e-wallets are especially risky for both the websites that use them and consumers because they are often located in countries with lax banking laws. Costigan, *Q & A*, *supra* note 144. For example, users have complained about security breaches and unapproved funds transfers from the overseas e-wallet service, ePassporte. *See also*, 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>.

269. GAO Report, *supra* note 85, at 29 (“But the issuers acknowledged that their monitoring efforts did not capture all transactions involving Internet gambling and could not always identify where the transactions took place.”).

270. *Id.* at 31.

271. *Id.*

272. *Id.* at 28–29.

not only fail to catch all online gambling transactions, but it may block valid transactions of foreign citizens visiting the U.S.²⁷³

According to Charles Murray, the enforcement difficulties and sheer “stupidity” of the new law may hinder Americans’ respect for the law in general and tempt good citizens to ignore it.²⁷⁴ He states that of the four sites where he plays poker, only one has blocked U.S. customers because of the law.²⁷⁵ Representative Jon Porter of Nevada is also concerned with the problems of enforcing the UIGEA.²⁷⁶ He asserts that millions of Americans who still gamble online daily may be harmed because of the lack of reliable age or identity verification structures and regulations to ensure fair games.²⁷⁷ As a result of these concerns, some individuals do not believe that the Act will impede the growing popularity of online gambling and instead will drive it underground to be run by bookies.²⁷⁸ However, other individuals believe that the code-and-blocking system would bar most bettors.²⁷⁹ In fact, enforcement has already begun with one of the biggest gambling busts ever on November 15, 2006.²⁸⁰ A 33-count indictment was issued by New York authorities charging twenty-seven individuals and three corporations with operating an illegal online gambling operation that allegedly booked more than \$3.3 billion in wagers over a twenty-eight-month period.²⁸¹ The St. Maarten-based operation had a large portion of its activities in New York and Miami, with runners transfer-

273. See 152 CONG. REC. H8026-04, H8030 (Sept. 29, 2006) (“Though a financial institution may block additional transactions based on a reasonable belief, it has no duty to do so, and may rely solely on the regulations to fully discharge its obligations.”).

274. Murray, *supra* note 13, at A27 (“The temptation for good citizens to ignore a stupid law is encouraged when it is unenforceable. In this, the attempt to ban Internet gambling is exemplary.”). Representative Porter also thinks that the disconnect between the current government policy of illegality and the thriving Internet gambling industry has fueled disrespect for the law because of its lack of enforcement. 152 CONG. REC. H8026-04, H8037 (Sept. 29, 2006) (statement of Rep. Porter).

275. Murray, *supra* note 13, at A27.

276. 152 CONG. REC. H8026-04 at H8037 (statement of Rep. Porter).

277. *Id.*

278. Schmadtke, *supra* note 16, at C9.

279. Peter Kaplan, *Banks Await Regulations on U.S. Internet Betting Ban*, REUTERS, Oct. 2, 2006, available at <http://www.topix.net/content/reuters/3321906943231723952434576494232579081870> (last visited Nov. 22, 2008).

280. *Defendant Fakes Heart Attack*, *supra* note 244. Daniel and Melissa Clarin, the controller and bookkeeper of playwithal.com, were sentenced on April 26, 2007 to pay \$300,000 in civil penalties, and only Daniel received two and one half to seven years imprisonment. Scott Shifrel, *Wrist Slaps for 3.3B Gambling Couple*, N.Y. DAILY NEWS (SPORTS FINAL ED.), Apr. 27, 2007. Melissa Clarin’s father, James Giordano, ran the company and still faces charges. *Id.*

281. *Defendant Fakes Heart Attack*, *supra* note 244. One of the individuals indicted was a professional baseball scout and another was a high-stakes poker player. News

ring money between New York and Las Vegas.²⁸² In addition to the criminal charges, the Queens D.A. is pursuing \$500 million in asset forfeitures from twenty of the defendants.²⁸³ The scheme used a secure Internet site to place sports bets through bookies.²⁸⁴ One of the defendants, Digital Solutions, is charged with providing the site with servers, data, and software and marks the first time that a Web designer for an offshore-based Internet company has been charged with directly participating in a criminal enterprise.²⁸⁵ Other investigations are currently underway and are using methods such as the wiring of actual servers and the use of informants at offshore sportsbooks.²⁸⁶ Despite the recent enforcement efforts, it will be a challenge for the U.S. to continue to effectively enforce the UIGEA amidst the public backlash, growing black market, and lucrative online gambling companies.

C. *Negative Consequences of the UIGEA*

In addition to causing industry losses but failing to eradicate Internet gambling companies (which may still potentially reach U.S. customers), the UIGEA has directly impacted individual gamblers.²⁸⁷ Some American customers have lost their online betting accounts, including their deposits and winnings.²⁸⁸ Others have lost access to reputable betting sites such as PartyPoker and BetOnSports.²⁸⁹ At the very least, gamblers have certainly been inconvenienced as third-party payment processors and some major international banks leave the industry.²⁹⁰ Although it is difficult to alter these unfortunate consequences now, the loss of these betting accounts, deposits, and winnings is a reminder that these foreseeable yet ignored events would likely never have happened had legislators chosen a system of regulation over prohibition.

Services, *Dozens Busted in Online Sports Gambling Ring*, CHI. TRIB., Nov. 16, 2006, at 12 [hereinafter *Dozens Busted*].

282. *Defendant Fakes Heart Attack*, *supra* note 244.

283. *Id.*

284. *Dozens Busted*, *supra* note 281, at 12.

285. *Id.*

286. *Id.*

287. Schmadtke, *supra* note 16, at C9.

288. *Id.*

289. *See, e.g.*, Gambling911.com, *supra* note 247; BETonSPORTS.com, BETonSPORTS PLC Update, <http://www.betonsports.com/> (last visited Jan. 14, 2009).

290. Costigan, *Q & A*, *supra* note 144.

D. Disparate Treatment Under the UIGEA

Despite the feared negative criminal and social effects of Internet gambling,²⁹¹ which were part of the push for the passage of the Act,²⁹² the UIGEA carves out several exceptions for fantasy sports and permits intra-state, tribal, and horse-racing Internet gambling.²⁹³ As a result of the UIGEA, a foreign Internet gambling site may only take bets on U.S. sporting events online or by telephone from clients in countries where this betting is allowed.²⁹⁴ However, § 5362(1)(E)(ix) of the Act excludes fantasy sports or educational games from the definition of “bet or wager” so that they can be played anywhere in the U.S. regardless of state gambling laws.²⁹⁵ This exemption has perpetuated involvement in sports betting and in the sports industry in general, albeit in a “fantasy” world.²⁹⁶

291. See *supra* Parts II.A and II.C.

292. See 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006).

293. See Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802(a), 120 Stat. 1884, 1954–56 (2006) (codified at 31 U.S.C. § 5363).

294. Armytage, *supra* note 106, at 29.

295. See § 802(a), 120 Stat. at 1954. In order to qualify as an exempt fantasy football game, the game must (1) not be based on the current membership of an actual team that is a member of an amateur or professional sports organization, (2) make all prizes offered to winners known to the participants in advance of the game, (3) ensure that prizes are not contingent on the number of participants or the amount of fees paid by those participants, (4) guarantee that all winning outcomes reflect the relative knowledge and skill of the participants, (5) guarantee that all winning outcomes are determined primarily by accumulated statistical results of the performance of individuals in multiple real-world sporting or other events, (6) prevent any winning outcome based on the score, point-spread or performance of any single real-world team or combination of such teams, and (7) prevent any winning outcome based solely on an individual athlete’s single performance in a single real-world sporting or other event. *Id.* This exception was added with the above restrictions to ensure the integrity of sports games. 152 CONG. REC. H8026-04, H8029 (Sept. 29, 2006).

296. Based on these rules, fantasy sports leagues run by Yahoo.com, ESPN, and other websites appear to be exempt from the Act’s online gambling prohibition. The Yahoo leagues, for example, are free to play and extend throughout the season of the designated sport. Yahoo! Sports, Fantasy Sports, <http://fantasysports.yahoo.com/> (last visited Jan. 14, 2009). The only prize offered for winning is bragging rights. Yahoo! Help, Ask Yahoo! Sports Fantasy Basketball Help: What do I Get if I Win?, <http://help.yahoo.com/l/us/yahoo/basketball/winning/hoops-21.html> (last visited Jan. 14, 2009). However, many leagues set up money pools on their own. Yahoo has roster control that allows participants to assemble a fantasy team of individual players from different teams through an online draft and trade them throughout the season. Yahoo! Sports, Fantasy Sports, <http://fantasysports.yahoo.com/> (last visited Jan. 14, 2009). This ensures that fantasy teams differ from real-world amateur or professional teams and that the winning outcome is not based solely on an individual athlete or real-world team’s single performance. *Id.* See also Yahoo! Help, Ask Yahoo! Sports Fantasy Basketball Help: Rules and Instructions, <http://help.yahoo.com/l/us/yahoo/basketball/rules/> (last visited Jan. 14, 2009). The sports figures online stock market, PRO-TRADE, seems to qualify as an educational game exempt from the UIGEA as it is

Intrastate transactions and tribal casinos are exempt from the UIGEA and are protected from foreign online gambling competition.²⁹⁷ Under § 5362(10)(B)(i)-(ii), a state may engage in online gambling if it is a purely intrastate transaction conducted under state law with appropriate security controls.²⁹⁸ For example, the state must have age and location verification requirements to block access to minors and individuals outside of the state and data security standards to prevent individuals whose age and location have not been verified from accessing the site.²⁹⁹ By complying with these requirements, online bets may be permissible inside Nevada or in tribal casinos and may encourage these casinos to take over large European online gambling companies weakened by the new law.³⁰⁰

Perhaps the most controversial of these exceptions is the horseracing exception. This exception allows gamblers, including addicts, to divert their attention from one form of gambling (online poker) to another form (horseracing), which ultimately frustrates the entire purpose of the law. While horseracing will remain regulated under the Interstate Horseracing Act, which allows “interstate off-track wagers,” it is not subject to the same scrutiny as the UIGEA.³⁰¹ Interstate off-track wagers are legal wagers placed or accepted in one state with respect to the outcome of a horserace taking place in another state.³⁰² They include “pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State,” as well as the combination of any pari-mutuel wagering pools.³⁰³ Now, with the horseracing excep-

highly statistical, free to play, and allows fans to have a “customizable sports experience.” See, e.g., PROTRADE: The Sports Stock Market, How to Trade, <http://www.protrade.com/HelpHowToTrade.html> (last visited Jan. 14, 2009); Zack O’Malley Greenburg, *Picking Winners*, FORBES, Oct. 16, 2006, at 56. This site is a place for participants to buy and sell shares of their favorite players in order to compile a portfolio of athletes using \$25,000 of fake money. PROTRADE: The Sports Stock Market, How to Trade, <http://www.protrade.com/HelpHowToTrade.html> (last visited Jan. 14, 2009). Since participants must determine who they want to buy or sell based on both the athlete’s skills and share price, establishing a portfolio requires knowledge and skill on behalf of each trader. PROTRADE: The Sports Stock Market, How the Market Works, <http://www.protrade.com/HelpHowTheMarketWorks.html> (last visited Jan. 14, 2008).

297. § 802(a), 120 Stat. at 1955.

298. *Id.*

299. *Id.*

300. Braude, *supra* note 102; § 802(a), 120 Stat. at 1955–56. Online gambling may be permissible in Nevada, since it has legalized gambling.

301. 15 U.S.C.A. §§ 3002(3), 3004 (2006).

302. 15 U.S.C.A. § 3002(3).

303. *Id.*

tion under the new Act, bets can be placed over electronic media such as the Internet so long as pari-mutuel wagers are legal in both states involved.³⁰⁴ Horseracing barons, such as the chief executive of the National Thoroughbred Racing Association (NTRA) and Breeders' Cup Ltd., Greg Avioli, are already positioning themselves to take advantage of the opportunity to be the only legal provider of Internet gaming.³⁰⁵ Avioli's suggestion is for the horseracing industry to create a single online site to bet the races.³⁰⁶ This is something that giant American-based casino companies would also aspire to do if the Wire Act, like the IHA, were amended to allow interstate gambling.³⁰⁷ In the meantime, the horseracing, intrastate, and intra-tribal online gambling industry can continue to grow under the UIGEA and thus may perpetuate the social and criminal effects feared by social conservatives.³⁰⁸

IV.

ALTERNATIVES TO ONLINE GAMBLING PROHIBITION

Instead of implementing a ban, the U.S. should examine other methods to control the negative implications of online gambling. Perhaps the most obvious alternative would be to follow the international

304. See, e.g., § 802(a), 120 Stat. at 1956; Phillips, *supra* note 104, at A11. Pari-mutuel wagers are wagers used in a "betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management." Merriam-Webster Online, Para-Mutuel, <http://www.merriam-webster.com/dictionary/parimutuel> (last visited Jan. 14, 2009).

305. John G. Brokopp, *Law Merely Muddies Online Gaming Waters*, CHICAGO SUN-TIMES (FINAL ED.), Nov. 3, 2006, at NC21.

306. *Id.*

307. The Wire Act criminalizes betting using a wire communication facility to transfer bets or information assisting in placing bets on any sporting event or contest in interstate or foreign commerce. 18 U.S.C. § 1084(a) (2006). However, the IHA exempts horseracing from the Wire Act based on a long history of acceptance of this type of gambling and a strong horseracing lobby. See *supra* note 228.

308. Thus, it does in fact appear that the government is "playing both sides of the fence" by outlawing only the forms of gambling that it cannot easily tax. See Schmitt, *supra* note 148, at 398. In 2007, tax revenues from legal commercial casinos and racetracks contributed over \$7 billion to state and local governments. See American Gaming Association, Industry Information Fact Sheets: Tax Payments-Commercial Casinos, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=10 (last visited Oct. 12, 2008) ("In the 12 states with commercial casinos in operation in 2007, casinos contributed \$5.79 billion in tax revenue to state and local governments, an 11.3 percent increase over 2006 data."); see American Gaming Association, Industry Information Fact Sheets: Tax Payments - Racetrack Casinos, http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=36 (last visited Oct. 12, 2008) ("In the 11 states with racetrack casinos in operation in 2007, casinos contributed more than \$2.22 billion in tax revenue to state and local governments, a 54.6 percent increase over 2006 data.").

trend in regulating online gambling through a licensing regime. One recent and largely successful example of a gambling licensing regime was established by Great Britain's Gambling Act of 2005 and regulates online gambling on a local level.³⁰⁹ Another method, although only intellectually debated, is a top level domain name system for legitimate gambling websites. While the effects of these methods are not clear at this point, they may provide more effective alternatives than a simple ban.

A. *Great Britain's Model: The Gambling Act of 2005*

1. *Evolution of the Gambling Act*

Great Britain opted to regulate online gambling through the Gambling Act of 2005.³¹⁰ This Act received Royal Assent on April 7, 2005 and became fully operational on September 1, 2007.³¹¹ It transfers authority for licensing gambling from the Magistrates' Courts to local authorities or to Scottish licensing boards³¹² and applies to all gambling in Great Britain other than the National Lottery and spread betting.³¹³ The objectives of the Act address many of the concerns of

309. See *infra* note 312.

310. See Gambling Act of 2005, 2005, c. 19, Part 1, available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#2> (last visited Jan. 14, 2009).

311. Exeter City Council, Gambling Act of 2005, <http://www.exeter.gov.uk/index.aspx?articleid=4951> (last visited Nov. 23, 2008); GAMBLING COMM'N, ANNUAL REPORT 2007-2008 4 (2008), http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Annual_report_0708.pdf [hereinafter GAMBLING COMM'N, ANNUAL REPORT] ("The Commission was created by the Gambling Act of 2005 . . . which came fully into force on 1 September 2007.").

312. See, e.g., Gambling Act of 2005, 2005, c. 19, Part 1, § 2, available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#2> (last visited Jan. 14, 2009); Gambling Act of 2005, 2005, c. 19, Explanatory Para 1, § 8. For example, the Exeter City Council will be required to produce a licensing policy which will last for up to 3 years. Exeter City Council, Gambling Act of 2005, <http://www.exeter.gov.uk/index.aspx?articleid=4951>, (last updated June 29, 2006) (last visited Jan. 14, 2009). On January 31, 2006, the Casino Advisory Panel (the "Panel") permitted all local authorities in Great Britain to apply for the right to issue one or more of the 17 new casino premises licenses. DEP'T FOR CULTURE, MEDIA AND SPORT, EXPLANATORY MEMORANDUM TO THE GAMBLING (GEOGRAPHICAL DISTRIBUTION OF LARGE AND SMALL CASINO PREMISES LICENCES) ORDER 2008 4 (2008), available at http://www.opsi.gov.uk/si/si2008/em/uksiem_20081327_en.pdf. The Panel picked sixteen local licensing authorities (fourteen in England and one each in Scotland and in Wales) and each authority must monitor any new casino it licenses to ensure that these casinos comply with the conditions of their premises licenses. *Id.* at 12.

313. See, e.g., Gambling Act of 2005, 2005, c. 19, Part 1, §§ 10(1), 15(1), available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#10> (last visited Jan. 14, 2009); Gambling Act of 2005, 2005, c. 19, Explanatory Para 1, § 3. Spread betting is betting on the movements in any market (e.g., sports, financial, real estate) where loss is calculated by the difference between your estimate and the reality of the prices.

both social conservatives and moderate libertarians. They include: (1) preventing gambling from being a source of or associated with crime or disorder, (2) preventing gambling from being used to support crime, (3) ensuring that gambling is conducted in a fair and open way, and (4) protecting vulnerable groups such as children from being harmed or exploited by gambling.³¹⁴ In addition, the Gambling Act of 2005 was passed to raise new taxes, a measure which American moderate libertarians also proposed.³¹⁵

To ensure the success of these objectives, the Act establishes the Gambling Commission to replace the Gaming Board.³¹⁶ In June 2007, the Commission issued a code of practices regarding the operations and advertising of gambling facilities to guide local authorities.³¹⁷ This code is called the Licence Conditions and Codes of Practice (LCCP).³¹⁸ Effective on September 1, 2007, the LCCP outlines the general conditions for operating and personal licenses, the principal code of practice (distinguishing between “social responsibility” and “ordinary” provisions), and the code of practice for casino premises licenses concerning access for young persons and children.³¹⁹ The

TimesOnline, *Spread betting on property market fluctuations, you could make a fortune — or lose your shirt, finds Rosie Millard*, THE SUNDAY TIMES, Feb. 4, 2007, available at http://property.timesonline.co.uk/tol/life_and_style/property/investment/article1310070.ece.

314. Gambling Act of 2005, 2005, c. 19, Part 1, §1, available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#1> (last visited Nov. 23, 2008). See *supra* Parts II.A. and II.C. (discussing the social and criminal consequences of banning versus regulating online gambling).

315. Richtel & Timmons, *U.S. Tries to Pull Plug*, *supra* note 182, at 10. See also *supra* Part II.B (discussing the economic consequences of banning versus regulating online gambling).

316. Gambling Act of 2005, 2005, c. 19, Part 2, § 2022, available at <http://www.opsi.gov.uk/acts/acts2005/50019—c.htm#20> (last visited Jan. 14, 2008).

317. GAMBLING COMM’N, ANNUAL REPORT, *supra* note 311, at 6.

318. *Id.*

319. GAMBLING COMM’N, LICENCE CONDITIONS AND CODES OF PRACTICE 4 (2007), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP%20June%202007.pdf> [hereinafter 2007 LICENCE CONDITIONS AND CODES OF PRACTICE]. The Commission has revised the LCCP several times since June, 2007 and added revised money laundering, gaming reserve, and remote licensing provisions. See GAMBLING COMM’N, LICENCE CONDITIONS AND CODES OF PRACTICE: SUPPLEMENT 2, REVISION TO THE FINANCIAL ROBUSTNESS LICENCE CONDITION ON CASINO GAMING RESERVES (2007), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP%20Supplement%202%20Revised%20Casino%20Reserve.pdf> (implementing revised provisions regarding required gaming reserves); GAMBLING COMM’N, LICENCE CONDITIONS AND CODES OF PRACTICE: SUPPLEMENT 3, REVISION OF THE CODE OF PRACTICE ON FINANCIAL REQUIREMENTS FOR CASINO OPERATORS (2007), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP%20Supplement%203%20-%20Revision%20to%20Code%20of%20Practice%20re%20Money%20Laundering%20Dec%202007.pdf> (implementing revised

LCCP has specific provisions to prevent money laundering, fraud, and underage gambling.³²⁰ To monitor adherence to the LCCP, the Commission requires licensed operators to file a Regulatory Return outlining information regarding the use of licensed facilities within twenty-eight days of the end of each quarterly or annual period.³²¹

The main enforcement mechanism for the LCPP is through the Commission-created Regulatory Panel, a rotating body of Commissioners which rules on complex licensing decisions and issues all regulatory sanctions above a warning letter.³²² While the Commission can void bets that are unfair,³²³ its powers and those of the Regulatory Panel are checked by the Gambling Appeals Tribunal, which will hear appeals from their decisions.³²⁴ To fully assess the effectiveness of the Act, the Commission must also advise the Secretary of State and Scottish Ministers about “the incidence of gambling, the manner in

money laundering provisions to reflect the Commission’s Guidance regarding the 2007 Money Laundering Regulations which came into effect on December 15, 2007); GAMBLING COMM’N, LICENCE CONDITIONS AND CODES OF PRACTICE (2008), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/LCCP08%20final%20pdf.pdf> [hereinafter 2008 LICENCE CONDITIONS AND CODES OF PRACTICE]. The 2008 revised LCCP, effective January 1, 2009, makes the following changes: (1) modifies the display of licensed status in respect of remote operators and adds a provision in respect of gaming machine technical and gambling software licences; (2) reduces the number of key events under licence condition 15.2 (requiring the reporting of key events to the Commission) and adds an ordinary code provision in respect of events that have a material impact on licensees; (3) removes the note attached to personal licences (referring to information requirements applying to operators) and adds a list of key events relevant to personal licence holders; and (4) adds new social responsibility and ordinary code provisions in respect of the identification of individual customers by remote licensees. *Id.* See also Gambling Commission, Publications, Licence Conditions and Codes of Practice-October 2008, <http://www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=402&id=1>.

320. 2008 LICENCE CONDITIONS AND CODES OF PRACTICE, *supra* note 319, at 11, 22-27, 50, 54.

321. 2007 LICENCE CONDITIONS AND CODES OF PRACTICE, *supra* note 319, at 25. The information required to be reported on the Regulatory Return includes information about the numbers of people using the facilities and the frequency of such use, the range of gambling activities provided by the licensee and the numbers of staff employed to deliver them, and the licensee’s policies regarding problem gambling. *Id.*

322. GAMBLING COMM’N, ANNUAL REPORT, *supra* note 311, at 8. Regulatory sanctions include fines, revocation of licenses and prosecution of illegal gambling. *Id.* at 9. The Regulatory Panel must contain at least three Commissioners. GAMBLING COMM’N, COMPLIANCE AND ENFORCEMENT POLICY STATEMENT 18 (2007), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/CE%20Policy%20statement.pdf> [hereinafter COMPLIANCE AND ENFORCEMENT POLICY STATEMENT].

323. Gambling Act of 2005, 2005, c. 19, Explt Para 1, § 20; COMPLIANCE AND ENFORCEMENT POLICY STATEMENT, *supra* note 322, at 13.

324. Gambling Act of 2005, 2005, c.19, Explt Para 1, § 11; COMPLIANCE AND ENFORCEMENT POLICY STATEMENT, *supra* note 322, at 21.

which gambling is carried on, the effects of gambling, and the regulation of gambling.”³²⁵

The types of licenses required by the new Act include (1) operator licenses for the management and conduct of gambling, (2) personal licenses for individuals with key operational functions in the gambling business, and (3) premises licenses for the property where the gambling occurs.³²⁶ Gambling premises include casinos, bingo halls, offices, adult gaming centers, and licensed family entertainment centers.³²⁷ In addition, betting permits will be given for gaming machines in pubs and other alcohol licensed premises.³²⁸ The Commission has started to issue and regulate operator and personal licenses, while local authorities will issue and regulate premises licenses and betting permits.³²⁹

The Act not only regulates but also promotes gambling within the U.K. in several ways. It increases the accessibility of bingo premises and casinos to the public through its elimination of the requirement that they have to be clubs with a 24-hour membership.³³⁰ In addition, the Gambling Act of 2005 introduces a new class of betting intermediary operating licenses to support the development of betting exchanges and repeals legislation preventing gambling contracts from being enforceable through courts,³³¹ a major concern among libertarians³³² and a source of disaster after U.S. Prohibition.³³³

The Act only seeks to promote fair and enforceable gambling. To achieve this goal, it has created two offenses: (1) providing facilities for gambling and (2) using premises for gambling without appropriate permission in the form of a license, permit, or registration or

325. Gambling Act of 2005, 2005, c.19, at Part 2, § 26. The Commission began this process in September 2007 with the publication of the Gambling Prevalence Survey 2007, which studied the national rate of gambling and the prevalence of problem gambling in Britain. GAMBLING COMM’N, ANNUAL REPORT, *supra* note 311, at 18.

326. Exeter City Council, *Gambling Act of 2005*, <http://www.exeter.gov.uk/index.aspx?articleid=4951> (last updated June 29, 2006) (last visited Nov. 23, 2008).

327. *Id.*

328. *Id.*

329. *Id.*; see also Gambling Act of 2005, 2005, c. 19, Explt Para 1, § 10.

330. Gambling Act of 2005, 2005, c. 19, Explt Para 1, § 16; Dept. for Culture, Media & Sport, What the Act Does, http://www.culture.gov.uk/what_we_do/Gambling_racing/gambling_act_2005/what_the_gambling_act_does.htm (last visited Nov. 24, 2008).

331. Gambling Act of 2005, 2005, c. 19, Explt Para 1, § 16; Dept. for Culture, *supra* note 330.

332. See *supra* notes 214–15.

333. See *supra* Part II.C.2.

without exemption under the Act.³³⁴ Facilities for gambling are subject to different degrees of regulation depending on the type of gambling, the way it is conducted, and the people who operate and patronize it.³³⁵ Electronic communications providers who act only as a carrier of information for individuals providing gambling facilities or for consumers participating in gambling are not subject to the Act.³³⁶ Thus, Internet service providers or mobile telephone operators would qualify as exempt electronic communications providers.³³⁷

Electronic communications providers may no longer be exempt if they make a means of remote communication available that they cannot reasonably expect to be used for purposes aside from gambling or are intended to be used wholly or primarily for gambling.³³⁸ For example, a personal computer connected to the Internet provides gambling facilities and would need a license if it had (1) a home page comprised of links to gambling websites or (2) signs indicating that it is available to be used for gambling and listing links one can use to gamble.³³⁹

Great Britain has used § 44 of the Gambling Act of 2005 to address the problem of its online gambling sites serving American customers by regulating the provision of unlawful facilities abroad.³⁴⁰ A person commits an offense if he does anything in Great Britain, or uses remote gambling equipment situated in Great Britain, for the purpose of inviting or enabling a person in a prohibited territory to par-

334. See, e.g., Gambling Act of 2005, 2005, c. 19, Part 3, §§ 33, 37, available at <http://www.opsi.gov.uk/acts/acts2005/50019—d.htm#33> (last visited Nov. 23, 2006); Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 7.

335. See Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 7 (“Where authority to provide facilities for gambling is obtained under the Act, it will be subject to varying degrees of regulation, depending on the type of gambling, the means by which it is conducted, and the people by whom and to whom it is offered.”). The decision of whether to impose regulatory sanctions depends on the Regulatory Panel’s weighing of a series of factors ranging from the presence of repeated breaches or failures to the licensee’s ability to pay. COMPLIANCE AND ENFORCEMENT POLICY STATEMENT, *supra* note 322, at 19.

336. See, e.g., Gambling Act of 2005, 2005, c. 19, Part 1, § 5(2), available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#5> (last visited Jan. 14, 2008); Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 43.

337. See Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 43.

338. See, e.g., Gambling Act of 2005, 2005, c. 19, Part 1, § 5(3), available at <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#5> (last visited Jan. 14, 2009); Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 44.

339. Gambling Act of 2005, 2005, c. 19, Explnt Para 1, § 44.

340. *Id.*

ticipate in remote gambling.³⁴¹ Remote gambling includes Internet gambling and is defined as gambling via remote communication.³⁴² Operators based in Great Britain must obtain an operating license in order to provide gambling by remote communication both domestically and internationally.³⁴³

In addition, in late September, 2007, advertising restrictions were revised.³⁴⁴ Licensees can now advertise so long as ads are consistent with the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising (BCAP) codes on advertising of gambling.³⁴⁵ Advertising of remote gambling sites in Britain is also permitted but is limited to operators regulated by the Commission or by operators based in the European Economic area or in a white-listed jurisdiction.³⁴⁶

Although there were substantial administrative costs to implementing a new regulatory regime, it has been largely successful. The scheme went into effect on September 1, 2007 and the Gambling Commission adopted a case-by-case approach led by local authorities for premises that did not have a new license in effect by the September 1, 2007 deadline or did not have a renewed or converted permit when required to do so.³⁴⁷ The Commission developed systems to ensure

341. *Id.* at Part 3, § 44(1). Remote communication means “using the Internet, telephone, television, radio or any other kind of electronic or other technology for facilitating communication.” *Id.* at Part 1, § 4(2).

342. *Id.* at Part 1, § 4(1).

343. Gambling Act of 2005, 2005, c. 19, Explt Para 1, § 15.

344. GAMBLING COMM’N, ANNUAL REPORT, *supra* note 311, at 16.

345. *Id.* The Advertising Standards Authority is the monitoring body for advertising and it has already published two decisions resulting in the removal of advertisements by two operators. *Id.*

346. *Id.*; GAMBLING COMM’N, GUIDE TO GAMBLING ADVERTISING CODES, (2007), <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Advertising%20codes.pdf>. “White listing is a term used to cover a jurisdiction that has successfully applied to the Secretary of State ([Department for Culture, Media and Sport](DCMS)) for approval for its operators to advertise in Great Britain. It indicates that the Secretary of State considers that the jurisdiction has a robust regulatory environment and that continuous licensing and regulatory enforcement of gambling operations takes place within that jurisdiction. DCMS has approved three states for this purpose Alderney, Isle of Man and Tasmania.” GAMBLING COMM’N, ANNUAL REPORT, *supra* note 311, at 20. The new ad rules banned approximately 1,000 online gaming sites from advertising in the U.K. Gambling in the United Kingdom Jurisdiction, Online Casino City, <http://online.casinocity.com/jurisdictions/jurisdiction.cfm?Id=269> (last visited Jan. 14, 2009).

347. Gambling Commission, Joint Compliance and Enforcement Statement, Aug. 30, 2007, <http://www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=221> (last visited Jan. 14, 2009). Beginning in January 2007 for operating and personal licenses and on May 21, 2007 for premises licenses, all operators requiring licensing under the new regime have had the opportunity to apply for their new licenses. *Id.*

that license applications were processed efficiently and by September 1, 2007 had successfully re-licensed most of the industry.³⁴⁸ By the second half of 2007, the focus moved from re-licensing the industry towards working with licensed operators to fully comply with the Act and the LCCP.³⁴⁹

Despite the success of the Act's implementation, there are some negative implications of the new regulatory regime. In addition to the inefficiencies of a discretionary system, the high tax rate on licensed casinos at fifteen percent of gross profits may deter mainstream casinos from obtaining a license in the U.K. and chill growth of the industry in Great Britain.³⁵⁰ In fact, the Commission has already noted that remote gambling operators are tending to move their remote gaming offshore.³⁵¹ However, the costs of the Gambling Act are unlikely to outweigh the social, criminal, and economic advantages of the Gambling Act—specifically in preventing money laundering and underage gaming, as well as in adding substantial tax revenue and jobs.

2. *The Gambling Act as a Superior Alternative to the UIGEA*

The presence of a unified regulator for most types of gambling provides a significant enforcement advantage by giving the public a clear idea of what types of gambling are legal throughout the entire

On Sept. 1, 2007, the full provisions of the Act came into effect and all operators that require operating and premises licenses were required to be licensed under the new Act. *Id.* GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 12–14 (citing exceptions to the license renewal process for the September 1, 2007 deadline and describing enforcement activities undertaken upon the Act's effective date).

348. GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 6. The Gambling Commission notes in its 2007–08 Annual Report that 2,357 existing operators, the majority of the industry, applied by April 27, 2007 and were able to continue their operations after September 1, 2007, even if their application had not been issued. GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 12. By March 31, 2008, 4,199 total operating licenses had been issued with 3,428 operators licensed across all industry sectors. *Id.*

349. *Id.*

350. "A mere 14 online poker and casino operators have registered for UK licences and virtually none is a mainstream company." Online Poker News, *Is the British Gambling Regulation Act a Losing Bet?*, Sept. 2, 2007, http://www.onlinepoker-news.com/20070902/is_the_british_gambling_regulation_act_a_losing_icd.aspx. However, the Gambling Commission maintains that 375 remote ancillary licenses were issued, although the Gambling Commission's 2007–08 Annual Report fails to mention how many of these licenses were issued to online poker and casino operators. GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 12. The Annual Report did note though that the majority of remote licenses were for remote betting (which covers telephone usage and online betting). GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 20.

351. GAMBLING COMM'N, ANNUAL REPORT, *supra* note 311, at 20.

country and not just by locality.³⁵² The specific provisions regarding gambling via remote communication³⁵³ are designed to keep pace with technological developments in a way that the UIGEA cannot while it is limited by its focus on the Internet.³⁵⁴ Furthermore, the difficulties of coordination between local authorities and the Commission pale in comparison with the difficulties of enforcing a complete ban. Prohibition of online gambling as outlined in the UIGEA risks a black market, economic losses, and political fallout that regulation can better avoid.³⁵⁵ Although the UIGEA preserves the historic right of each State to determine and enforce its own policies prohibiting or regulating gambling,³⁵⁶ this may have negative political consequences. An increased number of states which authorize certain forms of online gambling may risk further disapproval by the WTO who will question the “unjustifiable” patchwork of gambling laws in the U.S.³⁵⁷

Despite the differences between the U.S. and Great Britain (the U.S. has a larger population and a history of individual state gambling policy), the MGM Mirage’s online foray in 2001 shows that regulation is practically possible.³⁵⁸ Britain’s Gambling Act establishes a more localized form of regulation by transferring licensing power to local authorities,³⁵⁹ which corresponds to the state-centric approach of the U.S. to online gambling.³⁶⁰ However, a licensing regime similar to the U.K. is not practically possible without state support. Given our nation’s long history of allowing each state to set its own gambling policies, state support for federal licensing legislation such as Britain’s Gambling Act is unlikely, even if administered by the states.

352. Dept. for Culture, *supra* note 330. The Gambling Act of 2005 does not cover the National Lottery or spread betting. *See, e.g.*, Gambling Act of 2005, 2005, c. 19, Part 1, §§ 10(1), 15(1), *available at* <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#10> (last visited Nov. 23, 2008); Gambling Act of 2005, 2005, c. 19, Explt Part 1, § 3.

353. *Id.*

354. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, §802(a), 120 Stat. 1884, 1955 (2006) (criminalizing “unlawful Internet gambling.”). *See supra* notes 4–5.

355. *See supra* Parts II.B–D (discussing the economic, criminal and international political consequences of ban). *See also supra* Part III.A (discussing the economic losses triggered by the UIGEA).

356. NAT’L COALITION AGAINST LEGALIZED GAMBLING, UNLAWFUL INTERNET FACT SHEET ii-1 (2006), <http://www.ncalg.org/Library/internet/IG%20Law%20booklet.pdf> (“the issue of online gambling really begins and ends with the States.”).

357. *Id.* at ii-5.

358. SCHWARTZ, *supra* note 20, at 185–86; Interactive Gaming Council, *supra* note 29, at 97; *see supra* Part I.A.1.

359. *See, e.g.*, Gambling Act of 2005, 2005, c. 19, Part 1, § 2, *available at* <http://www.opsi.gov.uk/acts/acts2005/50019—b.htm#2> (last visited Jan. 14, 2009).

360. NAT’L COALITION AGAINST LEGALIZED GAMBLING, *supra* note 356.

B. *Top Level Domain Names for Legitimate Gambling Websites*

Another method of regulation that the U.S. could use is implementing “top level domain names”³⁶¹ exclusively for regulated gambling websites.³⁶² Since every gambling site must register its domain name, placing conditions on its registration is an expedient method of regulating these sites.³⁶³ A uniform set of rules can be applied to all registrants through contracts between a domain registrant and registrar.³⁶⁴ Domain name registries simplify enforcement by documenting the identity of every person who hosts a website³⁶⁵ and enabling domain names which do not comply with regulations to be deleted, rather than resorting to costly judicial intervention.³⁶⁶ Domain name registries also make detecting violations easier since the entity operating the domain can best monitor the traffic at each website and compare it with user account records.³⁶⁷ Thus, a centralized single purpose top level domain name would increase consumer confidence in the websites that use it and provide an incentive for online gambling casinos to participate.³⁶⁸

One method of implementing the top level domain name regime includes using the Internet Corporation for Assigned Names and Numbers (ICANN) to create the domain and either an international non-governmental organization or nonprofit corporation to administer it, instead of the state.³⁶⁹ An oversight committee comprised of industry representatives and governmental gaming commission members

361. Top level domain names are represented by the suffix appended to Internet Uniform Resource Locators (URLs) (the “.com” in “www.google.com”) and indicate a common administrative regime when administering all domains using that suffix. *See supra* note 14.

362. Scoolidge, *supra* note 31, at 253.

363. *Id.* at 258; MARCUS FRANDA, GOVERNING THE INTERNET: THE EMERGENCE OF AN INTERNATIONAL REGIME 48 (2001).

364. Scoolidge, *supra* note 31, at 259; *see* Muller, *supra* note 14, at 719.

365. Scoolidge, *supra* note 31, at 258–59; Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT. L.J. 359, 368–69 n. 49 (2003) (“A registrant’s administrative and technical contacts, as well as the IP Address of the web server that hosts the domain (or the name server for the second level domain), is entered into the WhoIs database. This database is publicly accessible, and provides ‘an important resource to Internet users including registrants, registrars, businesses, ISPs, intellectual property holders, and governmental law enforcement and consumer protection agencies.’”).

366. Scoolidge, *supra* note 31, at 259, 263; *see* FRANDA, *supra* note 363, at 30.

367. Scoolidge, *supra* note 31, at 259.

368. *Id.* at 262 (asserting that a new centralized top level domain for online gambling casinos would provide the legal foundation necessary for certainty in the future since the Internet gambling industry is at a critical stage where it needs to gain the full confidence of gamblers).

369. *Id.* at 262.

would develop policies on substantive matters such as crime and fraud prevention, underage and compulsive gambling, and licensing requirements.³⁷⁰ The international nongovernmental organization or non-profit corporation would then be in charge of implementing the policies and promulgating and enforcing regulations.³⁷¹ This entity would require adherence to the industry standards of eCOGRA and access to records of account activity stored on the website's servers in order for a site to register a domain name.³⁷² Finally, individual governments would retain the power to license and tax the websites.³⁷³ Thus, the top level domain name regime owner would supplant the state as the regulator, ensuring a more uniform and enforceable system.³⁷⁴

However, agreeing to a uniform set of rules for all registrants is likely to be difficult given that some countries require licenses for online gambling casinos while others remain unregulated.³⁷⁵ Furthermore, if the incentive of increased consumer confidence in sites using a centralized single purpose top level domain name is not sufficient for websites to realign to this system, then it will only confuse navigation of online gambling sites.³⁷⁶ Although disabling websites which do not adhere to ICANN regulations would be an alternative means of

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. This system would be parallel to other top level domains which are regulated such as ".com". See Internet Corporation for Assigned Names and Numbers (ICANN), Background Points, <http://www.icann.org/en/general/background.htm> (last visited July 7, 2008) ("ICANN is responsible for coordinating the management of the technical elements of the DNS [domain name system] to ensure universal resolvability so that all users of the Internet can find all valid addresses. It does this by overseeing the distribution of unique technical identifiers used in the Internet's operations, and delegation of Top Level Domain names (such as .com, .info, etc.)."). Website registrants face several constraints on the domain names they may choose to operate and the content they wish to post online which are enforced by ICANN. See Scoolidge, *supra* note 31, at 260.

375. *Id.* at 264 ("Currently, some e-casinos are subject to varying degrees and types of regulation, and some are subject to none at all."). For example, Great Britain has recently implemented a new licensing system for online gambling casinos with the passage of the Gambling Act of 2005. Gambling Act of 2005, 2005, c. 19, Explanatory Para 1, § 15. However, countries such as Costa Rica remained unregulated which is perhaps one reason why online gambling casinos based in Costa Rica are banned from advertising in the U.K. as of September 1, 2007. Online Casino City, Costa Rica, <http://online.casinocity.com/jurisdictions/jurisdiction.cfm?Id=1> ("Costa Rica is home to more than 200 online gambling companies, but the Central American country actually has no legislation specifically dealing with gambling over the Internet."); *A Thousand Internet Gambling Sites Face a U.K. Ban*, WASH. INTERNET DAILY, Aug. 10, 2007.

376. David E. Roberts, *Top Level Domain Reorganization: A Constitutional Solution to Legislative Attempts At Internet Regulation*, 36 IND. L. REV. 883, 904 (2003).

enforcing the new regime,³⁷⁷ this could have dire international consequences as host countries rebel against having their online gambling trade restricted.

While “an international consensus on regulatory oversight for gambling is beyond the hopes of any student of the law,” some believe that the top level domain name regime can still be effective with neither the acceptance of every sovereign state nor the replacement of every state’s own gambling regulations.³⁷⁸ Although there is little information as to how effective this regime would be without absolute compliance, if enough countries signed on to these policies, they could pressure others into doing the same. Despite the enforcement issues of the top level domain name regime, it remains a preferable alternative to a ban, which only perpetuates money laundering as gamblers in jurisdictions where online gambling is illegal continue to gamble in a currently unregulated market.³⁷⁹

CONCLUSION

Despite strong opposition to online gambling in the U.S., many individuals—particularly moderate libertarians—maintain that regulation is the best means to address the critics’ concerns and capitalize on the economic benefits provided by the online gambling industry. Age and identity verification controls,³⁸⁰ along with licensing or the implementation of top-level domain names for legitimate sites,³⁸¹ would combat problems associated with underage gambling and consumer protection. Regulation would also take Internet gambling out of the control of organized crime.³⁸² Meanwhile, unlike with prohibition, regulation would allow gambling sites to base their operations in the U.S., thus increasing American job opportunities. Furthermore, regulation also would provide federal and local governments with much needed tax revenue.³⁸³ Ultimately, given the paternalistic nature and proven ineffectiveness of prohibition, it is time for the U.S. to seriously consider the repeal of the UIGEA and implementation of new regulatory measures.

377. See Roberts, *supra* note 376, at 904 (“For any organization proposal to truly be effective, there must either be an overwhelming incentive for existing websites to adopt a new TLD or there must be some tangible penalty for refusing the new structure.”).

378. See Schoolidge, *supra* note 31, at 265.

379. *Id.*

380. See *supra* notes 161–66 and accompanying text.

381. See *supra* Part IV.B.

382. See *supra* Part II.C.2.

383. See *supra* note 176 and accompanying text.

