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## A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States

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# NOTES

## A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States

### ABSTRACT

*While a multitude of Internet enterprises folded in the 1990s, online gambling websites not only have held strong, but appear to be ready to increase the stakes. No business relating to the Internet currently generates more revenue than online gambling, and that trend does not look like it will change soon. While many Americans desire to participate in this form of cyber-gambling, the current legality of their ability to do so remains vague. For the most part, an American's ability to gamble currently resides under the purview of state law and a hodgepodge of antiquated federal wire acts. The nature of the Internet, however, mandates that any scheme, regulatory or prohibitory, be constructed in the international arena. For various reasons, there have been efforts by members of Congress to create strong prohibitory legislation specifically targeting Internet gambling. The Author analyzes not only whether a domestic prohibition schema is the best model to implement, but also whether such a model could even be truly effective. The Author further shows that an international regulatory model can provide a legitimate method of control while allowing individual countries to maintain discretion over the form of online gambling they allow to their citizens. At the same time, this international regulatory schema would still provide a valid international enforcement net against offenders. Under this regulatory schema, problem gamblers can be protected while still preserving the opportunity for other patrons to get lucky and hit it big.*

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## I. INTRODUCTION

No business on the Internet earns more revenue than online gambling.<sup>1</sup> In 2002, two million players lost a collective \$3.5 billion at nearly 2,000 “virtual casino” websites.<sup>2</sup> In 2003, online gambling sites

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1. John Horn et al., *Point and Bet*, NEWSWEEK, Oct. 28, 2002, at 1.  
2. *Id.*

took in more than \$4.1 billion dollars.<sup>3</sup> In 2004, it is projected that revenues from online gambling activities could be \$6 billion with potentially 15 million players.<sup>4</sup> Some estimates suggest that gamblers in the United States are responsible for sixty-five percent of this amount.<sup>5</sup> In describing the scope of online gambling's potential influence on the American populace, the Final Report issued by the National Gambling Impact Study Commission stated that "[o]nline wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24 hour access to the full range of gambling in every home."<sup>6</sup>

As the popularity of online gambling continues to swell, the issues surrounding its legitimacy have yet to be resolved. It is too simplistic to say that online gambling is or is not *per se* illegal in the United States. For the most part, gambling legislation has largely been a matter of state law.<sup>7</sup> Not surprisingly, state responses to online gambling legislation have varied considerably, running from prohibition to regulation to taxation.<sup>8</sup> Historically, the federal response to the issue of online gambling has been to acquiesce to the various approaches taken by the states.<sup>9</sup> Instead of enacting law specifically targeting online gambling, Congress has consistently relied on antiquated "wire acts" to maintain the choices that have been made at the state level.<sup>10</sup>

Controlling online gambling, however, is not an issue confined to the United States. Online gambling can best be described as a global issue that affects virtually all countries. While many Americans participate in online gambling as users, almost all gambling websites and virtual casinos are located offshore with their primary base of operations in exotic locations such as Antigua (a Caribbean-island country), Belize, and Curacao.<sup>11</sup> As will be discussed in this Note,

3. Gregory Manter, *The Pending Determination of the Legality of Internet Gambling in the United States*, 2003 DUKE L. & TECH. REV. 16, ¶ 1 (2003), at [www.law.duke.edu/journals/dltr/articles/2003dltr0016.html](http://www.law.duke.edu/journals/dltr/articles/2003dltr0016.html).

4. *Id.*; see Antonia Z. Cowan, *The Global Gaming Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 251, 252 (2003).

5. Manter, *supra* note 3.

6. Cowan, *supra* note 4.

7. Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (May 1999).

8. *See id.*

9. *Id.* at 1577.

10. *Id.* at 1580-81.

11. *Id.* at 1570-71; see, e.g., Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 156-63 (2000) (Although it is outside the scope of this Note, there have been instances in which virtual gaming operations were run from within the United States. These operations were normally prosecuted under state law and shut down. Thus, online gambling operations learned quickly to set up their operations in

these countries have created a safe-haven for online gambling operations and have gone to great lengths to encourage such business.<sup>12</sup> Thus, analysis of online gambling requires analysis from this international, operational perspective as well.

The fact that online gaming operations are run outside of the United States does not resolve whether it is legal for Americans to gamble on these websites as users.<sup>13</sup> One line of thought is exemplified by the Department of Justice (DOJ) when it claims that it is illegal for American users to gamble in this fashion.<sup>14</sup> Specifically, in August 2002, the DOJ informed the Nevada Gaming Control Board that Internet gambling was prohibited under a series of federal laws.<sup>15</sup> The DOJ made it clear that it considered online gambling to have occurred in both the jurisdiction of the gambler and in the jurisdiction of the gambling website's operations (essentially, where the website's computer servers are physically located).<sup>16</sup> Thus, under the DOJ's view, users in a U.S. state can be held liable for their activities even if the virtual casino is located in a different country.<sup>17</sup>

While the legality of online gambling in the United States remains in a quagmire of confusion, the societal concerns from unchecked online gambling cannot be ignored. A great deal of literature discusses the maladies that can accompany gambling. Gambling has been associated with practically every conceivable domestic problem one can think of: divorce, bankruptcy, crime, domestic violence, child neglect, addictive gambling, and alcohol and drug offenses.<sup>18</sup> While the purpose of this Note is not to analyze the causation versus correlative aspects of gambling or to understand the exact extent of social damage it can inflict, commentary stating that "[t]he yearly cost to society (in, e.g., productivity reductions, spending on social services, and creditor losses) is approximately \$5 billion" appears reasonable.<sup>19</sup>

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other countries even though the exact legal underpinnings preventing their operations in the United States could likely be questioned. Kelly provides a detailed account of the circumstances under which Minnesota, New York, Missouri, and Wisconsin successfully litigated against these Internet gambling entities in the domestic situation.).

12. Keller, *supra* note 7, at 1571; Kelly, *supra* note 11, at 119.

13. Manter, *supra* note 3, ¶ 10.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Cathryn L. Claussen & Lori K. Miller, *Online Sports Gambling - Regulation or Prohibition?*, 11 J. LEGAL ASPECTS SPORT 99, 108 (2001).

19. *Id.*

In lieu of these policy concerns and the unremitting fact that online gambling does not appear to be a fad, there is a pertinent need for the United States to develop a comprehensive schema to deal with the situation. As this Note will show, the most viable solution should encourage regulation over prohibition. Further, for this regulatory solution to be effective, its reach must encompass an international coalition of countries. The end result would be an international regulatory schema that preserves each country's individual right to decide the specifics of its online gambling laws while still creating a legitimate method of enforcement.

The background of this Note (part II) will discuss the current state of online gambling in the United States. This background will discuss the interplay of online gambling with federal regulation, state regulation, and proposed federal regulation. The relationship with online gambling and the credit card industry is also briefly discussed. This relationship is significant because self-regulation of the credit card industry is an important consideration when analyzing whether prohibition or regulation of online gambling operations would be more effective. Finally, the background also will highlight an example of pertinent case law that has been adjudicated on the matter. The analysis (part III) will present the particulars of the online gambling issue, and the criteria involved in evaluating different solutions. Part III of this Note will also specifically discuss the merits and drawbacks of the two major solutions, regulation and prohibition. Part IV will analyze the regulation and prohibition solutions in the context of what other countries have done, specifically focusing on the Australian model. Part V will then summarize the findings of the analysis and propose the required elements for an effective international regulatory schema for online gambling.

## II. BACKGROUND: THE CURRENT STATE OF ONLINE GAMBLING IN THE UNITED STATES

### A. *Online Gaming and State Law*

Historically, regulation of gambling has been a matter reserved for state legislation under the Tenth Amendment.<sup>20</sup> All states have some type of constitutional provision or statutory law that either (1) prohibits gambling, (2) places limitations on the type of gambling allowed, or (3) authorizes particular state-sponsored or licensed

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20. Cowan, *supra* note 4, at 255.

gambling.<sup>21</sup> While every state has made private lotteries unlawful, state-run lotteries have become commonplace. At last count, these state sponsored, revenue-generating enterprises are currently operating in thirty-eight states, the District of Columbia, and the United States territories of Puerto Rico, the Virgin Islands, and the North Mariana Islands.<sup>22</sup> Further, casino gambling in either conventional commercial casinos or Indian casinos is allowed in twenty-nine states.<sup>23</sup>

Nevertheless, the states have had drastically different reactions to the perceived threats of online gambling.<sup>24</sup> Certain states have clearly prohibited online gaming. This is most easily seen in states such as Utah and Hawaii, where gambling in any form is prohibited.<sup>25</sup> Hawaii, for example, adamantly supports prohibition of online gaming activities from both the operational and user perspectives.<sup>26</sup> With respect to the user-perspective, a recent bill in the Hawaiian legislature urged "Congress to enact legislation which [would] ban United States citizens and resident aliens from engaging in gambling activity of any kind with any Internet or world-wide gambling, gaming, or wagering establishment, and from placing wagers with any world-wide web page or site that offers gambling opportunities."<sup>27</sup>

Nevada was the first state to develop a schema that distinguished conventional, land-based gambling from online gambling. In 1997, Nevada passed legislation specifically prohibiting Internet gambling by its residents while still permitting land-based casinos to operate.<sup>28</sup> Specifically, Nevada criminalized the conduct of both a user who made an Internet bet and an operator who accepted a wager from a person within Nevada.<sup>29</sup> The Nevada statute also contained a rather large exception stating that the law was inapplicable in cases where the bet was "transmitted to a licensed person or establishment in Nevada," thus undermining the strength

21. *Id.*

22. *Id.*

23. *Id.*

24. Keller, *supra* note 7, at 1576.

25. Cara Franklin, *Virtual Las Vegas: Regulate or Prohibit?*, 2001 DUKE L. & TECH. REV. 21, ¶ 7 (2001), available at [www.law.duke.edu/journals/dltr/articles/2001dltr0021.html](http://www.law.duke.edu/journals/dltr/articles/2001dltr0021.html).

26. Kelly, *supra* note 11, at 154.

27. *Id.*; see also H.R. Con. Res. 150, 19th Leg. (Haw. 1998).

28. Jenna F. Karadbil, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413, 419 (2000).

29. NEV. REV. STAT. ANN. 465.091-.094 (Michie 2001); Kelly, *supra* note 11, at 154.

of the legislation.<sup>30</sup> In response to the softening hearts of the Nevada legislature toward the viability of an effective online gambling schema, the Nevada Gaming Commission was given power under a key piece of 2001 Nevada legislation to begin creating regulations and a licensing structure for casino operators who wished to operate online gambling ventures.<sup>31</sup> This was a significant departure from the conventional attitude of the states.

While Nevada went from one extreme to the other, other states have gradually passed legislation prohibiting online gambling—at least at some level. Other examples include Illinois and Louisiana passing laws specifically prohibiting Internet gambling operations.<sup>32</sup> Louisiana “made gambling by computer a misdemeanor punishable by a \$500 fine and/or six months in jail.”<sup>33</sup> Specifically, under the Louisiana statute, “[a]n operator or designer of Internet gambling is subject to a \$20,000 fine and/or a five-year prison sentence.”<sup>34</sup> Illinois law also criminalizes the conduct of the operator of the Internet gambling site in addition to the user who uses the Internet for gambling.<sup>35</sup> The Illinois legislation has become, however, “the subject of ridicule” with the local media essentially because of the inherent and troubling problem of enforcing any type of prohibition scheme when the online gambling activity occurs in private.<sup>36</sup> “The *Chicago Sun Times* succinctly concluded that the Illinois law ‘has bark and no bite’ and that without cyber cops monitoring households and their computers, the law will be difficult to enforce.”<sup>37</sup> While the *Sun-Times’* comments appear particularly acidic in tone, the criticism seems to have merit—how can an online gambling prohibition be enforced (especially against a user) while still respecting some semblance of privacy?<sup>38</sup>

In summary, even though the exact differences among the various state laws with respect to online gambling are beyond the scope of this Note and irrelevant to the issues discussed, it is important to realize that these differences exist. As will be seen in this Note, analyzing the way multiple states or territories deal with the online gambling situation in concert gives insight into the

30. Craig Lang, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 543 (2002) (discussing Nevada’s position as a leader in the gambling industry as a basis for the State’s new stance).

31. *Id.*; see also NEV. REV. STAT. 463.

32. Kelly, *supra* note 11, at 154; see also 1999 Ill. Laws 257; LA. REV. STAT. ANN. § 14:90.3 (West 1998).

33. Kelly, *supra* note 11, at 154-55.

34. *Id.* at 155.

35. *Id.*; see 1999 Ill. Laws 257.

36. Kelly, *supra* note 11, at 155.

37. *Id.*

38. See generally *id.*

viability of an international regulatory schema that involves various countries with different agendas. In addition, it is important to note that while the different states have varied policies, the general position among the states appears to favor prohibition, instead of regulation, of online gambling activities.

### B. Online Gaming and Federal Statutes

Although there is currently no specific federal regulation regarding online gambling, there are a number of regulations that arguably operate to regulate and prohibit it. The DOJ maintains that Internet gambling is illegal under "at least four federal statutes."<sup>39</sup> The Wire Act of 1961 is the principal law that governs interstate gambling.<sup>40</sup> "The Wire Act makes it illegal for gambling providers to offer or to take bets from gamblers over telephone lines or through other wire devices unless the specific act is authorized by a particular state."<sup>41</sup> Because the Wire Act was originally enacted in 1961, it is not surprising that it does not specifically mention the Internet or other existing technologies like satellite-based transmission.<sup>42</sup> The Wire Act's terminology of "through other wire devices," however, arguably does give the DOJ "the leeway to prosecute interstate and international gambling transactions executed over the Internet."<sup>43</sup> The DOJ further maintains that the Wire Act covers not only the taking and placing of bets on the Internet, but also embraces any knowing "use" of the Internet in connection with a gambling business.<sup>44</sup> Subsequently, the DOJ contends that the law prohibits "not only the act of gambling, but also the transmissions of any information that make it possible to bet in the first place."<sup>45</sup> Gaming industry leaders contend that the DOJ places too much emphasis on the Wire Act in the context of online gambling prohibition.<sup>46</sup> They argue that the legislative history surrounding the Wire Act makes it clear that the purpose of the legislation was to crack down on illegal sports betting; consequently, it remains silent on other gambling activities.<sup>47</sup> Further, the industry leaders advocate that "if Congress

39. Karadbil, *supra* note 28, at 426; *see also* Transmission of Wagering Information, 18 U.S.C. § 1084 (1998); Lottery Statutes, 18 U.S.C. §§ 1301-04 (1999); Illegal Gambling Business, 18 U.S.C. § 1955 (1998); RICO, 18 U.S.C. §§ 1961-63 (1999).

40. Karadbil, *supra* note 28, at 426.

41. *Id.* at 426-27; *see also* Transmission of Wagering Information § 1084.

42. *Id.* at 427.

43. Franklin, *supra* note 25, ¶ 9.

44. Keller, *supra* note 7, at 1581.

45. *Id.*

46. Manter, *supra* note 3, ¶ 11.

47. *Id.*

has changed its policy toward telephone and Internet gambling over the last forty years, it must make its intentions clear in the form of new legislation."<sup>48</sup>

While the Wire Act is the piece of legislation most often used to prosecute illegal online gambling, the 1961 Travel Act (18 U.S.C. § 1952) and the 1970 Illegal Gambling Business Act (18 U.S.C. § 1955) were passed with the legislative intent that both laws be applied extraterritorially, signifying the possible application of either legislation in place of the over-extended Wire Act.<sup>49</sup> The Travel Act prohibits interstate or foreign travel or use of an interstate facility in furtherance of an unlawful business enterprise.<sup>50</sup> Under the 1970 Illegal Gambling Business Act, a conviction requires showing that "there is a gambling operation which, in either interstate or foreign commerce, (1) is in violation of state or local law; (2) involves five or more persons that either conduct, finance, manage, supervise, direct or own all or part of the business; and (3) remains in substantially continuous operation for thirty days or has gross revenue of \$2,000 in any given day."<sup>51</sup> Nevertheless, while these statutes arguably do have a further jurisdictional reach than the Wire Act, these statutes are rarely used to prosecute online gambling activities because of their tenuous relations to the process by which electronic gambling fundamentally occurs.<sup>52</sup>

### C. Online Gaming and Proposed Legislation

The concern over the questionable effectiveness of the Wire Act as a prohibition to online gambling has resulted in newly proposed federal regulations.<sup>53</sup> In 1995, responding to this concern, Senator John Kyl introduced the Internet Gambling Prohibition Act (IGPA)

48. *Id.*

49. Cowan, *supra* note 4, at 257 (demonstrating the extended reach of the statutes by the use of broad *prohibiting* words in each statute and the inclusion of phrases such as "interstate or foreign commerce").

50. *Id.*; see 18 U.S.C. § 1952 (1961).

51. *Id.*; see 18 U.S.C. § 1855 (1970).

52. *But see* Franklin, *supra* note 25, ¶ 11 (stating that "[f]or now, online gambling is still, technically, illegal in the United States under the Wire Act, but this foundation is shaky at best, and definitely does not eradicate online gambling, or even come close to putting a dent in it"). See *generally* 18 U.S.C. § 1855 (1970) (Likewise, the Wire Act is more immediately applicable to online gambling operations than the Illegal Gambling Act, which defers to state law in its criteria for violations.); 18 U.S.C. § 1952 (1961) (The Travel Act rarely is as useful as the Wire Act in the context of online gambling because electronic transfer of data is not sufficient to count as "travel" under the Travel Act.).

53. Franklin, *supra* note 25, ¶ 10.

specifically to prohibit online gambling.<sup>54</sup> In committee, this bill died.<sup>55</sup> In the years following, bills mirroring the IGPA were introduced in both the House and the Senate. While these bills earned recognition and support, a new law never resulted.<sup>56</sup> For instance, in 1997, Senator Kyl reintroduced a new IGPA, which the Senate approved by a vote of ninety to ten on July 28, 1998.<sup>57</sup> Nevertheless, the House did not pass that version of the IGPA.<sup>58</sup> While the 1997 IGPA did not pass, it is significant to note that the focus of the legislation was to update the Wire Act so that it included broader terms more clearly and precisely banning Internet gambling.<sup>59</sup>

On March 23, 1999, Senator Kyl reintroduced his bill, but this version was less ambitious in its scope than previous versions.<sup>60</sup> The 1999 IGPA did not attempt to criminally punish the individual bettor; rather, it focused on the operational side of Internet gambling.<sup>61</sup> Specifically, the IGPA amended "the Federal Criminal Code to make it unlawful for any person engaged in a gambling business to use the Internet to place, receive, or otherwise make a bet or wager; or to send, receive, or invite information assisting in the place of a bet or wager."<sup>62</sup> Further, the 1999 IGPA did not attempt to amend the Wire Act, but rather it intended to introduce a new section, 1085, to Title 18 of the United States Code.<sup>63</sup> Aside from retracting criminal penalties for individual bettors, the new version also did not attempt to give the United States worldwide jurisdiction over Internet gaming.<sup>64</sup> Similar to the 1997 bill, the Senate approved the legislation (this time unanimously), but it never was approved by the House.<sup>65</sup> The IGPA was later killed by a joint congressional budget committee, and there is no indication that its fate would be different if it were to resurface.<sup>66</sup> The resistance to passing prohibition legislation signals, perhaps, the opinion of members of the House that

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54. *Id.*

55. *Id.*

56. *Id.*

57. Karadbil, *supra* note 28, at 427.

58. *Id.* at 429.

59. *Id.* at 427.

60. *Id.* at 430.

61. *Id.*

62. *Id.*; see Internet Gambling Prohibition Act of 1999, S. 692, 106 Cong. § 2(b) (1999) (the bill that was not enacted); see also Kelly, *supra* note 11, at 145.

63. Kelly, *supra* note 11, at 135-37.

64. *Id.*

65. Thomas J. Friedrich, *Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & Dangers of Prohibition*, 11 COMMON L. CONSPICUOUS 369, 379 (2003); Karadbil, *supra* note 28, at 431.

66. Friedrich, *supra* note 65, at 379.

regulation, rather than prohibition, is a schema that can be more effective and ultimately offer greater reward.

The DOJ also expressed concern over the need and viability of the IGPA. The DOJ, basing its position on federal law such as the Wire Act, the Travel Act, and the Illegal Gambling Business Act, maintained that online gambling was already illegal.<sup>67</sup> The DOJ had further problems with respect to IGPA's position in the international context. Specifically, a provision in the updated IGPA stating that "the Congress [and] the Executive Branch should commence negotiations with foreign countries in order to conclude international agreements that would strengthen the ability of the United States to enforce the proposed legislation" was censured by the DOJ and ultimately removed by Senator Kyl.<sup>68</sup> The DOJ explained its reasoning for wanting the comment removed:

In our view, redirecting that effort, even in part, to focus on Internet gaming would be a mistake. We should also note that, to the extent individuals and organizations, whether here or abroad, violate U.S. law; existing legal mechanisms can be used to enforce it. Although we recognize that there may be times when we cannot obtain foreign assistance, the fact remains that some form of gambling is legal in virtually every state in the United States. This diminishes our ability to persuade a foreign country that gambling must be vigorously combated, absent extenuating circumstances.<sup>69</sup>

Essentially, the DOJ felt that U.S. federal law intending to prohibit online gambling could not be supported in an international coalition. It is uncertain what the DOJ's position would be about the viability of an international *regulatory* schema instead.

In 2002, another provision, the Internet Gambling Enforcement Act (IGEA) was passed in the House of Representatives, finally ending the streak of failed attempts at passing some type of online gambling legislation in the House.<sup>70</sup> The bill, sponsored by Reps. Jim Leach and John DeFalce is designed to limit U.S. access to Internet gambling sites hosted on offshore servers.<sup>71</sup> The bill aims to accomplish this goal by prohibiting Internet gambling businesses from accepting credit, electronic funds transfers, checks, or drafts from U.S. Internet gamblers.<sup>72</sup> The bill also holds financial institutions responsible that knowingly act as intermediate agents

67. See Cowan, *supra* note 4, at 257.

68. Kelly, *supra* note 11, at 141.

69. *Id.*

70. Manter, *supra* note 3, ¶ 4; see also H.R. 556, 107th Cong. (2002); Friedrich, *supra* note 65, at 375 (discussing House Resolution 556 under its alternative title, the Unlawful Internet Gambling Funding Prohibition Act (UIGFPA)).

71. Manter, *supra* note 3, ¶ 4.

72. *Id.*

between the Internet gaming business and gamblers.<sup>73</sup> Commentary, however, suggests that the IGEA may lack requisite substance. In his Note, Thomas Friedrich, for example, states that the IGEA “all but contradicts itself by effectively authorizing states to allow such gaming activity because prohibited activity does not include ‘any lawful transaction with a business licensed or authorized by a State’ but at the same time, it specifically bans bets or wagers.”<sup>74</sup>

The resolution’s future is unclear at this point.<sup>75</sup> In 2002, the White House urged then Senate Majority Leader Tom Daschle to schedule a vote on this bill, arguing “the illegal Internet gambling industry must be stopped.”<sup>76</sup> In a letter in 2002, White House economic adviser Lawrence Lindsey wrote that “Internet gambling serves as a haven for money laundering and organized crime and, potentially, for international terrorism.”<sup>77</sup> Because of the constant state of inaction in the Senate regarding the Act, which has continued into the current term, “Congressional sources have said that the enactment of legislation under those circumstances would be unlikely until late 2004 or 2005.”<sup>78</sup>

Considering the progression of the IGPA and IGEA, it appears that the federal interest in online gambling is driving toward bottlenecking online gambling operations. This is significant because proponents of regulatory or prohibitive schemas in the United States will have to note strategically that schemas built on user-based perspectives have a much higher chance of facing legislative stagnation. In addition, the legislative stagnation over the IGPA strikes at the very heart of the difficulties concerning online gaming law—whether it is in the best interest of the United States to regulate or prohibit this activity.<sup>79</sup> One commentator has suggested that the lackluster, head-nod-only appeal of the IGPA was due in part to Congress’ mixed feelings about the effectiveness of an outright ban of online gambling versus more reserved measures such as increased regulation or licensing.<sup>80</sup>

73. *Id.*

74. Friedrich, *supra* note 65, at 375.

75. *Id.* at 370.

76. Rod Smith, *White House Presses Web Gaming Ban*, REVIEW JOURNAL. COM, ¶ 1 (Oct. 31, 2002), available at [http://www.reviewjournal.com/lvrj\\_home/2002/Oct-31-Thu-2002/news/19963771.html](http://www.reviewjournal.com/lvrj_home/2002/Oct-31-Thu-2002/news/19963771.html).

77. *Id.* ¶ 2.

78. *Id.* ¶ 10.

79. *See generally id.*

80. *Id.* ¶ 20.

### D. Online Gaming and the Credit Card Industry

Because the IGEA targeted financial institutions that served as intermediaries in online gambling transactions, the credit card industry has begun to self-regulate with regard to the role it chooses to play in online gambling.<sup>81</sup> Many of the financial institutions targeted in the IGEA have taken independent steps to prohibit transactions between gamblers and Internet gambling businesses.<sup>82</sup> American Express, Discover, Citibank, MasterCard, and Visa prohibit Internet gambling transactions because of the uncertain legal climate of the industry.<sup>83</sup> In addition to increased liability, credit transaction companies are concerned about increased risks of fraud and default on payment, which they believe are higher in the area of online gambling than in other transactions.<sup>84</sup>

Alternatively, online gamblers regularly make payments through digital money services such as PayPal, a business that primarily facilitates online money transfers between members via e-mail.<sup>85</sup> PayPal, partially in response to its acquisition by E-Bay, declared that it has agreed to prohibit all gambling transactions that it had domain over.<sup>86</sup> Nevertheless, while PayPal is the largest name in the online money transfer business, it still represents just one example of these digital money transfer businesses.<sup>87</sup> Other online money services similar to PayPal have rushed to fill the demand, and a problem remains on this front.<sup>88</sup> A likely result, if the IGEA becomes law, is a system of online payment transfers where the payment recipients are not recognized.<sup>89</sup> One author has speculated that “[t]his scenario could create a blind e-commerce that could not be regulated and could exacerbate concerns about money laundering.”<sup>90</sup>

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81. Manter, *supra* note 3, ¶ 4; Linda Punch, (USA) *Are All Bets Off for Online Gambling?*, 15 CREDIT CARD MGMT., MERCHANT ACQUIRING, No. 6, Sept. 2, 2002, at 14.

82. Punch, *supra* note 81, at 14.

83. *Id.*

84. *Id.*

85. Manter, *supra* note 3, ¶ 9.

86. *Id.*

87. Friedrich, *supra* note 65, at 376.

88. *See id.* (discussing the problem remaining with these online payment sources); *see also* Manter, *supra* note 3, ¶ 9.

89. Friedrich, *supra* note 65, at 376.

90. *Id.*

### E. Relevant U.S. Case Law

The small amount of federal case law addressing online gambling is not sufficient to form a comprehensive pattern. At this time, the most significant federal case is *United States v. Cohen*.<sup>91</sup> The Second Circuit took a strong stand against Internet gambling from both the operation and user viewpoint.<sup>92</sup> In *Cohen*, Jay Cohen, a bookmaker, moved to the Caribbean island of Antigua to establish World Sports Exchange (WSE), a sports-betting company that specifically targeted customers in the United States through advertisements in newspapers and on television and radio.<sup>93</sup> The success of Cohen's venture was impressive: taking in \$5.3 million in wired U.S. funds during a fifteen-month period.<sup>94</sup> The FBI investigated Cohen and his operation by placing bets of its own on WSE via the telephone and the Internet from October 1997 to March 1998.<sup>95</sup> In March 1998, Cohen was arrested under the Wire Act of 1961.<sup>96</sup> Cohen was convicted in February 2000 for violation of three prohibition clauses in §1084(a) of the Wire Act: (1) transmission in interstate or foreign commerce of bets and wagers, (2) transmission of a wire communication that entitles the recipient to receive money or credit as a result of bets or wagers, and (3) information assisting in the placement of bets and wagers.<sup>97</sup>

Cohen appealed his decision to the Second Circuit Court of Appeals arguing that the jury was improperly instructed to disregard certain safe-harbor provisions set forth in § 1084(b) of the Wire Act.<sup>98</sup> The Second Circuit disagreed, finding that the safe harbor provisions set forth in § 1084(b) were not applicable because they required that the betting be legal in both the origin and the destination of the transmission, which was not the situation in the case in chief.<sup>99</sup> Cohen argued that his system was designed so that the "transmission between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua" and, therefore, was not a true transmission under the Act as no act was illegally occurring domestically.<sup>100</sup> The Court,

91. 260 F.3d 68 (2d Cir. 2001).
92. Manter, *supra* note 3, ¶ 12.
93. 260 F.3d at 70.
94. *Id.*
95. *Id.* at 71.
96. *Id.*
97. *Id.*
98. Manter, *supra* note 3, ¶ 13.
99. *Id.*
100. *Id.*

however, held that a transmission between a bettor and WSE over the telephone or Internet to signal the placement of a bet constituted a transmission under §1084, and therefore an illegal transaction “event” occurred at both the user end and the operation end.<sup>101</sup> What is significant about this case is that the Second Circuit held that WSE’s customers were placing bets by making those requests and having them accepted even if the servers were located in foreign territory.<sup>102</sup> As one author has stated, “the [*Cohen*] decision sends a strong message to the Internet gambling industry: when determining whether a gambling transmission took place, the Second Circuit will pierce through the mechanical means of placing bets to prevent the safe-harbor for assisting information from applying.”<sup>103</sup> As stated, however, other circuits have not taken such aggressive positions.

### III. ANALYSIS

#### A. *The Need for Movement and a Solution*

Online gambling currently resides in a state of legal purgatory. There have been pushes from all three branches of the U.S. government to prohibit or regulate both the operation and scope of virtual gambling. The inconsistency of varying state regulations indicates three concerns that need to be addressed. The fundamental concern is that different states have opposite philosophical views on the issue. Second, the varied state approach makes any prohibitive scheme pragmatically impossible unless all states are to prohibit. Third, the nature of the Internet with respect to online gambling greatly exacerbates regional differences in regulation. Looking to the federal government for a solution to this issue, at least in a domestic vacuum, seems unappealing as well. Aside from the federal government’s ambivalence about what philosophy to take, its ability to regulate or prohibit appears questionable until new legislation is passed. The lack of a comprehensive federal common law on the matter only adds to the difficulty in reaching a solution.

The first identifiable line of inquiry into online gambling is whether regulation or prohibition, in the abstract, would be a more viable policy option to take. In addition, like other issues involving the Internet, online gambling—by its very structure—is transnational in nature. While there is little commentary specifically

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101. *Id.*

102. *Id.*

103. *Id.*

articulating this point, this observation would seem obvious. Online gambling transactions overcome state or national boundaries (and laws) with the ease of clicking a mouse. Thus, the virtues of any regulatory or prohibitive schemas must be analyzed from an international perspective that explores how effective solutions would work in a global context. This concern cannot be overstated. If the issue of online gambling is to be resolved, any solution must consider how that implementation works with within the context of an international coalition. Therefore, analysis is conducted under the framework of an international perspective looking at how the European Union, Australia, and various other countries have dealt with the matter. Finally, the virtues of a regulatory international schema will be discussed.

### B. *Criteria and Policy Implications of a Solution (Factors and Guidelines)*

The debate on whether to prohibit online gambling or merely regulate it sparks a myriad of policy positions about the societal ills that this form of gambling creates.<sup>104</sup> The range of policy concerns is endless and touches almost all areas of society. Opponents of online gambling consistently expound on the “four evils” of Internet gambling: (1) access to online gambling by minors, (2) potential for fraud, (3) gambling addiction, and (4) tax preservation.<sup>105</sup>

Those who seek to prohibit online gambling often cite the potential abuse by minors that online gambling creates.<sup>106</sup> At a basic level, these proponents of prohibition have a valid argument—without regulation and institutional safeguards on online gambling, minors are able to gamble online because Internet operators cannot verify the age of their users effectively.<sup>107</sup> Congressman Jim Leach has echoed this belief, stating that children are extremely vulnerable to falling prey to Internet gambling and that precautions must be taken.<sup>108</sup>

Second, proponents of prohibition point out that Internet gaming establishments do not have the same consumer protection mechanisms in place as their land-based counterparts, a critique that was pointed out in the Senate Committee Report on the IGPA.<sup>109</sup> The

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104. Friedrich, *supra* note 65, at 370.

105. Theresa E. Loscalzo & Stephen J. Shapiro, Symposium, *Internet Gambling Policy: Prohibition Versus Regulation*, 7 VILL. SPORTS & ENT. L.J. 11, 13 (2000).

106. Friedrich, *supra* note 65, at 386.

107. Loscalzo & Shapiro, *supra* note 105, at 14.

108. Friedrich, *supra* note 65, at 382-83.

109. Loscalzo & Shapiro, *supra* note 105, at 14-15.

argument essentially is that the online gamblers cannot be certain that virtual casinos operate their games fairly; in other words, whether the underlying online computer programming creates a fair simulation and operates under a fair winning percentage.<sup>110</sup> It is clear that absent the kind of regulations that are imposed on land-based casinos in the United States, there is the potential for abuse by online casinos.<sup>111</sup>

An additional fear that was expressed in the Senate Committee Report on the IGPA was that the continuous nature of online casinos could lead to an increase in pathological gambling.<sup>112</sup> Furthering this problem is the detached nature of online gambling, which can exacerbate the risk of addiction.<sup>113</sup> Simply stated, between electronic fund deposits and video wagering, an online gambler never comes into physical contact with the funds being gambled.<sup>114</sup> Such a system can lead some to gamble beyond their means.<sup>115</sup>

Finally, some proponents for prohibition of online gambling may be acting on behalf of additional interests that are not as altruistic as those who voice "problem gambling" concerns. Though proponents of prohibition may not publicly admit it as a concern, online gambling undisputedly reduces state tax revenues.<sup>116</sup> States that have legalized conventional gambling casinos collect significant taxes from these operations.<sup>117</sup> Because online gambling websites allow gamblers to patronize gambling establishments that are not licensed by any state, states cannot obtain tax revenues from online casinos that are either unlicensed or licensed by other jurisdictions.<sup>118</sup> To the extent that gamblers reduce their patronage of state-licensed gaming establishments in favor of wagering via online casinos, these states suffer a significant decline in tax revenues.<sup>119</sup> Thus, the prohibition argument may carry an economic agenda.

### C. Regulation Versus Prohibition

As the background section has outline above, U.S. legislation in favor of an absolute prohibition of online gambling has met with

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110. *Id.*

111. *Id.*

112. Loscalzo & Shapiro, *supra* note 105, at 14-15; *see also* Lang, *supra* note 30, at 550 (discussing the concerns over gambling addiction in greater detail).

113. Lang, *supra* note 30, at 550.

114. *Id.*

115. *Id.*

116. Loscalzo & Shapiro, *supra* note 105, at 15.

117. *Id.*

118. *Id.*

119. *Id.*

resistance. The prohibition of online gambling, whether it comes in the form of federal or state legislation, has problems when implemented. First, an absolute ban on online gambling by U.S. users contradicts the concept of capitalistic free exchange and forecloses one of only two online business activities that produce profits on a yearly basis.<sup>120</sup> An economically better solution would be a regulatory-licensing scheme.<sup>121</sup> If online casinos are forced to comply with strict licensing requirements, it would not only help to legitimize the virtual casinos that are "playing by the rules," but the licensing fees could also help pay for the monitoring and auditing of all Internet gambling sites to ensure that they are complying with the regulations.<sup>122</sup> Also, operators are likely to act more reputably if they are subject to licensing regulations that include requirements such as the payment of operating fees and personal and credit investigations for operators.<sup>123</sup>

Besides leading to losses in tax revenue, prohibition does little to solve the many policy-based concerns with online gambling activity.<sup>124</sup> For example, simple prohibition by the United States simply cannot extend far enough to truly safeguard gambling addicts and minors.<sup>125</sup> Although domestic regulations could arguably discourage U.S. operators from running online casinos based in the United States, U.S. prohibitions would have no effect on offshore Internet casino enterprises that are owned and operated by non-U.S. citizens.<sup>126</sup> More specifically, to the extent that minors and addicts are able to deposit funds with foreign Internet casinos, the IGPA and additional U.S. legislation will not eradicate the problem of illegal gambling on the Internet. Even if the federal or state regulations prevent U.S. users from gambling in online casinos, U.S. bettors could easily mask their location by dialing to an offshore Internet service provider before logging into a virtual casino.<sup>127</sup> By doing this, it would appear to the virtual casino operator and regulatory agencies that the gambler is accessing the Internet from a jurisdiction where Internet

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120. Lang, *supra* note 30, at 539; see Horn, *supra* note 1 (the adult entertainment industry is the only other business on the Internet that regularly turns a profit).

121. See Karadbil, *supra* note 28, at 435 (describing the effectiveness of regulatory licensing in Belize).

122. *Id.*

123. *Id.*

124. Loscalzo & Shapiro, *supra* note 105, at 19-20.

125. *Id.* at 20.

126. *Id.* at 19.

127. Lang, *supra* note 30, at 541-42.

gambling is legal.<sup>128</sup> Thus, effective enforcement of federal (or state) prohibition laws is unrealistic.

While the argument above leads to the conclusion that prohibition is ineffective, Theresa E. Loscalzo and Stephen J. Shapiro go a step further, contending that a sole U.S. prohibition schema would actually *aggravate* the policy problems of online gambling in the United States.<sup>129</sup> Their views are reflected in the following passage:

[D]omestic laws that prohibit Internet gambling may discourage respected U.S. casino operators from entering the online casino market. These respected operators, if permitted to open gaming sites on the Internet, would have an incentive to implement security measures to assure [sic] that minors do not access their sites. Namely, these respected companies would be unwilling to jeopardize their land-based operating licenses by allowing underage gambling on their Internet sites. In the absence of respected U.S. casino operators or otherwise appropriately licensed and regulated casinos from the online gaming market, unlicensed, unregulated online operators will see the opportunity for greater profits in the face of diminished competition from established operators. This may encourage unknown or "fly by night" operators who will be less likely to take action to reduce underage gambling on their Web sites to enter the market. U.S. prohibitions on Internet gambling, therefore, are unlikely to eliminate or even reduce underage gambling and may exacerbate the problem.<sup>130</sup>

A better solution to prohibition is the development of a regulatory schema. The effectiveness of this regulatory model depends on a comprehensive international agreement involving multiple countries. A schema of international scope is the only viable way to prevent online gambling establishments from simply relocating their company servers to countries where they cannot be regulated as easily.<sup>131</sup>

128. *Id.*

129. Loscalzo & Shapiro, *supra* note 105, at 19.

130. *Id.*; see also Karadbil, *supra* note 28, at 431. Karadbil shares the viewpoint that prohibition can actually make the situation worse. She notes,

A complete prohibition drives out those who would comply with regulatory burdens. Thus, only those who are 'already predisposed to breaking the law' will run Internet gambling operations outside of the United States . . . . The IGPA, in practice, would have little effect other 'than to scare away scrupulous operators, leaving behind only those that are willing to break the law to satisfy a very real consumer demand.

131. Keller, *supra* note 7, at 1571. One Internet gambling operator has stated the ease of creating and operating a virtual casino:

All wagers take place in Antigua on our server. No money is transferred on a bet by bet basis. People must open accounts and wager from their accounts. When players bet they are directing a foreign transaction, no different than moving money from one offshore business to another. . . . The bet takes place

Thus, any regulatory model must have sufficient international cooperation to handle the complexity of these online casinos.

A basic regulatory model can allow for gambling while addressing potential complications. First, many of the societal concerns revolving around online gambling can be managed by a strong regulatory system. While it is true that online gambling may facilitate the troubling habits of gambling addicts, it is also true that specialized technology such as data-tracking systems that monitor Internet casino transactions make spotting and screening out of compulsive gamblers easier than land-based casinos.<sup>132</sup> Essentially, the technology creates an electronic-transfer record every time a virtual bet is made that can be compiled to identify patterns of addictive and compulsive behavior.<sup>133</sup> Unlike the land-based resorts, which rely on the dealer or pit boss' memory, these electronic records can be saved indefinitely.<sup>134</sup> With respect to underage online gambling, a regulatory schema can be effective as well. For example, organizations such as the Interactive Gaming Counsel have proposed ideas such as creating a worldwide database that could be used to identify and screen out minors.<sup>135</sup>

Currently, there is very little support for an international regulatory schema with U.S. involvement.<sup>136</sup> The two elements necessary for such a schema are regulation and international collaboration. While these two elements appear to go hand-in-hand in creating a viable schema for addressing the policy concerns of online gambling while still taking advantage of the revenues to be gained, no sources strongly and simultaneously advocate both elements. Particular commentators have supported a regulatory schema over a prohibitive one.<sup>137</sup> But only one commentator espouses the virtue of even a *general* international solution. In her Note, Cara Franklin states that "[t]he Internet offers a brand new, and ever expanding forum that has seemed to elude the government's strict regulations."<sup>138</sup> Franklin further notes that "prohibiting online gambling outright would be much easier if this view was supported

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in Antigua. The money is already here. . . . They are making a virtual visit to Antigua.

*Id.*

132. Karadbil, *supra* note 28, at 439.

133. *Id.*

134. *Id.*

135. *Id.* at 440.

136. *Id.* at 445-47.

137. See, e.g., Loscalzo & Shapiro, *supra* note 105, at 27; see also Franklin, *supra* note 25, ¶ 11.

138. Franklin, *supra* note 25, ¶ 11.

by an international coalition. Much to the dismay of American politicians, a coalition of this sort of organization is nowhere near fruition; in fact, many foreign countries support online gambling and profit from its existence."<sup>139</sup> Surprisingly, however, while Franklin goes on to support a regulatory schema, she never seriously contends that the United States should engage in real attempts to form that regulatory schema in an international context.<sup>140</sup>

#### IV. ONLINE GAMBLING AND CURRENT INTERNATIONAL SCHEMAS

##### A. The Caribbean Countries

As mentioned earlier, attempts to prohibit gambling at both the state and federal levels have led to the creation of "safe havens"—locations outside the United States where Internet casino operators base their operations<sup>141</sup> and obtain Internet gambling licenses with minimal effort and at low cost.<sup>142</sup> Of the approximately sixty-eight offshore Internet gambling sites in the Caribbean and Central America, about twenty-seven are in Antigua.<sup>143</sup> Antigua and the Caribbean Islands currently operate their licensing program under the "1994 Antigua and Barbuda Free Trade and Processing Zone Area Act."<sup>144</sup> Under this Act, a commission is established to create a tax-free zone for a number of industries, including gambling.<sup>145</sup> A business only has to purchase a license from the commission in order to benefit from the tax breaks.<sup>146</sup> "Antigua charges a \$100,000 annual fee for an Internet casino license and \$75,000 for a sports license, and a twenty percent tax for overseas phone bills."<sup>147</sup> "Applicants are also subject to a background check and the government claims to have rejected over 300 applications."<sup>148</sup> Unfortunately, Antigua and other Caribbean countries require little accountability in exchange for the licenses.<sup>149</sup> In fact, many countries rely heavily on the licensing

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139. *Id.*

140. *Id.* ¶¶ 14-18.

141. Lang, *supra* note 30, at 541.

142. *Id.*

143. Kelly, *supra* note 11, at 128.

144. Franklin, *supra* note 25, ¶ 12.

145. *Id.*

146. *Id.*

147. Kelly, *supra* note 11, at 128-29.

148. *Id.* at 128.

149. *Id.*

scheme and thus provide government protection from prosecution by U.S. authorities.<sup>150</sup>

Responding to concerns that Antigua was operating its licensing programs without any form of control, the Antiguan government enacted regulations, such as the "Antigua and Barbuda Standard Conditions for the Licensing of Virtual Casino Wagering" and "Sports Book Wagering in the Antigua and Barbuda Free Trade and Processing Zone" that established certain restrictions specifically prohibiting the transfer of a license to a third party and the falsification or willful omission of any information required as a condition for licensing.<sup>151</sup> These regulations require the testing of software used to operate online gambling sites.<sup>152</sup> Nevertheless, the general reputation that Antigua and the Caribbean in general share as a place of loose regulation will not likely change soon.<sup>153</sup> For example, even with the new restrictions in place, there have been allegations that questionable practices still take place.<sup>154</sup> Recently, Starnet Communications International, Inc., a Canadian Internet gambling operator, allegedly made a "secret deal" with Antiguan regulators whereby Starnet obtained fifteen Internet licensees for \$50,000 each, plus \$250,000, and further orchestrated the removal of an Antiguan commissioner of the Free Trade Zone who had been a "hindrance" to Starnet's business.<sup>155</sup> A coalition of countries involved in an international regulatory schema would need to take precautions to crack down on safe-havens such as Antigua.

### B. *The Australian System*

While the regulatory schemas in the Caribbean countries cater to the casino operators, the Australian government has established a more balanced licensing scheme for hosting Internet gambling sites within its borders.<sup>156</sup> Specifically, the Australian states have chosen to license only qualified applicants.<sup>157</sup> This move by the Australian government supports the view that simple Internet banning is not

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150. Lang, *supra* note 30, at 541-42.

151. Franklin, *supra* note 25, ¶ 13.

152. *Id.*

153. Kelly, *supra* note 11, at 129.

154. *Id.*

155. *Id.*

156. Mark G. Tratos, *Gaming on the Internet III, the Sequel: Will Greed Create or Kill the Expansion of Virtual Casinos?*, 610 PRACTISING L. INST. 673, 695 (2000).

157. Kelly, *supra* note 11, at 125 (noting that Canada and South Africa have considered, but have not yet approved, licensing measures).

effective.<sup>158</sup> Australia opted for regulation over prohibition because, similar to the situation in the United States, online gambling was already taking place by Australian users.<sup>159</sup> As one commentator has stated, the Australian model of regulation balances different agendas and facilitates a result in which the “companies are solvent, the games are fair, and the winners can claim their loot.”<sup>160</sup>

The fact that the Australian government chose a regulatory system over a prohibition system does not mean that policy considerations such as addiction and underage gambling were not recognized or addressed. Specifically, the government had “grave concerns about the potential for online gambling to exacerbate already high levels of problem gamblers in Australia.”<sup>161</sup> In response, many of Australia’s regulations focus on minimizing harm to problem gamblers while simultaneously ensuring that the industry operates according to the Australian laws that apply to traditional casinos.<sup>162</sup> Nevertheless, the Australian government also wanted to respond to the prolific nature of online gambling.<sup>163</sup> Thus, the Australian regulatory model was the most viable policy to take.<sup>164</sup> The Australian model has been characterized as providing legitimate online gambling while “being subject to stringent regulation by sophisticated and experienced regulatory bodies.”<sup>165</sup> The result was that in 1997, each Australian state and territory released a draft model for regulating Internet gambling.<sup>166</sup> The international community has taken note of the success and reasonableness of the Australian system. For example, Antigua is currently in the process of revising its International Business Corporation Act and, in doing

158. Tratos, *supra* note 156, at 695 (quoting David Ford, Executive Director of the Queensland Office of Gaming Regulation in Australia: “Australian officials concluded that Internet gambling could not effectively be banned, and the decision to regulate it came easily, because the country has a long tradition of acceptance of gambling.”).

159. *Id.* at 695 (quoting another Australian official indicating that banning online gambling was not “addressing the real issues. . . . [P]rohibition leads to loss of consumer and producer benefits, inefficient allocation of resources (including enforcement) and crime and corruption.”).

160. Mark Blandford’s *Got a Couple of Bets Going at the Same Time. Like . . .*, RED HERRING, Apr. 1, 2000, available at 2000 WL 22831152.

161. Simon Johansson, *Online Casino Threatens to Move Offshore*, AGE ONLINE, Sept. 22, 2000, at <http://www.theage.com/au/c...rsion?story=20000922/A12512-2000Sept22>.

162. Adrian Goss, *Jay Cohen’s Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States’ Anti Gambling Laws*, 7 RICH. J.L. & TECH. \*9 (2001).

163. Karadbil, *supra* note 28, at 434.

164. Goss, *supra* note 162, at \*4.

165. *Id.* at \*8-9.

166. *Id.*

so, will use the Australian Queensland Interactive (Player Protection) Act as a model.<sup>167</sup>

The specifics of the Australian system demonstrate how a regulatory schema can accomplish many of the protective measures that a prohibition system aims to achieve while not completely eradicating the option to gamble online. First, in the Australian system, government officials check the software of online casinos as they do with land-based casinos.<sup>168</sup> The officials investigate the background of the virtual casino operators and do spot-checks to verify that each casino's odds are what they are claimed to be and that the games are not being manipulated.<sup>169</sup> Once the operation has passed the regulations, Australia makes it legal for its citizens anywhere in the world to play online, provided they have the necessary equipment to allow downloading of some basic software and have verified they are of legal age via a system of gatekeeping measures.<sup>170</sup>

As a result of the Australian model, the first licensed online casino approved, monitored, and taxed by a developed country went online in 2000.<sup>171</sup> In April of that year, the Lasseters Casino in Alice Springs, Australia was permitted to operate online gambling operations by the Northern Territory Minister for Gaming.<sup>172</sup> Under this regulatory scheme, the casino site was licensed under the Northern Territory Gaming Control Regulations.<sup>173</sup> The casino offered the same selection of games common to most brick-and-mortar casinos (such as roulette, joker poker, blackjack, sicbo, and seven different slot games with a ninety-two percent payout).<sup>174</sup> The result is a casino with the functionality, control, and protection of a standard casino and, theoretically, the advantages of time and convenience of the Internet. In addition, online players who have disputes with the casino have a governmental authority to whom they can complain and in theory, have a fair adjudication of the problem.<sup>175</sup> That government entity can monitor the payouts and act as an intermediary on the player's behalf, thus serving in a similar

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167. *Id.* This fact shows the viability and willingness of countries to base their systems on the Australian model. Thus, if a regulatory international model can be implemented, it would seem reasonable to base it on a system that has already been singled out by a multitude of countries for its success. *Id.*

168. *Id.*

169. Tratos, *supra* note 156, at 696.

170. *Id.*

171. *Id.* at 698.

172. *Id.*

173. *Id.*

174. *Id.*

175. *See id.*

regulatory function as it has done so in the past for land-based casinos.<sup>176</sup>

The Australian model serves as an excellent example of an effective regulatory schema and, in addition, gives insight into what an *international* regulatory schema should encompass. First, in the Australian system, online casino operators are licensed by the state and territorial governments.<sup>177</sup> The reason that Australian gaming regulation has been under the province of the various Australian state and territory governments is that the Australia Commonwealth Constitution did not give the Commonwealth power with respect to gaming.<sup>178</sup>

The fact that the Australian model was territorially based gives insight into how an international regulatory schema could constructively operate.<sup>179</sup> For the purposes of this analysis, by extrapolating each territory as if it were a country, it is useful to see that Australia's system creates a broad regulatory schema while still preserving the particular and individual economic policies and moral standards of each state and territory. For example, the Australian system has allowed each state and territory to develop a significant (and not necessarily identical) regulatory regime and at a "high level of expertise across a range of areas, including economic and social policy."<sup>180</sup>

The Australian system, while generally effective, has not escaped criticism. On August 17, 2000, in reliance on its chartered power to legislate with respect to "postal, telegraphic, telephonic, and other like services," the Commonwealth Government introduced the Interactive Gambling (Moratorium) Bill 2000 (hereinafter, the Bill).<sup>181</sup> The Bill was created to "pause the development of the Australian based interactive gambling industry while an investigation into the feasibility and consequences of banning interactive gambling is conducted."<sup>182</sup> The Bill finally passed the House of Representatives on December 7, 2000, after intense political lobbying by both anti-gambling establishments and land-based casino businesses.<sup>183</sup> By that time, more than half of the moratorium period

176. *Id.* at 698-99.

177. *Id.* at 699.

178. *See id.*

179. *See Goss, supra* note 162 at \*4.

180. *Id.*

181. Goss, *supra* note 162, at \*8-9 (citing AUSTL. CONST. ch. I, pt. V. § 51(v)).

182. Interactive Gambling (Moratorium) Bill 2000: Explanatory Memorandum, Commonwealth of Austl. Senate (circulated by the hon. Senator Richard Alston, Minister for Communications, Information Technology and the Arts), *available at* <http://www.aph.gov.au.senate> (n.d.).

183. Goss, *supra* note 162, at \*8-9.

had already lapsed.<sup>184</sup> Nevertheless, as one author has commented, “despite the temporary cessation of licensing as a result of the passage of the Bill, the Australian Internet gambling industry continues to flourish.”<sup>185</sup>

The Australian regulatory system has also suffered in popularity because of attacks against its economic efficiency. As stated, the Australian system allows its states and territories to enact their own specific gaming regulations.<sup>186</sup> In some of the Australian territories, the licensed online casino pays a tax of eight percent on its online gambling revenue.<sup>187</sup> But the regulatory schema for Victoria, Queensland, and the Australian Capital Territory include a fifty percent online gambling tax.<sup>188</sup> The rationale for the fifty percent tax is premised upon the supposed economics of Internet gambling. An Internet gaming operator does not have to make the capital investment in physical infrastructure that operators of land-based casinos do.<sup>189</sup> For example, online gambling operations neither employ a significant number of people nor pay substantial real property taxes.<sup>190</sup> Essentially, the argument is that the fixed costs of online gambling operations are low enough that online operators can afford to pay the tax. While this contention may be true, a high tax rate and accompanying regulation by the Australian government can at times strongly discourage online gambling ventures from being established.<sup>191</sup> This criticism of the Australian model could also be an attack on an international regulatory schema modeled after the Australian system. If different countries tax the casino servers that are housed in their countries at significantly different rates, then these discrepancies could lead online gambling companies to relocate to where they are taxed the least. If the countries with the lowest tax rates also happen to be the countries with the weakest regulatory policies, then the result of such an international schema would not be much different from the situation as it stands today. Therefore, while the Australian model is a good example of how to enact an international regulatory schema while still preserving the individual positions of particular countries, it is evident that there would need to be cooperation among the countries involved in determining (1) a range of regulatory policies not so diverse so as to create the safe-

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184. *Id.*

185. *Id.*

186. *See* Tratos, *supra* note 156, at 699.

187. *Id.*

188. *Id.*

189. *Id.* at 699-700.

190. *Id.* at 700.

191. *See generally id.*

havens that currently exist in Antigua and the Caribbean and (2) comparable tax structures so that companies choose not to relocate based on the fixed costs of operations.

### C. The European Union

The European Union (EU) offers another model of regulation that could possibly serve as a template for an international regulatory schema. Gambling is regulated at the national level by all EU Member States in the absence of EU legislation.<sup>192</sup> In order to control and limit the supply of gambling in their territories and to ensure that the revenue of gambling is to a certain extent used for public benefit, all Member States have imposed limitations on cross-border gambling activities.<sup>193</sup> One important feature of the EU system is that Member States have the right to prohibit or restrict games offered from other EU jurisdictions, even if they are provided by means of the Internet.<sup>194</sup> The Scandinavian countries apply the most stringent regulatory standards to gambling services, where only state-controlled operators are competent to offer games of chance.<sup>195</sup>

The European Commission is currently reconsidering whether, and under what form, it should regulate online gambling as a collective entity.<sup>196</sup> The EU may address this issue in three forms. First, the EU may pass legislation covering all types of gambling services.<sup>197</sup> Second, the Commission may decide to deal with some issues (for example, betting), while leaving others to national law (for example, casinos and lotteries).<sup>198</sup> Third, the Commission may not act at all.<sup>199</sup>

If the Commission decides to regulate gambling services, it has two options for doing so: mutual recognition or harmonization.<sup>200</sup> Under mutual recognition, a gaming operator complying with the requirements of his country of origin has the right to provide his

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192. See Philippe Vlaemminck & Pieter De Wael, *The European Union Regulatory Approach of Online Gambling and Its Impact on the Global Gaming Industry*, 7 GAMING L. REV. 177, 177 (June 2003).

193. *Id.*; see also Cowan, *supra* note 4, at 255-58 (discussing Great Britain specifically and in the United Kingdom, the Gaming Board has stated that measures to outlaw online gambling would be futile and has recommended that the government adopt legislation regulating Internet gambling sites).

194. Vlaemminck & De Wael, *supra* note 192, at 177-78.

195. *Id.*

196. *Id.*

197. *Id.* at 178.

198. *Id.*

199. *Id.*

200. *Id.*

services in all the other EU Member States.<sup>201</sup> Mutual recognition would make it possible for U.K. gaming operators to offer their services on a pan-European scale.<sup>202</sup> An important fundamental distinction between these two options is that under harmonization, all different national rules are replaced by a single set of universal rules, while mutual recognition is more of a standard international comity arrangement.<sup>203</sup>

Based on the nature of online gaming operations, the Commission, sensibly, would like to propose legislation grounded on a harmonization theory.<sup>204</sup> But the Commission realizes that harmonization would not be easy, as it would require a political consensus on a uniform set of gambling laws.<sup>205</sup> Realistically, the Commission understands that a single government or law cannot control the Internet.<sup>206</sup> The Commission has also called for "international treaties to create worldwide law enforcement structures for the Internet."<sup>207</sup> The European Council has also considered the viability of an international regulatory schema similar to the schema proposed in this paper. While the Commission seems to support the idea in theory, it was skeptical of the ability to implement such a schema.<sup>208</sup>

Many of these concerns were addressed in 1998 by the Gaming Regulators European Forum (hereinafter, the Forum). The Forum advocated for an approach lying somewhere between prohibition and regulation.<sup>209</sup> At its May 1998 meeting in Helsinki, the Forum concluded that Internet gambling regulation must reside under the purview of country sovereignty and that "such decisions should be

201. *Id.*

202. *Id.*

203. *Id.*; see also Cowan, *supra* note 4, at 264 stating that

[c]omity, in the legal sense, is neither a matter of absolute obligation, on the other hand, nor mere courtesy and goodwill upon the other. But it is the recognition that one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under protection of its laws.

204. Cowan, *supra* note 4, at 264, 267-68 (asserting that harmonization is favored because of "the advent of Internet gambling and the increasing cross-border competition resulting from Internet gambling").

205. *Id.*

206. Karadbil, *supra* note 28, at 446.

207. *Id.*

208. *Id.*

209. Kelly, *supra* note 11, at 132.

respected by other jurisdictions.”<sup>210</sup> The Forum went on to further suggest that the regulatory schema that the EU employs should be based on mutual recognition.<sup>211</sup> Specifically, it stated that “the gambling so offered should be restricted to residents of the jurisdiction concerned and residents of such other jurisdictions with whom there are cooperative or reciprocal arrangements.”<sup>212</sup> The Forum also was concerned with the policy problems faced by users, as discussed earlier.<sup>213</sup> It specifically suggested measures to protect compulsive gamblers, the integrity of the games, player confidentiality, and to prevent of money laundering.<sup>214</sup>

#### D. Examples from Other Nations

Belize was the first nation to pass legislation providing for the regulation of Internet gambling operations.<sup>215</sup> The Belize government passed the Computer Wagering Act of 1995, which was intended to regulate the online gambling industry.<sup>216</sup> The Wagering Act creates a Computer Wagering Licensing Board whose members are appointed by the government.<sup>217</sup> The Board members supervise the industry and protect the interests of those who gamble on online casinos whose servers are located in Belize.<sup>218</sup> One regulation requires that operators must post bonds and acquire an Internet gaming license if they wish to set up servers in Belize.<sup>219</sup> The Belize government believes that these stringent regulations actually can boost online gambling revenues by establishing confidence in the system and consequently attracting more Internet gambling operators and patrons.<sup>220</sup>

Another approach worthy of consideration is the Liechtenstein model. The Liechtenstein model is a quasi-government-operated Internet facility that has revenue of at least \$50 million a year.<sup>221</sup> Recently, the Red Cross contracted with the country for a worldwide

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210. *Id.* (quoting from *Position Statement on Gambling on the Internet* (as adopted at the Annual Meeting at Helsinki on 15 May 1998)(transcript on file with William Mitchell Law Review)).

211. *See id.* at 132-33.

212. *Id.*

213. *See infra* Part IV-V.

214. Kelly, *supra* note 11, at 133.

215. Karadbil, *supra* note 28, at 435.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Kelly, *supra* note 11, at 123-24.

lottery called "Millions 2000."<sup>222</sup> The goal of the venture is to create an international lottery on the Internet to raise money for victims of war and disaster.<sup>223</sup> The site has five different games for users to play.<sup>224</sup> The jackpot is normally around one million dollars each week with an average of five million tickets each week.<sup>225</sup> The Secretary of the International Red Cross, in supporting the project, stated that "[w]e cannot fight tomorrow's battle with yesterday's weapons. . . . This means that we have to steer beyond the traditional fundraising mechanics and develop alternatives, which appeal to a global audience."<sup>226</sup> The rest of the proceeds pay operating costs and the weekly winners and are donated to Liechtenstein charities.<sup>227</sup> If all online gaming operations were run with such altruistic goals, forming an international coalition to support a broad regulatory schema would be much easier.<sup>228</sup> As an example of the lack of progressive thinking on the matter of regulatory schemas, the American Red Cross decided not to participate in these lotteries because "they are not consistent with our traditional broad based fund raising appeals."<sup>229</sup> Once again, this shows a lack of perspective. It is evident in this case that a regulatory policy can further policy objectives more successfully than an outright ban or prohibition.

#### E. World Trade Organization

The World Trade Organization also offers a possible starting point for creating an international schema. Within the scope of the World Trade Organization, online gambling has not been regarded as a particularly pressing issue.<sup>230</sup> But countries are beginning to use the WTO as a forum for online gambling disputes. For example, on March 13, 2003, Antigua and Barbuda complained to the WTO Dispute Settlement Body that U.S. restrictions on the cross-border supply of gambling and betting services are not compatible with WTO law, and they requested that the WTO Settlement Dispute Body consult with the United States on the matter.<sup>231</sup> Thus, the WTO would seem to be a useful institution for developing either a regulatory or prohibition scheme.

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222. *Id.*

223. Karadbil, *supra* note 28, at 435.

224. *Id.*

225. *Id.* at 436.

226. Kelly, *supra* note 11, at 124.

227. Karadbil, *supra* note 28, at 436.

228. *See generally id.* at 436.

229. Kelly, *supra* note 11, at 124.

230. Vlaeminck & De Wael, *supra* note 192, at 182.

231. *Id.*

## V. CRITERIA OF THE PROPOSED INTERNATIONAL REGULATORY SCHEMA

Based on the different perspectives identified, it is evident that certain criteria are essential to an international regulatory schema. The Australian model illustrates that an international regulatory schema must include the flexibility to allow individual countries to choose the number of operational licenses they would grant.<sup>232</sup> Without this flexibility and autonomy, countries would likely be unwilling to submit to regulations and to a "Code of Conduct" that would require them to vouch for integrity, suitability, and solvency of their country's gaming operations.<sup>233</sup> Nevertheless, one author has suggested that there must be a base level of regulations in every country that would "prohibit utilization of facilities by minors and the extension of credit, mandate self-exclusion for problem gamblers, protect players' privacy, require disclosure of slot machine payouts, and mandate that operators submit to audits and inspection."<sup>234</sup> The Australian model, however, serves as an example that it is possible to tailor the particulars of online gambling regulations while still preserving the international schema if mutual recognition among the particular nations is achieved.<sup>235</sup>

This concept is exemplified in the Queensland Interactive Gambling (Player Protection) Act, which was passed on October 1, 1988.<sup>236</sup> For example, the Queensland Act provides the following:

- (1) a regulatory framework for the conduct of interactive gambling; (2) licenses to be issued to approved providers of interactive gambling activities; (3) *mutual recognition* of licensed providers from other jurisdictions within Queensland and vice versa; (4) taxes to be levied on licensed providers; and most significantly (5) a detailed regime for the protection of people who participate in interactive gambling and the community generally. [Emphasis added.]<sup>237</sup>

The Queensland model also addresses the policy considerations discussed earlier in this Note.<sup>238</sup> The model taxes online gamblers

232. See also JOHN NAISBITT, *GLOBAL PARADOX* (Avon Books, New York 1995) (As countries begin to enter into a single market world economy, these same countries will more fiercely attempt to preserve their customs and beliefs. Likewise, the countries willing to enter into an international coalition to regulate online gambling would likely want to enter only if they could maintain basic control over the online gaming operations that would ultimately occur in their country. These willing countries would not want to enter into a coalition if they believed the end result was a step backward.).

233. Kelly, *supra* note 11, at 125.

234. *Id.*

235. *Id.*

236. *Id.* at 126.

237. *Id.*

238. See *infra* Part IV-V.

locally if Internet gaming is legal where the gambler resides, thereby creating large incentives for each territory to regulate and control illegality in player use.<sup>239</sup> The Queensland's Player Protection Act also mandates the availability of a "Personal History and Suitability of Person Proforma" form.<sup>240</sup> The form says that online players may exclude themselves and "if the player is concerned about . . . another player's welfare and believes that the gambling habit poses a threat to the player or the player's family, an application may be made to have the player banned from participating in any form of licensed interactive gaming activity."<sup>241</sup>

To further protect children and problem gamblers, the regulatory system should require that online casinos register their sites with a governing agency.<sup>242</sup> The registration system should include all pertinent personal identification information from users.<sup>243</sup> In addition, a system of verification must then be put into place to ensure that the information received by the casino is valid and accurate.<sup>244</sup> This type of regulation—aside from protecting problem gamblers and children—will also allow participating casinos to confirm whether there are any interstate commerce issues because the casinos will easily be able to establish the location of each player.<sup>245</sup> Finally, this regulation system likely could be effective in preventing money laundering through off-shore channels.<sup>246</sup>

Another aspect of the Queensland Act that may translate well into an international schema is the mutual recognition system. While it would be ideal for a regulatory schema to require a harmonization for its participating members, such a requirement likely would be detrimental.<sup>247</sup> As stated, the EU has faced difficulty implementing this consideration. For an international regulatory scheme to stand a genuine chance of being approved by a large number of countries, mutual recognition must be used to grant each country the flexibility to adjust online gambling legislation to reflect its own view, from an economic and a cultural standpoint, of online gambling. Of course, mutual recognition, left unchecked, has the potential to make an international regulatory schema ineffective and pointless because it

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239. Kelly, *supra* note 11, at 125-26.

240. *Id.* at 126.

241. *Id.* at 126-27.

242. Friedrich, *supra* note 65, at 386.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Kelly, *supra* note 11, at 125; *see also* United States v. Cohen, 260 F.3d 68 (2d Cir. 2001) (holding that the United States needs a greater jurisdictional reach in the area of online gaming operations).

would only take one country to relax its regulation in search of increased gain to undermine the entire system. Thus, this Note's proposed schema is workable only if there is legitimate goodwill between the participating countries. To that point, this Note further proposes that the WTO, discussed earlier, be the hub and negotiating nexus through which various countries can align their legislative policies to the degree that any remaining differences do not render the regulatory schema ineffective.

## VI. JURISDICTIONAL CONCERNS INVOLVED WITH INTERNATIONAL SCHEMAS

While jurisdictional issues are beyond the scope of this Note, their relevance and importance cannot be overlooked in the implementation of a regulatory international schema. While this Note supports the use of an international regulatory schema, the ability of the United States to have jurisdiction over gambling operators located outside its borders would enhance the model's effectiveness and would further increase the chance of congressional approval of such a model. One line of commentary suggests that the United States can obtain personal jurisdiction over foreign-based, foreign-owned virtual casinos under a conventional analysis of personal jurisdiction.<sup>248</sup> Conversely, other commentary has concluded that the United States could not obtain jurisdiction over foreign operators of virtual casinos.<sup>249</sup> In espousing his support for domestic prohibition, Senator Kyl, not surprisingly, stated that it "would be a very difficult kind of activity to regulate because we don't have jurisdiction over the people abroad who are doing it."<sup>250</sup> In conclusion, although the jurisdictional issue has not been addressed at length, that fact must change before an effective regulatory schema, or even a prohibitive one, is implemented.

## VIII. CONCLUSION

Like many areas involving the Internet, online gambling continues to expand. This growth has created new legal issues, and many of the specifics involved with online gambling's legitimacy and

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248. See generally *Cohen*, 260 F.3d 68.

249. Karadibil, *supra* note 28, at 431.

250. *Id.*

legality reside in a quagmire of uncertainty.<sup>251</sup> One academic has stated that “[c]onflict and confusion are the order of the day” with respect to the regulation of online gambling.<sup>252</sup> This Note has articulated that an effective regulatory international schema is more likely to help control underage and abusive gambling, as well as address other societal concerns, than domestic prohibition legislation can. In addition, it would be disingenuous not to note that countries that have established legitimate regulatory licensing schemas have brought in significant tax revenues in the process.<sup>253</sup> For this international regulatory schema to be effective, participating countries must create a strong international coalition in order to prevent virtual casinos from simply relocating their servers to places outside the enforcement net.

A viable international regulatory schema can be one patterned after Australia’s Queensland Interactive Gambling (Player Protection) Act. The Queensland model addresses many of the issues an international regulatory schema would deal with and offers key insight into what types of problems the model would face. One of the greatest “balancing acts” that an international schema would have to undertake would be to allow each country to retain its sovereign right to decide its own online gambling position while creating enough uniformity in the system so as to legitimately create a valid enforcement net. For an international schema to have any chance of being sustained, it would likely operate under a policy of mutual recognition rather than harmonization. Such a compromise would require participating countries to extend a measure of goodwill toward each other. The result of a successful international regulatory schema would be a win-win situation: users who wish to gamble online could do so without harm, and participating countries would be able to earn significant tax revenue in the process. Online gambling, if regulated and properly legislated, can be a great instrument for entertainment and commerce, a situation in which everyone involved ends up with a winning hand.

*John D. Andrlé\**

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251. See Friedrich, *supra* note 65, at 369 (referring to online gambling as “the elusive speeding car on the information superhighway, weaving through traffic and seemingly immune to efforts that attempt to slow its charge”).

252. Cowan, *supra* note 4, at 267.

253. Friedrich, *supra* note 65, at 386.

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