

# NOTE

## CHECK, RAISE, OR FOLD: POKER AND THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

### I. INTRODUCTION

Gambling permeates throughout American society. One cannot watch television without stumbling upon a poker show,<sup>1</sup> listen to the radio without hearing the amount of today's lotto jackpot,<sup>2</sup> or go on the Internet without encountering an advertisement for a gambling website. When one thinks of this country's history, the image of the frontier saloon with its raucous drinking and debauchery goes hand in hand with gambling, mainly poker. In nearly every state in the Union, to one extent or another, there exists some form of legalized gambling.<sup>3</sup> With such an ever pervasive culture of gambling in this country, why is Internet gambling the bane that needs to be eradicated from modern society? The Unlawful Internet Gambling Enforcement Act of 2006<sup>4</sup> ("Act" or "UIGEA") is only the most recent legislation passed by Congress in an attempt to curb the ongoing "problem" that is Internet gambling.<sup>5</sup> Simply stated, the Act prevents those transactions that are deemed restricted from being settled through any financial institution, including banks and credit cards.<sup>6</sup> It is merely the enforcement mechanism being utilized to curb online gambling. Such legislation begs the question: Is Internet gambling an actual problem, and if so, is the means by which the Legislature is attempting to quash this predicament the paramount approach by which to handle the situation? This Note argues that the Act (as well as its predecessor bill, the Internet Gambling Prohibition Act of 1997 ("IGPA")<sup>7</sup>) is merely a protectionist statute concerned primarily with the economic well-being of the nation. It will be shown that despite

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1. See, e.g., *World Series of Poker* (ESPN); *Celebrity Poker Showdown* (Bravo); *World Poker Tour* (Travel Channel).

2. See NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 1-1 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter NGISCR].

3. *Id.*

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

5. Gary Rivlin & Matt Richtel, *D'Amato Never Folds: Former Senator, a Poker Aficionado, Lobbies for Online Gambling*, N.Y. TIMES, Mar. 5, 2007, at C1.

6. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5363).

7. Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

claims to the contrary,<sup>8</sup> the existence of the UIGEA is in actuality beneficial. The fact that it is cloaked in an aura of morality rhetoric is merely a guise to bypass international sanctioning in lieu of the World Trade Organization (“WTO”).<sup>9</sup>

However, as necessary and beneficial as such legislation may be to the national interest, in its current form it is gravely flawed, for the Act impinges on the individual liberties of the independent citizen on the basis of a lack of uniformity between gambling and investing laws.<sup>10</sup> This is mainly due to a historic disdain for the former.<sup>11</sup> Currently, the state of affairs in this field fails to homogeneously treat laws governing investments with those governing gambling, despite the similarities in the skills involved in the underlying activities. Such an incongruous legal approach is therefore flawed since it denies the citizen the right to do as he wishes without the omnipotent eye of government. How can one reconcile the availability of gambling on every media outlet with the attempt to banish it on the basis that gambling is somehow immoral?

The subsequent portion of this Note focuses on the development of Internet gambling as a powerful entity and the contemporaneous expansion of federal and state restrictions of such entities. To fully grasp the role this legislation has played it will be necessary to understand the political climate in which the Act was formulated and in turn its expeditious passage through Congress.

From there, Part III provides an examination of the Act in its current state through the lens of economic analysis. Viewed under such a microscope it becomes apparent that the Act is actually beneficial, pointing out mainly that the lost tax revenue<sup>12</sup> is hurting the common citizen. Such investigation will ultimately lead to the conclusion, based strictly on economic theory, that, left unchecked, the Internet gambling industry was causing the United States to hemorrhage billions of dollars.

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8. See, e.g., Rivlin & Richtel, *supra* note 5, at C1 (“But the more that the government does to impede poker players, the more angry and frustrated they’re going to become.”); Poker Players Alliance: Fight for Poker, <http://www.pokerplayersalliance.org/> (last visited Aug. 30, 2007).

9. See Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 *FORDHAM L. REV.* 695, 708 (2005).

10. See generally Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 *B.U. L. REV.* 371 (2006) (discussing the inconsistent nature of the current legal system in regards to gambling and investing and the basis of speculation as the factor that binds the two).

11. Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 *NEV. L.J.* 197, 199 (2003) (“In many instances, historic reasons, based on politics rather than analytical reasoning, exist for such distinctions.”).

12. DAVID O. STEWART, *AN ANALYSIS OF INTERNET GAMBLING AND ITS POLICY IMPLICATIONS I* (Am. Gaming Ass’n ed., 2006) (“Neither federal nor state governments receive tax revenues from online gambling.”).

Part IV examines the reasoning behind disguising the bill in terms of values and mores, pointing mainly to the necessity of bypassing WTO regulations. This Note then examines the disparity in regulatory standards governing the gambling industry, and that due to this variance, passage of domestic legislation is not actually violative of the aforementioned international treaty.

Part v. criticizes the current state of the law in regard to the unparalleled approach between investing and gambling. It becomes evident through the juxtaposition of the skills of mathematical and psychological analysis that is utilized by a poker player with that of a derivatives or day trader that both activities are based on the understanding of chance and the minimization of risk. This comparison proves fruitful because it points to the hypocrisy that permeates throughout this entire area of the law once it becomes clear that there is no true difference between the skills and pitfalls involved in some forms of investing and some forms of gambling.

Part VI shows that based on the above mentioned analysis, the Act is flawed in that there is no uniformity between such closely related skilled activities. Yet, possibly, no modification to the UIGEA needs to be made. The current verbiage of the statute allows for poker to escape the constraints imposed on ordinary gambling activities. Additionally, the utility will in and of itself show the necessity for providing an exception from broadly generalizing poker as gambling.

Part VII summarizes that the incompatible position that the government takes between gambling and investing, attacks the individual's sensibilities of what is allowed and not allowed in today's America. Therefore, to accommodate the liberties to which each citizen is entitled and yet protect the United States Treasury's coffers, one of two approaches can be taken: 1) by Court decision which would exempt poker from the status of a game of chance, or 2) by incorporating language directly into the Act exempting poker from the categorization of "restricted transaction" similar to the treatment of derivatives and day-trading. Part VII discusses these modifications.

## II. POLITICAL CLIMATE OF DICTATING MORALITY

The American Values Agenda will defend America's founding principles. Through this agenda, we will work to protect the faith of our people, the sanctity of life and freedoms outlined by our founding fathers. Radical courts have attempted to gut our religious freedom and redefine the value system on which America was built. We hope to restore some of those basic values through passing this legislative

agenda and renewing our country's commitment to faith, freedom and life.<sup>13</sup>

Two thousand six was an election year. The Act was born out of this political cauldron as part of the American Values Agenda.<sup>14</sup> At the time of the Act's inception every state had at least one District Seat open to challengers and a multitude of states had far more, as well as key Senate and gubernatorial races.<sup>15</sup> The proponents of this agenda believe it is their duty to instill a uniform set of values upon which the nation is to abide by, values that our forefathers would be proud of.<sup>16</sup> So, in a political move to garner the support of the conservative right, the proponents of the Act earmarked the legislation onto a key Homeland Security bill.<sup>17</sup> This device would ensure an expeditious passage through Congress and summarily the furtherance of the aforesaid agenda.

Classic Greek philosophy declared that the state should be the ultimate promoter of morality.<sup>18</sup> This idea can be categorized as state sponsored paternalism. Undoubtedly, the statement that "[w]e hope to restore some of those basic values through passing this legislative agenda"<sup>19</sup> can be seen as an adherence to the Greek school of thought by the authors of the Agenda. Viewed in this light, the Act is nothing more than a tool of the current administration to promote its values—exactly what the bill claims to be.

However, from a strictly ideological view, such an approach directly conflicts with the notion of individualism that has been a staple of the core American value system since the Jeffersonian era.<sup>20</sup> As a nation we have always allowed people to do as they wish as long as it was within the boundaries of the law.<sup>21</sup> The Act then, in this sense, is a

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13. U.S. Newswire, *Speaker Hastert Statement on the House Republican American Values Agenda*, June 27, 2006 [hereinafter Speaker Hastert].

14. *See id.*

15. WashingtonPost.com: Complete List of 2006 Races, <http://projects.washingtonpost.com/elections/keyraces/> (last visited Aug. 30, 2007).

16. *See* Bob Bernick Jr., *Matheson Far Enough to the Right for Utahans*, DESERET MORNING NEWS, Aug. 25, 2006.

17. *U.S. Congress Passed Anti-Internet Gambling Legislation Last Week*, Internet Business Law Services, Oct. 3, 2006 ("[T]he final version of UIGEA was passed within a Homeland Security Bill, H.R. 4954, called the Port Security Improvement Act.").

18. Gregory R. Johnson, *The First Founding Father: Aristotle on Freedom and Popular Government*, in LIBERTY AND DEMOCRACY 29, 30 (Tibor R. Machan ed., 2002) ("Indeed, [Aristotle] explicitly advocates using state coercion to morally improve citizens.").

19. Speaker Hastert, *supra* note 13.

20. *See* Charles M. Wiltse, *Jeffersonian Democracy: A Dual Tradition*, 28 AM. POL. SCI. REV. 838, 838 (1934).

21. *See generally*, U.S. CONST. amends. I-X (enumerating the basic rights afforded to every citizen). Interestingly, at the inception of the Bill of Rights, Alexander Hamilton opposed their inclusion into the Constitution:

betrayal of such an individualistic spirit. “Radical courts have attempted to gut *our* religious freedom and redefine the value system on which America was built.”<sup>22</sup> Whose religious freedom? More importantly, whose value system?

In light of this substantial gambling presence throughout the country, there is arguably not a moral hang-up with gambling. In fact, federal researchers reported that over sixty percent of adults partake in some type of gambling, and a Gallup Poll discovered that eighty percent of those surveyed supported the legalization of gambling.<sup>23</sup>

If eighty percent of the public supports legalization of gambling, then whose religious freedom is being gutted? Whose value system needs to be maintained? Clearly it is not the majority who generally enjoys gambling on an occasional basis,<sup>24</sup> but rather a small core of the conservative right.<sup>25</sup>

With a few exceptions, the federal and state governments have been hostile to Internet gambling, though large numbers of U.S. residents routinely gamble online. This clash between policy and reality prevents American businesses from providing increasingly popular Internet gambling services that would create jobs and tax revenues for Americans. Government hostility to Internet gambling has been expressed in the form of (1) criminal and civil enforcement actions, (2) regulatory actions, and (3) legislation.<sup>26</sup>

As such, the Act can be likened to a parent asserting his control over a child when that child acts out against what the parent believes to

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I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.

THE FEDERALIST WITH LETTERS OF “BRUTUS” NO. 84, 420 (Alexander Hamilton) (Terence Ball ed., 2003).

22. Speaker Hastert, *supra* note 13 (emphasis added).

23. Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1050 (1999) (citing James Mann & Gordon Bock, *Gambling Rage Out of Control?*, U.S. NEWS & WORLD REP., May 30, 1983, at 27, 27).

24. See NGISCR, *supra* note 2, at 1-1 (“Sixty-eight percent of Americans report having gambled at least once in the past year.”).

25. Hastert is a staunch Republican and his political base is primarily comprised of the conservative right.

26. STEWART, *supra* note 12, at 7.

be proper. “The law did not make it impossible or illegal for Americans to bet online, but it did make it trickier for players to get their cash to the offshore casinos that run the Internet sites.”<sup>27</sup> For example, the parent withholds funds from the child when the parent feels the child is acting inappropriately. In this sense the government is not allowing its citizens to spend their own money freely under the guise of promoting morality. This contradicts American Individualism.<sup>28</sup> Additionally, it has historically been the right of the states to decide what is appropriate on matters not enumerated under the Constitution—not the federal government<sup>29</sup>—and evidently gambling was not discussed at the Constitutional Convention.

Interestingly, the current treatment of Internet gambling is not a new phenomenon. Congress has attempted for more than a decade now to curb the expansion and destroy the current infrastructure that offers online gaming,<sup>30</sup> the spearhead of this campaign being Senator Jon Kyl.<sup>31</sup> However, federal legislative initiatives have not been the only means by which the issue of Internet gambling has been addressed. The states have as much at stake individually, if not more, than the nation does as a whole. The rest of this section is organized by state and federal responses to the Internet gambling issue and the means by which each has attempted to control what it deems to be a growing problem.

#### A. State Responses

State regulations have played an integral part in the current legal landscape and likely will continue to do so for some time to come. “Today, 48 states and the District of Columbia permit some form of legalized gambling.”<sup>32</sup> However, similar to the predicament faced by the

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27. Rivlin & Richtel, *supra* note 5, at C1.

28. Daniel Yankelovich, *How American Individualism is Evolving*, PUB. PERSP., Feb./Mar. 1998, at 3, 3.

A belief in individualism is, of course, as old as the nation itself. But prior to the 1960s, American individualism focused mainly on the political domain—freedom to speak our minds, to pursue our own religious beliefs, to live where we chose to live. In the 1950s we were a nation of political individualists but social conformists. The 1960s ushered in a radical extension of individualism, broadening it from the political domain to personal life styles.

By the 1980s the ethos of expressive individualism had grown into a national preoccupation. Now, in the late 1990s, after more than three decades of radical experimentation, Americans find a new conception of individualism evolving.

29. U.S. CONST. amend. X.

30. STEWART, *supra* note 12, at 10.

31. See Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

32. Richard Raysman & Peter Brown, *Cyber-Casinos: Gambling Meets the Internet*, N.Y. L.J., Aug. 12, 1997, at 3.

federal government in losing billions of domestic dollars in revenue, individual states have reacted with their own measures in response to gambling over the Internet.<sup>33</sup> The hypocritical posturing by lawmakers, as irritating as it is, is nonetheless necessary for the financial well-being of each state and ultimately the nation as a whole.<sup>34</sup>

Presently, the lawmakers from the so-called “gambling states” are the greatest supporters of the prohibition of online wagering.<sup>35</sup> States that receive a large chunk of their revenue from gambling stand to lose the most if Internet gambling becomes even more prevalent.<sup>36</sup> For example, a state that currently has a lottery, horse racing, dog racing or riverboat casinos may lose revenue if “gamblers develop a preference for the on-line medium.”<sup>37</sup> Nevertheless, many states have begun developing their own gambling websites for either a lottery, or pari-mutuel betting,<sup>38</sup> as an “if you can’t beat them, join them” strategy. In order to avoid breaking the law, legislators drafted changes to both the IGPA as well as the current Act to exempt state lotteries<sup>39</sup> and horse racing<sup>40</sup> among a slew of other contests that can be considered gambling. However, as Tom W. Bell, director of technology studies at the Cato Institute, so eloquently argued, ““this is not a moral issue, this is an issue about who has more lobbying clout.””<sup>41</sup>

To further drive home the point of the hypocrisy that is a state denying Internet gambling on moralistic grounds and reaffirming the issue of lobbying influence is an anecdote from the State of Illinois. Illinois recently has shown interest in establishing a means by which its citizens could purchase lottery tickets through the Internet.<sup>42</sup> This is the same Illinois that relatively recently had the state lottery advertised on billboards in one of its ghettos proclaiming, “This Could Be Your Way

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33. See Kailus, *supra* note 23, at 1068.

34. See generally *infra* Part III (explaining the economic necessity of controlling Internet gambling).

35. Edward C. Baig, *Outlaw Online Betting? Don't Bet on It: Despite Pending Legislation, a Ban Is Unlikely to Work*, BUS. WK., Dec. 15, 1997, at 44, 44.

36. See Kailus, *supra* note 23, at 1051.

37. *Id.* at 1069.

38. Pari-Mutuel has been defined as “[a] system of betting on races, or events, whereby the winners divide the total amount bet, after deducting management expenses, in proportion to the sums they have wagered individually.” WALTER L. LEWIS, *THE GAMBLER’S GUIDE TO TAXES: HOW TO KEEP MORE OF WHAT YOU WIN* 132 (2003).

39. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(10)(B)(ii)).

40. *Id.* § 5362(10)(B)(iii)(I).

41. Kailus, *supra* note 23, at 1070 (citation omitted).

42. Dennis Cauchon, *Lotteries May Gamble on Internet*, USA TODAY, Apr. 22, 2005, at 1A, available at [http://www.usatoday.com/news/nation/2005-04-21-lottery-online\\_x.htm?POE=NEWISVA](http://www.usatoday.com/news/nation/2005-04-21-lottery-online_x.htm?POE=NEWISVA).

Out.”<sup>43</sup> States, including Illinois, are spending upwards of half a billion dollars annually on lottery advertisements.<sup>44</sup> Why not? Currently, state lotteries generate more than \$35 billion every year.<sup>45</sup> Denying Internet gambling on the grounds of morality may be hypocritical, however, allowing a potential \$35 billion cash cow to be siphoned away over the Internet is not a fundamentally sound business principle either. “For example, lotteries capture enormous revenues for state governments, ostensibly benefiting the general public in the form of enhanced services, such as education.”<sup>46</sup> Due to this simple reason, the states are justified in attempting to derail Internet gambling. “After all, state and local officials collect \$0.00 from Internet gambling operations.”<sup>47</sup>

More importantly though is the means by which each state has dealt with this new competitor vying for its citizens’ funds. One way states attempt to curb this new medium is by amending current statutes to incorporate the new technology of the Internet.<sup>48</sup> A number of states have adopted laws that specifically prohibit Internet gambling, or similar to the current Act, have restricted financial transactions related to Internet gambling.<sup>49</sup> These states include Indiana,<sup>50</sup> Louisiana,<sup>51</sup> Massachusetts,<sup>52</sup> Oregon,<sup>53</sup> South Dakota,<sup>54</sup> Utah,<sup>55</sup> and of course our good friend Illinois.<sup>56</sup> Furthermore, the first state to do so was (not surprisingly) Nevada, which as early as 1997 explicitly outlawed Internet gambling.<sup>57</sup>

However, states have taken other measures as well to ensure that Internet gambling is not left to its own devices. For example, state courts have interpreted pre-existing statutes in such a way that they cover activities over the Internet.<sup>58</sup> Such was the case in New Jersey,<sup>59</sup> as well

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43. Charles Bowden, *Crapshoot Nation*, GQ, Apr. 1998, at 131, 143.

44. *Id.*

45. *Id.*

46. NGISCR, *supra* note 2, at 1-2.

47. Tom W. Bell, *Internet Gambling: Popular, Inexorable, and (Eventually) Legal*, 336 POL’Y ANALYSIS, Mar. 8, 1999, at 4, available at <http://www.cato.org/pubs/pas/pa336.pdf>.

48. David I. Gold, Note, *Internet Gambling Debt Liability: Trouble Ahead? A Consideration of Providian v. Haines*, 22 T. JEFFERSON L. REV. 219, 225-26 (2000).

49. STEWART, *supra* note 12, at 12.

50. IND. CODE ANN. § 35-45-5-2(c) (West Supp. 2006).

51. LA. REV. STAT. ANN. § 14:90.3 (2004).

52. MASS. GEN. LAWS ANN. ch. 271, § 17A (West Supp. 2007) (addressing the use of telephones, or other devices, for gaming purposes).

53. OR. REV. STAT. § 167.109 (2005).

54. S.D. CODIFIED LAWS §§ 22-25A-1 to -15 (2006).

55. UTAH CODE ANN. § 76-10-1102 (2006).

56. 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2003).

57. NEV. REV. STAT. ANN. §§ 465.091-465.094 (LexisNexis 2001).

58. Gold, *supra* note 48, at 226.

59. Gold, *supra* note 48, at 226.



as Missouri,<sup>60</sup> and Minnesota.<sup>61</sup>

Additionally, a multitude of attorneys general have called for federal regulation deeming Internet gambling illegal in their respective states.<sup>62</sup> These include Texas, Florida, Oklahoma, Minnesota, and Kansas.<sup>63</sup> It seems as though nearly every state has some sort of legalized gambling as well as some constitutional or statutory bar against any gambling business that is not licensed by the state, which is a category that nearly all of the current Internet gambling sites fall into.<sup>64</sup> The states' position therefore is fairly evident—there is nothing immoral about gambling, unless they are not getting a cut.

### B. Federal Responses

Federal responses to this issue have taken a similar path to that of the states in relation to regulating Internet gambling. They have either applied federal gambling statutes that pre-date the Internet or created new legislation focusing directly on the root of the problem.<sup>65</sup> Taking each method individually, it will become clear that the target of the current regulations is not the individual gambler, but rather the people and entities that are responsible for promulgating the gaming.

In order to understand the current state of the federal law it is necessary to go to a time prior to the IGPA and UIGEA, respectively. The federal government has had a few weapons in its arsenal prior to the passage of the two Acts mentioned above, the main one being the Wire Act.<sup>66</sup> However, there are numerous other statutes that are believed to be applicable to Internet gambling.<sup>67</sup> These statutes include: Conspiracy,<sup>68</sup> Money Laundering,<sup>69</sup> the Amateur and Professional Sports Act,<sup>70</sup> the Racketeer Influenced and Corrupt Organizations Statutes,<sup>71</sup> and the

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59. Peggy Wright, *Morris Judge Pulls Plug on Web Sites for Gambling*, DAILY RECORD (N.J.), Oct. 4, 2005, at A1.

60. See *Missouri v. Interactive Gaming & Commc'ns Corp.*, No. CV97-7808 (Mo. Cir. Ct. May 23, 1997).

61. See *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d. 715, 721 (Minn. Ct. App. 1997).

62. See NGISCR, *supra* note 2, at 5-9.

63. STEWART, *supra* note 12, at 12-13.

64. See, e.g., MICH. COMP. LAWS ANN. § 432.218 (West 2001).

65. Kailus, *supra* note 23, at 1051.

66. 18 U.S.C. § 1084 (2000).

67. See Kailus, *supra* note 23, at 1057-58.

68. 18 U.S.C. § 371 (2000).

69. *Id.* § 1956.

70. 28 U.S.C. §§ 3701 to 3704 (2000).

71. 18 U.S.C. §§ 1961 to 1968 (2000).

Travel Act.<sup>72</sup> Yet, since the inception of Internet gambling the Wire Act has proven to be the most utilized of those already existing statutes.<sup>73</sup>

Concisely stated, the Wire Act simply criminalizes the transmission of wagering information.<sup>74</sup> It states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>75</sup>

As stated above, this statute does not make it illegal to place a wager over the Internet.<sup>76</sup> Rather, it requires that the person be “engaged in the business of betting or wagering.”<sup>77</sup> For example, in the case of *United States v. Baborian*,<sup>78</sup> it was held that an individual who placed bets, even as often as three to four times weekly, in excess of \$800 a wager, was not subject to a violation of the law because the plain meaning of the statute prescribes that the individual must be in the *business* of betting or wagering.<sup>79</sup> While initially this statute was created to halt the expansion of interstate gambling via telephone,<sup>80</sup> the drafters (either consciously or fortuitously) made the language broad enough to incorporate the new medium of the Internet. Additionally, the legislative purpose behind the statute further reinforces the position of the states in their rationale to curb the expansion of such gambling. The Wire Act was not enacted to “protect bettors from their gambling proclivities”<sup>81</sup> but rather its purpose was to aid the states in enforcing their own gambling laws.<sup>82</sup>

However, the Wire Act has its limitations. Namely, the statute’s language reaches only as far as sports betting, making no mention of Internet Casinos.<sup>83</sup> This distinction is vital. Even though the Department of Justice in both the Clinton and current Bush administration has

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72. *Id.* § 1952.

73. See Kailus, *supra* note 23, at 1057.

74. 18 U.S.C. § 1084 (2000).

75. *Id.* § 1084(a).

76. See Kailus, *supra* note 23, at 1059.

77. 18 U.S.C. § 1084.

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

79. *Id.* at 326, 331 (emphasis added).

80. STEWART, *supra* note 12, at 7.

81. *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983).

82. H.R. REP. NO. 87-967, at 2631 (1961).

83. 18 U.S.C. § 1084 (2000) (addressing only “sporting event[s] or contest[s]”).

expressed the view that the Wire Act prohibits all forms of Internet gambling,<sup>84</sup> the United States Court of Appeals in the Fifth Circuit has found otherwise. In *In re Mastercard Int'l, Inc.*, the court held that the key statutory language refers only to wagers made on sports.<sup>85</sup>

During the fledgling stages of Internet gambling, sports betting accounted for more than half of the revenues generated.<sup>86</sup> Currently, the percentage of total revenue from sports betting has dipped to roughly thirty-five percent.<sup>87</sup> Even though in absolute terms sports betting is on the rise,<sup>88</sup> there are new players in town drawing all of the attention—casino games and poker. Casino games consistently have accounted for about one-fourth of the online gambling market, the remainder being allocated to poker.<sup>89</sup>

As mentioned previously, the Wire Act, which was used in the early stages to stop the gambling trend, does not reach these new revenue producers. One may make the argument that the Wire Act, when supplemented by the Travel Act, would cover these forms of gambling. Such an assumption should prove wrong, however. The Travel Act states that:

Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(1) distribute the proceeds of any unlawful activity; or . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both . . .<sup>90</sup>

The term “unlawful activity” is defined therein to mean “any business enterprise involving gambling . . . in violation of the laws of the State in which committed or of the United States.”<sup>91</sup>

The Travel Act therefore is not enforceable upon the new forms of gambling unless the illegality of these new methods has been specifically enumerated. Since the language is written in general terms, the Travel Act is restricted. The trend of states than has been to create legislation outlawing these types of gaming. Yet, such a tactic has been relatively

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84. STEWART, *supra* note 12, at 7.

85. *In re Mastercard Int'l Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002).

86. STEWART, *supra* note 12, at 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. 18 U.S.C. § 1952(a) (2000).

91. *Id.* § 1952(b).

recent, and not all states have taken action. And since historically, gambling laws have been state matters,<sup>92</sup> the Travel Act could not reach Internet casinos and Internet poker houses.

At last, the IGPA was introduced. For the first time on a federal level, Internet gambling was specifically restricted.<sup>93</sup> This in turn broadens the scope of the Wire Act, the Travel Act, as well as the other statutes mentioned above. However, it is important to note that the passage of the IGPA was not done merely on a whim. The federal government sponsored a commission to study the impact that gambling has on the nation, hence, the birth of the National Gambling Impact Study Commission (“NGISC”).<sup>94</sup> The study, which was not restricted to simply the impact of Internet gambling, but rather gambling as a whole, had some direct recommendations.<sup>95</sup> Specifically: (a) “that the federal government should prohibit, without allowing new exemptions or the expansion of existing federal exemptions to other jurisdictions, Internet gambling not already authorized within the United States or among parties in the United States and any foreign jurisdiction;”<sup>96</sup> (b) that legislation be passed “prohibiting wire transfers to known Internet gambling sites, or the banks who represent them;”<sup>97</sup> and (c) that legislation be passed “stating that any credit card debts incurred while gambling on the Internet be unrecoverable.”<sup>98</sup>

Prior to addressing each portion of the recommendation, the hypocrisy should once again be noted. Within the study, the commission also recommends a multitude of items that state, local, tribal, and the federal governments should take in order to halt the spread of pathological gambling.<sup>99</sup> At this time no such advice has been followed in regards to everyday “brick and mortar” gambling.<sup>100</sup> The reasoning is simple and reverts back to a very pragmatic and non-glamorized reason—money. No level of government is willing to take on the

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92. NGISCR, *supra* note 2, at 1-5.

93. Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997).

94. *See* NGISCR, *supra* note 2.

95. *Id.* at 5-12.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See generally* NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT RECOMMENDATIONS (June 18, 1999), <http://govinfo.library.unt.edu/ngisc/reports/ngisc-fir.pdf> (enumerating an extensive list of proposals aimed at reducing the problems associated with gambling).

100. For example, one of the recommendations included proposals restricting all legal gambling to those twenty-one years of age and older. *Id.* at 1. As of now, lotteries in New York and New Jersey as well as virtually every other state still have the legal age to purchase a lottery ticket at eighteen. This is just one of the many points of hypocrisy riddled throughout the NGISCR.

necessary legislation to adhere to the commission's recommendations when its own bottom line will ultimately be affected. Such hypocrisy is telling, but as stated before, understandable.

One of the most powerful motivations has been the pursuit of revenues. It is easy to understand the impetus: Faced with stiff public resistance to tax increases as well as incessant demands for increased or improved public services from the same citizens, tax revenues from gambling can easily be portrayed as a relatively painless method of resolving this dilemma.<sup>101</sup>

Therefore, when adhering to capitalistic principles, it seems morals have no business.

Furthermore, it is interesting to note that this is not the first time in history the United States government is attempting to control the untamed beast that is the Internet by targeting the settlement of transactions.<sup>102</sup>

The myth of the borderless internet, never very credible . . . took another hit . . . when the US Congress voted to ban bank and credit card payments to gambling firms . . . .

. . .

We've seen this before. In 2005 the U.S. government clamped down on the sale of cigarettes over the net by using the same strategy, successfully restricting people from buying from states that had lower taxes.<sup>103</sup>

However, unlike the previous exercise in control, the current action affects the entire international community.

If every state and nation . . . attempts to apply its laws with respect to Internet activities it deems illegal, the end result will be an Internet that satisfies the lowest common denominator in terms of acceptable activity . . . Values and mores are so different and the desire to regulate so different—especially from country-to-country—that agreeing to a common framework would be difficult.<sup>104</sup>

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101. NGISCR, *supra* note 2, at 1-5.

102. Bill Thompson, *Who is Really In Charge of the Internet?*, Oct. 6, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/5412980.stm>.

103. *Id.*

104. Andrea M. Lessani, *How Much Do You Want to Bet That the Internet Gambling Prohibition Act of 1997 is Not the Most Effective Way to Tackle the Problems of Online Gambling?*, UCLA ONLINE INST. FOR CYBERSPACE LAW AND POL'Y, May 1998, <http://www.gseis.ucla.edu/iclp/alessani.html>.

Not only is there such a great disparity in values between nations, such a lack of corresponding mores exists right here at home, as expressed by the fact that there are both opponents and proponents to the UIGEA. Summarily, to understand the debate that currently is Internet gambling, a quote from the National Gambling Impact Study Commission in regards to the differences between positions seems useful.

[I]f polls are to be believed, a clear majority of Americans favor the continued legalization of gambling (in fact, in any given year a majority of Americans report having gambled . . .) but a clear majority also opposes unlimited gambling, preferring continued regulation. Drawing the line on gambling has proven difficult; and, in fact, most lines in this area become blurred when examined closely. But governments are in business to draw lines, and draw them they do.<sup>105</sup>

The question that should invigorate the reader then is quite simple, for whom has the government drawn the line?

Returning now to the recommendations proposed by the NGISC, the first two are essentially a means of targeting the externalities associated with gambling. Externalities are the negative consequences or costs of an industry such as pollution from manufacturing plants.<sup>106</sup> For gambling, however, the externalities are not as tangible. Rather than combating gambling externalities the way one would a steel plant's water pollution (by paying a tax that is equal to or in excess of the cost to the State associated with the clean-up),<sup>107</sup> the Commission proposed the prohibition of the activity. This is because the costs associated with Internet gambling are not as readily quantifiable as its tangible industry counterparts.<sup>108</sup> For example, "[s]ocial and economic externalities proffered for a ban on gambling include dysfunctional gambling, crime, adverse economic consequences, and corruption."<sup>109</sup> And the mechanism being used to counteract such externalities is to cut off the ability to settle these transactions. However, as will be shown,<sup>110</sup> "poker as a game of skill should be evaluated differently than games of chance."<sup>111</sup>

Conversely, the third recommendation by the NGISC should remain applicable to poker—that legislation be passed stating that any credit

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105. NGISCR, *supra* note 2, at 1-4.

106. Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 492-93 (2005).

107. *Id.* at 493.

108. *See id.*

109. *Id.*

110. *See infra* Part V (discussing why poker should not be considered gambling).

111. Cabot & Hannum, *supra* note 106, at 495.

card debts incurred while gambling over the Internet be unrecoverable.<sup>112</sup> The reasoning for keeping such a proposal is simple. Gambling in its general sense employs long-term negative expectation to the player—over the long haul the player will always be at a disadvantage and as an extension one of the primary concerns of the NGISC is pathological gambling.<sup>113</sup> For example, it has been proven that casino customers prefer small, intimate settings for their gambling activities, rather than open spacious areas.<sup>114</sup> There is no setting more comfortable to an individual than one's own home. Therefore, combining pathological gambling with the inability to end up victorious over the long-term and the comfort of one's own home to keep playing creates a dangerous cocktail that may reduce the individual's account to dust.

Therefore, the ability to use credit cards for gambling purposes exposes the credit industry to tremendous liability when these individuals fail to pay their debts. This ultimately has a tremendous externality on all of society since credit card companies turn around and charge ever increasing rates to all consumers. It also has the effect of leaving those individuals who are not able to control their gambling habits potentially in bankruptcy and the externalities to society associated with that. Additionally, even though poker should not qualify as gambling, the fact remains that not every player will play to perfection and in turn is susceptible to the dangers of pathology. This proposal simply assists the credit institutions in their ability to limit gambling debt exposure as well as protecting the individual from herself—a measure beneficial to society as a whole.

### III. AN ECONOMIC ANALYSIS

From a strictly economic perspective, the Act is nothing more than a protectionist statute geared to harbor United States currency from being expatriated offshore. "Financial institutions perceive this bill as a protection to their financial services . . ." <sup>115</sup> The Act, however, is actually beneficial to the average American. Without the existence of the UIGEA, the United States economy would continue to bleed billions of

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112. NGISCR, *supra* note 2, at 5-12.

113. *Id.* at 5-5.

114. *See generally* BILL FRIEDMAN, DESIGNING CASINOS TO DOMINATE THE COMPETITION: THE FRIEDMAN INTERNATIONAL STANDARDS OF CASINO DESIGN (2000) (purporting a new standard of interior casino design focusing on maximizing the establishments profits by keeping the players comfortable and seated in secluded areas).

115. *U.S. Congress Passed Anti-Internet Gambling Legislation Last Week*, *supra* note 17 (quoting Steve Verdier, director of congressional relations for the Independent Community Bankers of America).

dollars to offshore sites. These are untaxed dollars lost to warm shores never to return again,<sup>116</sup> never to be reinvested. Since the New Deal era, the government has taken an active stance of caring for the financial welfare of its people and the increase of government funded programs, grants, mandates, and an assortment of other spending is a telling example of this role.<sup>117</sup> Annual online gambling revenues of at least \$20 billion are projected by 2009.<sup>118</sup> Most of these wagers are placed through websites whose jurisdiction is outside of the borders of the United States.<sup>119</sup> If these sites are allowed to operate as they were prior to the time of the UIGEA, by the end of the decade, billions of dollars in potential tax revenue will have been lost.

Opponents of the UIGEA may argue, by using a laissez faire economic theory,<sup>120</sup> gambling is actually stimulating the economy, by allowing the corporations or individuals that run these sites or those that win large sums from them to freely spend their winnings and ultimately further domestic economic growth—the trickle down theory of economics.<sup>121</sup> However, applying such an idea to the current Internet gambling landscape, it is evident that there is a fatal flaw to such reasoning, namely that the “house” is not a United States entity.

In any game where a wager is made or a market where a transaction is rendered, there must be an equal and opposite position by two or more parties. For example, if one were to bet on black in a game of roulette, that means that another party has wagered that red is to hit. Likewise, in a market setting, for every share of Microsoft that a party wishes to purchase there must be an equally situated party willing to sell that share on the exchange. In games that have typically been classified as gambling, such as roulette, the “house” or casino has taken your bet of black, in essence, by wagering that red is going to be the actual outcome. Therefore, in any given game, or market trade,<sup>122</sup> for every winner, there

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116. See STEWART, *supra* note 12, at 1.

117. See Gavin Wright, *The Political Economy of New Deal Spending: An Econometric Analysis*, 56 REV. ECON. & STAT. 30, 30 (1974).

118. STEWART, *supra* note 12, at 2.

119. See *id.*

120. Laissez-faire is defined as “a doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights,” or “a philosophy or practice characterized by a usually deliberate abstention from direction or interference esp. with individual freedom of choice and action.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 652 (10th ed. 1996) [hereinafter MERRIAM-WEBSTER].

121. Trickle-down theory is defined as “a theory that financial benefits given to big business will in turn pass down to smaller businesses and consumers.” *Id.* at 1261.

122. Jeff Schatz, *A Farewell to Trading*, THE MOTLEY FOOL: FREQUENTLY ASKED QUESTIONS—DAY TRADING, <http://www.fool.com/FoolFAQ/FoolFAQ0048.htm> (“Trading, like any job, is hard work and offers no free ride. Remember that there are thousands of market players



must conversely be a loser. This is the premise behind any zero-sum game.<sup>123</sup> For example, disregarding the house's rake, a game of poker played in a casino is a zero-sum game unless the pleasure of gambling or the cost of operating a casino is taken into account, making it a non-zero-sum game. It should be noted that the concept of poker as a zero-sum game was first purported in the seminal work on game theory by John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior*.<sup>124</sup> An entire chapter within that work is devoted to the connection between poker and economics:

A seemingly trivial and playful pursuit like poker . . . might hold the key to more serious human affairs for two reasons. Both poker and economic competition require a certain type of reasoning, namely the rational calculation of advantage and disadvantage based on some internally consistent system of values ("more is better than less"). And in both, the outcome for any individual actor depends not only on his own actions, but on the independent actions of others.<sup>125</sup>

Accordingly, such cannot be said of games of chance. Even though games such as roulette and blackjack are still zero-sum games, the decision of one actor is not dependent on the "independent actions of others,"<sup>126</sup> therefore not following the tenets of game theory. Concretely, what is established is that each player computes provably optimal strategies.<sup>127</sup> In turn, aside from card-counting in blackjack, the probabilities can never be manipulated to be in the individual's favor, therefore, never following the minimax theory first hypothesized by von Neumann.<sup>128</sup>

Reverting back to the roulette hypothetical, if red hits then party A—by taking black—would be the loser. If all parties involved, however, were to be part of one finite set where the dispersion of funds

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working very hard at trying to take your money away; every winning trade requires a loser at the other end.") (last visited Sept. 5, 2007).

123. Zero-sum is defined as "of, relating to, or being a situation (as a game or relationship) in which a gain for one side entails a corresponding loss for the other side." MERRIAM-WEBSTER, *supra* note 120, at 1376.

124. JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 186-219 (Princeton University Press 1953) (1944). Additionally, the concept of game theory can be defined simply as "the analysis of a situation involving conflicting interests (as in business or military strategy) in terms of gains and losses among opposing players." MERRIAM-WEBSTER, *supra* note 120, at 478.

125. SYLVIA NASAR, *A BEAUTIFUL MIND* 13-14 (1998).

126. *Id.* at 14.

127. VON NEUMANN & MORGENSTERN, *supra* note 124.

128. Minimax can be defined as "the smallest of a set of maximum possible losses each of which occurs in the most unfavorable outcome of a strategy followed by a participant in a situation governed by the theory of games." MERRIAM-WEBSTER, *supra* note 120, at 741.

simply changed hands but the overall amount remained the same, then the distribution of funds would not be of any matter in the macroeconomic view. Staying with this example, if party A were to start her roulette wagering with \$100 and the “house” was to start with the same amount, prior to the first wager there would be \$200 total in the system. If the wager placed on each spin was \$1, after the first roll party A would have \$99 while the casino would have \$101. The total amount within the system would remain at \$200. Even though one party would be a winner and the other a loser, when taken in totality no amount was actually lost. From the macro view, the system is no better or worse off than it was prior to the new allocation of funds as a result of the outcome of the game.

Yet, the current state of Internet gambling is not conducive to this economic theory for one fundamental reason—the money being lost is not remaining within the system. If the law remains as it did prior to the UIGEA and the IGPA (nonexistent), then from the macroeconomic view the system does not maintain the dynamic equilibrium necessary to ensure the stability of the structure. If today party A wanted to make the same wager on black from the comfort of her own home through an Internet casino, the “house” that is taking her bet is not going to be situated within the encapsulated system that is the United States.<sup>129</sup>

As will be discussed in greater detail in the following sections, the major hub of Internet gambling is the Caribbean. Therefore, if party A once again began with \$100 and the Internet casino located in Antigua began with \$100 as well, the system this time is only starting out with \$100. This is because party A’s original \$100 is taxable revenue, while the funds located off-shore are outside the taxable jurisdiction of the United States. Crucially, after party A’s first lost dollar, the system is now down to \$99, and will be subsequently depleted for every lost wager. Now, opponents to this theory might argue that for every dollar won by party A, the system is replenished. This however is untrue. Since casino games such as roulette have a long-term negative expectation for the individual, when the “house” is located outside the United States, there is no possibility that the domestic system remains whole over time.

Mathematically, the system is always at a disadvantage and will accordingly be methodically drained. Additionally, a counterargument against allowing poker may be made that in games such as poker you are not playing against the “house” but rather against similarly situated opponents and, therefore, no money is being removed from the system.

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129. See *infra* Part IV.

Once again this is not entirely true. If there were no rake<sup>130</sup> then this premise would be valid. However, if there were no rake there would be no incentive for any website to operate as an Internet poker room. Therefore, even though playing poker is not a pure game of person against the house, with the house taking the equal and opposite position, a sizeable amount of money is still being lost by allowing these sites to operate at the status quo prior to the creation of the UIGEA.

In summary, what the Act attempts to do is to protect domestic wealth by 1) reducing the amount of money that is being shipped offshore untaxed,<sup>131</sup> 2) keeping money in the pockets of American citizens that can be spent on other things like domestic goods as well as foreign products (because foreign products are taxed at the retail level generating a source of revenue for the government) and 3) reduce the costs associated with problem gambling and the impact it has on the coffers of the United States Treasury.<sup>132</sup>

For these reasons, it is evident that the UIGEA is actually necessary. However, necessity and fairness are not one and the same. Since the United States system, from a macroeconomic perspective would be no worse off with the allowance of Internet poker if the rake-collecting “house” were to be situated within its borders, such a scenario should not be condemned. As will be seen in the upcoming section, such a situation is possible.

#### IV. INTERNATIONAL PRESSURE

Due to the current inconsistencies in Internet gambling policy, the United States has already begun to receive international pressure as a result of the UIGEA.<sup>133</sup> As of March 2005, the totals for online gambling businesses broken down by jurisdiction globally are as follows:<sup>134</sup>

• Antigua	536
• Costa Rica	474
• Kahnawake Mohawk (Canada)	401
• Curacao	343

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130. Poker Rake: How to Calculate the Rake in Poker, [http://www.pokercheckraise.com/the\\_poker\\_rake.html](http://www.pokercheckraise.com/the_poker_rake.html) (last visited Sept. 5, 2007) (“The rake in poker is what the casino takes for allowing you to play in their game. Typically the rake is 10% of every pot up to a maximum of \$3.00.”).

131. See STEWART, *supra* note 12, at 1.

132. See NGISCR, *supra* note 2, at 1-6 to -7.

133. STEWART, *supra* note 12, at 1.

134. JUDY XANTHOPOULOS, POKER PLAYER’S ALLIANCE, INTERNET POKER INDUSTRY AND REVENUE ANALYSIS FINAL REPORT 30, app. A, <http://www.pokerplayersalliance.org/pdf/InternetPokerFinalReport.pdf> (last visited Sept. 6, 2007).

- Gibraltar 111
- United Kingdom 70
- Belize 60

Not surprisingly, the greatest foreign opposition to the UIGEA has come from Antigua, the worldwide leader of the industry. There, gambling legalization was part of a strategic economic development plan to attract investment in a non-polluting, technologically oriented way.<sup>135</sup> In order to protect the precious resource that brings investment to this tiny island nation, Antigua has already threatened sanctions through the World Trade Organization.<sup>136</sup>

In 2003, Antigua formally filed a complaint against the United States with the WTO. The basis of this complaint was that the restrictions placed on Internet gambling violated prior trade promises.<sup>137</sup> In 2004, after many briefs and hearings, a WTO panel ruled in favor of Antigua.<sup>138</sup> Much speculation was made that the United States would soon have to let Americans bet with foreign online operators. However, in 2005, the Appellate Body of the WTO reversed.<sup>139</sup>

That judicial body found that “by allowing U.S. businesses to take online bets on horseracing, yet barring non-U.S. companies from doing so, the United States acted inconsistently with its fair-trade commitments under the General Agreement on Trade in Services (“GATS”).”<sup>140</sup> However, it has been established that WTO rulings are “not binding on the United States, much less [the courts]’ . . . [I]f U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress”<sup>141</sup> to decide. But, since the deadline for congressional action passed without Congress even approaching this issue, Antigua may ask the WTO for sanctioning. Additionally,

Under an exception to the WTO’s General Agreement on Trade in Services (“GATS”), members are permitted to adopt measures that are “necessary to protect public morals” even if they do not meet “market access” or “national treatment” standards of GATS, and the U.S. has

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135. STEWART, *supra* note 12, at 4.

136. *Id.* at 10.

137. I. Nelson Rose, *Internet Gaming: United States Beats Antigua in World Trade Organization*, 9 GAMING L. REV. 437, 437 (2005).

138. *Id.*

139. *Id.*

140. STEWART, *supra* note 12, at 9.

141. *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (internal citation omitted); *see also* *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992); 19 U.S.C. § 2504(a) (2000) (“No provision of any trade agreement . . . nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.”).

argued that its position with respect to gambling fits within this exception.<sup>142</sup>

Therefore, it appears that the major impetus for the current legislation being shrouded in an aura of morality is to bypass WTO sanctioning.

In spite of this, the United States does not need to rely on disguises in order to pass legislation that is restrictive to gambling from foreign sovereigns. It is a well established principle in international law that a country may place constraints on gambling.

The High Court of Europe has consistently ruled that the nations of the European Community cannot keep out trade from other members—*except gambling*. Even in the U.S., we have long had the concept of a state's Police Power, the state's right to do just about anything to protect the health, safety, welfare, and morality of that state's citizens.<sup>143</sup>

Along this same line of reasoning, the WTO's Appellate Body stated in its decision in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,<sup>144</sup> that the federal laws against interstate and international betting were necessary, and the United States had successfully shown a specific connection between the remote supply of gambling services and the dangers to the American public.<sup>145</sup>

Interestingly, this entire international debacle could have been avoided. When the United States signed the WTO treaty in 1994, they made the short-sighted decision to permit every recreational service except sporting.<sup>146</sup> The WTO contained a section in its provisions agreeing that participating nations would let in some types of goods and services of other signing nations.<sup>147</sup> There was a category for Recreational, Cultural & Sporting Services, which included many varying things, like circuses and news agencies.<sup>148</sup> All signatories had the opportunity to forbid foreign nations from establishing gambling operations, and some nations did precisely that.<sup>149</sup> Unfortunately, the United States was not one of those nations.<sup>150</sup> All the United States had

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142. Crawford, *supra* note 9, at 708.

143. Rose, *supra* note 137, at 438 (emphasis added).

144. WORLD TRADE ORGANIZATION, UNITED STATES—MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES (Apr. 7, 2005), [http://www.wto.org/english/tratop\\_e/dispu\\_e/285abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf).

145. Rose, *supra* note 137, at 437-38.

146. *Id.* at 437 (reasoning behind this decision being the United States did not want professional athletic leagues exposed to the possibility of foreign influence and expansion).

147. *Id.*

148. *Id.*

149. *See id.*

150. *Id.*

to do to keep out foreign gambling was say so,<sup>151</sup> but the lack of forethought of our lawmakers fomented our problems today.

However, in my educated opinion the United States can simply prohibit foreign nations from providing Internet gambling and at the same time create domestic websites that do just that. On its face this is entirely contradictory to the WTO and GATS, but should nonetheless be allowed. The reasoning is simple—the regulatory schemes that are currently in place in the nations that are offering Internet gambling are not nearly as stringent to afford the protections that are necessary in order to maintain United States public policy concerns. For example, if a car manufacturer located in Korea wanted to open up distribution chains in the American market for its product, there would be many barriers in place prior to actually reaching the consumer, like not complying with the strict safety standards that are in place for all vehicles that are sold in the United States. For instance, if these cars lacked seatbelts, they would be prevented from entering the marketplace. By analogy, this exact situation exists with Internet gambling. A product is being sold to the American consumer that is lacking the regulatory equivalent of seatbelts.

When the Caribbean nations began operating their businesses they offered lax regulations “with few mandated controls on problem and underage gambling, few provisions on money laundering, inadequate auditing, and, in general, virtually no accountability for either regulators or operators.”<sup>152</sup> They quickly learned that the market was begging for stricter regulation.<sup>153</sup> Though varied, these regulatory regimes have some common elements that bear a surface resemblance to traditional regulation for commercial casinos in the United States, but this appearance is attenuated at best.

For example, all require that gambling licensees and key employees be “suitable,” persons of “integrity,” or “fit and proper.”<sup>154</sup> As adequate as this seems facially, the thoroughness of the background investigations for licensing may be subject to question. Some, for example, accept

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151. *Id.*

152. DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 193 (2005).

153. See Joseph J. McBurney, Note, *To Regulate or To Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 CONN. J. INT'L L. 337, 352 (2006).

154. Online Gambling Regulation Act 2001 § 4 (Isle of Man), available at <http://www.gov.im/lib/docs/infocentre/acts/ogra2001.pdf>; Directorate of Offshore Gaming, Regulations Concerning Interactive Gaming and Interactive Wagering § 14 (Antigua and Barbuda); Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming § 29 (1999); Alderney Gambling Control Commission, Alderney eGambling Regulations § 6 (2006), available at <http://www.gamblingcontrol.org/docs/13.pdf>.

licensure in another jurisdiction as prima facie evidence of suitability.<sup>155</sup> This means that if another jurisdiction does not have *any* requirements for licensing (aside from maybe paying a filing fee), that alone may qualify an applicant for a license. Furthermore, all jurisdictions require that the games be conducted fairly in order to maintain integrity, however, these requirements vary from quite specific<sup>156</sup> to fairly open ended.<sup>157</sup> On the issue of underage gambling, most online jurisdictions establish a minimum age of eighteen,<sup>158</sup> but some online gambling sites apply the assumption that any holder of a major credit card is at least eighteen years old, whether or not such assumption is valid.<sup>159</sup> Additionally, from my experience, having played on many of these websites, the age requirement is based on the honor system, prompting the player to enter their birthday and nothing more. Clearly, based on these few examples, there are many chinks in the armor of the current regulatory landscape that exists on today's gambling Internet.

Conversely, the regulatory regime that has been established within the United States is quite extensive and far more stringent than their virtual counterparts. "In New Jersey, for example, the license application includes a fifty-two page business entity disclosure form and multijurisdictional personal history disclosure forms (sixty-eight pages each) for all directors and officers, plus a thirteen-page supplement to that form."<sup>160</sup> In addition, the regulation of Atlantic City casinos, for example, is conducted by the Casino Control Commission and Division of Gaming Enforcement.<sup>161</sup> Under the watchful eye of this entity, prospective companies must pay \$200,000 merely to submit a license application and then pay the expenses incurred during the investigation period, which often exceed \$1 million.<sup>162</sup> These costs are incurred for the

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155. Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming § 32 (1999).

156. Alderney Gaming Control Commission, Internal Control System Guidelines for eGambling § 6.1, *available at* <http://www.gamblingcontrol.org/UserFiles/File/ICS%20Guidelines%202006.pdf>; Directorate of Offshore Gaming, Regulations Concerning Interactive Gaming and Interactive Wagering, §§ 106-112 (Antigua and Barbuda).

157. The Online Gambling (Systems Verification) Regulations 2001 (Isle of Man); Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming §§ 111-28; Gambling Act 2005 § 25 (Gibraltar), *available at* <http://www.gibraltarlaws.gov.gi/articles/2005-72o.pdf>.

158. Kahnawake Gaming Commission, Regulations Concerning Interactive Gaming § 145(a)(iii); Directorate of Offshore Gaming, Regulations Concerning Interactive Gaming and Interactive Wagering, § 115 (Antigua and Barbuda); Gambling Act 2005 § 37(2)(b) (Gibraltar), *available at* <http://www.gibraltarlaws.gov.gi/articles/2005-72o.pdf>.

159. STEWART, *supra* note 12, at 6.

160. SCHWARTZ, *supra* note 152, at 194.

161. *Id.*

162. *Id.*

thorough due diligence associated with licensing.<sup>163</sup> Furthermore, aside from simply the costs associated with starting a traditional brick and mortar casino, they must also adhere to extensive regulations.<sup>164</sup> Clearly, the safety valves that are in place for Internet casinos are not nearly as rigorous as those practices established within the United States.

As such, the public policy concerns that were enumerated by both the Appellate Body of the WTO,<sup>165</sup> as well as the National Gambling Impact Study Commission,<sup>166</sup> namely underage gambling and anti-money laundering, are being violated without the safeguards of a protectionist mechanism, such as the UIGEA. This distinction provides an avenue on which the United States can justify discriminating against foreign entities; that is, since these countries cannot provide the same regulatory structure as that of a traditional casino, they should be barred from access to the American public. In turn, if the United States were to establish its own form of Internet gambling, it would not be in violation of the WTO as long as the same rigid standards as that of brick-and-mortar casinos apply. If and when these foreign entities meet our rigorous compliance standards, then—and only then—can they be allowed access within the United States.

Yet, the real threat to the United States's position currently stems from the United Kingdom and not the Caribbean. The passage of the Gambling Act of 2005,<sup>167</sup> significantly liberalizes regulation of online gambling, and is anticipated to be the largest opposition to the UIGEA. Companies such as Partygaming, LadBrokes (as part of Hilton Group Plc), and Sportingbet Plc are all publicly traded companies on London's Stock Exchange. For example, Partygaming has reported that eighty-eight percent of its revenues in 2005, which totaled close to \$1 billion, were generated by poker play and that eighty-four percent of its revenue comes from United States players.<sup>168</sup> The fact that such a large endeavor is being compromised due to United States policy, and the fact that said policy seems entirely protectionist in the eyes of the world, will most likely leave the two nations at loggerheads. The United Kingdom (obviously) will not boycott American goods but it will create some

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163. See *McBurney*, *supra* note 153, at 353.

164. *Schwartz*, *supra* note 152, at 194-95.

165. See WTO Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 373(D)(iii), WT/DS285/AB/R (Apr. 7, 2005).

166. See *NGISCR*, *supra* note 2, at 1-1 to -9.

167. Press Release, Department for Culture, Media and Sport, *Gambling Bill Receives Royal Assent* (Apr. 8, 2005), [http://www.culture.gov.uk/Reference\\_library/Press\\_notices/archive\\_2005/gambling\\_bill\\_royal\\_assent.htm](http://www.culture.gov.uk/Reference_library/Press_notices/archive_2005/gambling_bill_royal_assent.htm) (last visited Sept. 7, 2007); see also *Gambling Act 2005*, c. 19 (U.K.).

168. *PARTYGAMING PLC, 2005 ANNUAL REPORT* 48.



conflict between the close allies and may lead to possible sanctions.

Many anticipate that doing business in the United Kingdom offers substantial advantages: (i) a stable political environment, (ii) vibrant capital markets, (iii) a reliable communications infrastructure, (iv) a large pool of skilled workers, and (v) regulations that should inspire confidence among customers and investors.<sup>169</sup> While the United States may be able to discriminate against Caribbean basin nations effectively due to the regulatory disparity, it will be much more difficult to institute such reasoning with the United Kingdom. However, this does not mean that such a distinction is not possible.

As already mentioned, pursuant to the Tenth Amendment of the Constitution, states have traditionally been in charge of deciding whether or not to legalize and regulate gambling activity for their citizens.<sup>170</sup> To that extent, nearly every state has a statutory or constitutional bar against unlicensed casinos.<sup>171</sup> As such, each independent state does not have to allow their citizens access to any site that has not been licensed by that particular autonomous entity or other states. In turn each state can create a system in which Internet gambling is allowed, if they see fit. For example, it can be played on an intra-state basis,<sup>172</sup> and not be in violation of the UIGEA, as long as foreign citizens are being allowed to play in the United States market. Again, on its face this seems entirely discriminatory and utterly brazen in the face of the WTO guidelines, but it in fact is not.

The reasoning is once again analogous to brick-and-mortar casinos,

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169. STEWART, *supra* note 12, at 4.

170. *Id.* at 13.

171. *Id.*

172. Unlawful Internet Gambling Enforcement Act of 2006, (to be codified at 31 U.S.C. § 5362(10)(B)) (stating that “the term ‘unlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i) the bet or wager is initiated and received or otherwise made exclusively within a Single state;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State’s law or regulations; and

(iii) the bet or wager does not violate any provision of—

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 [28 USCS §§ 3701 et seq.] (commonly known as the ‘Professional and Amateur Sports Protection Act’);

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)”).

in that licensing requirements are necessary for these traditional casinos and should likewise extend to the online gambling market. This would force foreign websites to comply with the United States regulations and subject them to United States auditing and fair business practices—a regulatory rather than protectionist measure. Failure to meet these stringent criteria would result in rejection of licensing; in turn allowing for each state to establish its own websites and disallowing foreign sites based on a violation of state law.

Furthermore, once more tackling this issue from an equity based argument, it seems contradictory, especially by our European counterparts, to state that the European community be allowed to forbid an independent sovereign from accepting foreign gambling while forcing the United States to do just that.<sup>173</sup> It seems even more incredulous since this entire situation was borne from an inconspicuous oversight nearly fifteen years ago.

Moreover, as will be seen in the upcoming pages, this leniency towards gambling should not apply to all games. Actually, nothing that is predominantly subject to chance should be accessible over the virtual realm, whatsoever, due to the UIGEA. Poker, however, is not a game which is predominantly subject to chance and therefore, the United States should be allowed to establish only Internet poker houses, without the fear of international repercussion and without being in violation of the UIGEA.

## V. INVESTING V. GAMBLING

### A. *The Poker Paradox*

Why does this still seem like gambling to you? I mean, why do you think the same five guys make it to the final table of the World Series of Poker *every single year*? What are they, the luckiest guys in Las Vegas? It's a skill game, Jo.<sup>174</sup>

In determining whether or not an activity has an element of “gamble,” one must first understand the practical concept of gambling. Essentially, gambling practices often display qualities of wagering on the outcome of a future event, which is affected by chance. Of course, determining how much risk a particular activity has is established by probability. Nevertheless, the colloquial interpretation of succeeding at gambling is that for one to prevail in a wager, he or she must “get

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173. Rose, *supra* note 137, at 438.

174. *ROUNDERS* (Miramax Films 1998) (emphasis added).

lucky.”

Betting that a fair tossed coin will land on the “heads” side is a bet in which the odds are (in theory) 50/50. Perhaps this exercise could be considered gambling if the wagering were performed on one coin flip, but if this exercise were performed again and again, there would effectively be no gamble because the positive expectation of perpetually selecting “heads” would be zero.<sup>175</sup> Short term fluctuations may tip the scale toward one side because of the “luck factor,” but in the long-run the bettor selecting “heads” and his opponent betting “tails” would effectively end up breaking even. Mathematical probability is not overcome in the long term, and essentially no gamble has been taken. Thus, one may consider gambling in terms of long-term expectations, or what would happen if this bet were performed an infinite amount of times. Though “luck” factors in, in the short run, probability holds true in the long run.

If this same exercise were performed in a slightly different manner, by laying odds, the game is totally altered. In the previous example, all things were equal, including the amount bet. For instance, “heads” was betting \$1 each toss and “tails” was betting \$1 each toss. Even with luck being a factor, the long term result would be both players breaking even—a neutral long-term expectation. Now, slightly alter the game by having the “heads” bettor win \$1.01 each time it lands on her side and the tails bettor \$1.00 for a win on her side. Perhaps in the short term of only a couple of coin flips, a “lucky” tails bettor may emerge victorious and show a profit.<sup>176</sup> In the long term, however, this exercise is not at all a gamble, for the “heads” bettor is certainly assured a profit.<sup>177</sup> Over the course of several hours, even the luckiest man in the world would not show a profit by betting “tails.” This is a mathematical fact.

Given that certain games such as equal wagering on coin tosses have little or no “gamble” to them, one must carefully assess a game in determining the value of a gamble. For example, in casino blackjack (as with other “table games” which are played versus a dealer/house), the house has a small, yet distinct, proven advantage with the odds. In this particular game, the odds are approximately 51% for the house and 49% for the players of winning any given hand.<sup>178</sup> Though this 2% “edge” for

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175. DAVID SKLANSKY, *THE THEORY OF POKER* 9 (4th ed. 2001).

176. *Id.* at 10.

177. *Id.*

178. *See generally* Blackjack Strategy and Odds: The Wizard of Odds, How to Play Blackjack, <http://wizardofodds.com/blackjack/> (last visited Sept. 7, 2007) (providing background information on playing blackjack); Blackjack: Expected Return for Every Play, <http://wizardofodds.com/blackjack/appendix1.html> (last visited Sept. 7, 2007) (listing expected returns for a variety of hands in blackjack).

the “house” is a seemingly small advantage, casinos survive because of it. On any given night, the house may lose some money, if they have gotten unlucky. However, over the course of a year (the longer term), casinos always make a tremendous profit on blackjack, because the 2% edge that seems apparently beatable, becomes essentially unbeatable after millions of hands have been played. Consequently, when players seek to tip the scales of probability in their favor, such as the case with blackjack “card counters,”<sup>179</sup> the people who attempt at leveling the playing field are quickly detected and forbidden from play.<sup>180</sup> The small advantage in probability for each table game may never be disturbed and has been profitable enough for Las Vegas to become the thriving mecca it has been for decades now.<sup>181</sup>

Another perfect example of an unbeatable gambling game (as described conceptually by long term expectation) is roulette. In this game, players bet on either of two colors (red or black) or on an individual number in the range of 1-36. A ball is then spun on a round disk with thirty-eight spaces, which is divided by color and number. A winning bet placed on red or black yields a player a win of the exact amount they bet, or in gambling parlance, “even money.” For instance, a winning wager of \$10 on black would win \$10 in profit. A winning spin on an individual number, however, is paid at a scale of 36 to 1. Thus, a \$10 bet would yield the winner \$360. However, the house is paying “incorrect” odds in that the probability of landing on a particular number is not 36 to 1, but rather 38 to 1, due to the inclusion of 0 and 00. Similarly, the odds of hitting red or black are not quite 50/50, since those two additional numbers (0 and 00) are green. This mathematical disparity gives the house an advantage in long term profit expectation. Though on a given night some players may get lucky and hit more than their fair share of numbers or colors, the mathematical disparity between the probability of hitting and the “incorrect” pay scale produces a negative expectation for the player. No amount of skill can overcome this mathematical disparity.

Essentially, players trying to win at these casino table games are gambling—they are playing a “game subject to chance.”<sup>182</sup> Most of the

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179. See generally BEN MEZRICH, BRINGING DOWN THE HOUSE: THE INSIDE STORY OF SIX MIT STUDENTS WHO TOOK VEGAS FOR MILLIONS (2002) (explaining the story behind the team of students who worked together to apply the theory of large numbers to the game of blackjack in order to exploit the odds and make a fortune at casinos).

180. See *id.* at 196-98.

181. See NGISCR, *supra* note 2, at 1-1 (“Gambling has not just made the desert bloom in Las Vegas but has made it the fastest growing city in the United States.”).

182. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)(A)).

participants are fully aware that the odds of their winning are against them, and are dubiously relying on luck to amass a profit. blackjack (without card counting) and roulette are examples of gambling, while something as random as wagering on coin tosses is not gambling, for gambles are determined by long term expectation. If one side has a decided advantage, then there is a gamble being taken. If both sides have the same odds, then they are practically wasting their time. The exception to all of this is the game of poker.

Poker is a card game with some elements of gambling, but it should not be mistaken for a true gambling game. Like with other table games, wagers are made corresponding to the result of certain cards. In any one hand, chance plays a role in determining the victor. However, poker is different in the fact that there is no house advantage, and in fact, the casino does not play at all. Players are pitted against one another, with equal odds, and an equal opportunity to win.

The reason why thousands of professional poker players make a living at cards is because skill is the influential factor in determining winners and losers. The most skillful roulette player cannot overcome the decided advantage of a casino, while skillful poker participants can outwit other players on a level field. Simply put, since the odds are not stacked against poker players, skillful play trumps the “luck factor” en route to an annual profit.

Certainly, luck plays a role in any individual poker hand. There are situations when one player is a 95% favorite to beat another player but the underdog who has a 5% chance at winning gets a lucky card and prevails. However, serious poker players tend to ignore short term outcomes and focus on long term results.<sup>183</sup> Since there is an element of chance, the most skillful player in the world can still lose to a novice on a given night, but if the contest was repeatedly played, the skillful player would win money more often than not. Luck does not exist in the long term, for if it did, lucky players would be able to beat roulette consistently (with such a small house advantage). All that exists in the long term is probability. When viewed through this lens, those who can manipulate odds in order to have probability in their favor have the advantage at poker. The gambling aspect is only a factor in the short term, as better players win over the course of a year.

A simplified example of why poker is not gambling is as follows: A player has four spades in a standard fifty-two card deck and needs

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183. See SKLANSKY, *supra* note 175, at 13 (“It is much harder to make that fold if you are upset because your hand was outdrawn. However, the money you save by folding instead of calling adds to your winnings for the night or for the month.”).

another spade in order to make a flush and prevail in the hand. With one card to come in Texas Hold'Em<sup>184</sup> (the most popular variant of poker), the odds are (approximately) four to one against improving to the flush. This calculation is performed by taking the amount of unseen cards (which in this case is forty-six), divided by the amount of spades left in the deck (nine). Nine divided by forty-six equals 19.5%. Simply, the odds of making the flush and winning the hand with one card to come are four to one against or roughly 20%.

In poker, a pot is collected. The pot is similar to a bank or the total amount of bets that have been made throughout the current hand. If the pot has now grown to \$40 and it costs a player \$10 to try to make the flush, this would be a wager with a long term expectation of zero, neither positive nor negative. Of course, if the hand were played one time, the player would most likely lose the \$10 since your odds of catching the needed card are four to one. Again however, gambling events are analyzed in terms of long term expectation. If this scenario were played out five times, the player would lose \$10 four times, amounting to -\$40.

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184. Texas Hold'em is the most popular variety of poker, as well as the easiest to learn. Players receive two "hole" cards that only they can see and use. Then, five "community" cards are dealt that everyone can see and use. Players can make their five-card hand from both, one or none of their hole cards in combination with the community cards. The game is divided into four rounds of betting, and the betting moves clockwise around the table. Betting starts from the position next to the dealer button, which moves one place to the left after each hand. In online games, the dealer button replaces the "real" dealer. If two or more players tie by holding equally-strong winning five-card hands, the pot will be split between the tying players. If there is an odd chip, the player sitting closest to the left of the dealer button will get the odd chip.

The Blinds: Before a game starts, the two players to the left of the dealer post "blind" bets, so-called because they are made before the players have seen any cards. The blinds ensure that there is some money in the pot to play for at the very start of the game. The player to the left of the dealer posts the "small blind" and the player to his left posts the "big blind."

Pre-Flop: Next, each player receives two cards that only they can see, called "hole" cards. After this, the first round of betting is started by the first player to the left of the big blind. This player, who is known as "under the gun," can:

Call: match the amount bet in the big blind;

Raise: increase the amount bet, or;

Fold: surrender his cards and stake in the game.

When the betting returns to the player who made the big blind (the first full bet), that player can "check," or opt to stay in the game without adding anything to the pot. However, if an opponent has raised, the big blind has three options: he must fold, call, or re-raise.

Flop: Three "community" cards, which all players can use to make their five-card hand, are dealt face up on the table. A second round of betting follows.

Turn: A fourth community card is dealt face up on the table. The third round of betting follows.

River: The fifth and final community card is dealt, followed by the final round of betting.

Showdown: If there is more than one player left in the game, there is a showdown in which the players reveal their cards and the highest hand wins pursuant to the traditional poker hand hierarchy. If two players share an identical hand, the pot is split.

PartyPoker.com, Texas Hold'Em, [http://www.partypoker.com/how\\_to\\_play/poker\\_school/poker\\_games/texas\\_holdem.html](http://www.partypoker.com/how_to_play/poker_school/poker_games/texas_holdem.html) (last visited Sept. 7, 2007).

However, the one time he gets the needed spade, he wins a pot of +\$40, thereby offsetting the losses he took in the previous four attempts. If this scenario were replayed an infinite amount of times, the player would neither lose nor win any money, for it is effectively a wager of even money, like that of the fair coin tosses.

However, taking the same example and inflating the pot to \$50 changes the complexion of the hand entirely and creates a very profitable scenario for the player. Now the player is being offered odds of five to one with his odds of winning at four to one. Again, most of the time, the player will not get the necessary flush card, but in this instance, when he does, he will be compensated for those previous losses and would additionally have made a profit. For each five times this scenario is run, the player makes a profit of \$10. If the player could consistently achieve this type of bet (and this is what skillful players recurrently succeed at doing), he will make money in the long term. Assuming that this scenario arises one thousand times throughout the course of a year for a good player, the annual profit would be \$2,000. If the stakes were higher, perhaps \$100 bets instead of \$10, then the profit would swell to \$20,000!

This straightforward example is one of many showing why poker is not a gamble.<sup>185</sup> Skillful players win out, plain and simple. Better players manipulate the odds in their favor more frequently. By making informed decisions and educated guesses about what odds are necessary for a victory, each hand is simply a process of analyzing a ratio of risk versus reward.<sup>186</sup> Serious players see poker much as investing, for both activities may experience short term fluctuation, but knowledge produces profit in the longer period. Over time, you are not lucky; it's statistics that are in your favor. "Poker can teach you that you can lose a lot, but still be profitable in the long run."<sup>187</sup> However, maybe the best way of understanding the dynamic between skill and luck in poker would be to turn once again to Jefferson. The great President once stated, "I'm a great believer in luck, and I find the harder I work the more I have of it."<sup>188</sup> Rest assured—understanding the game of poker is indeed very

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185. For an excellently detailed analysis of why poker does not constitute gambling mathematically, see EDWARD W. PACKEL, *THE MATHEMATICS OF GAMES AND GAMBLING* 15, 51-58 (1981); ANATOL RAPOPORT, *TWO-PERSON GAME THEORY: THE ESSENTIAL IDEAS* (1966); Cabot & Hannum, *supra* note 106, at 459.

186. SKLANSKY, *supra* note 175, at 245 ("Like any other gambling game, poker is a game of risks versus rewards. Any decision you make at the poker table can be thought of as a comparison of the risk involved in a particular play and the possible reward for the play.").

187. Benjamin Y. Lowe, *Poker Tests for Job Recruits: Trading Firm Hosts a Poker Tournament to Fill Odds Jobs*, PHILA. INQUIRER, Oct. 24, 2006, at C1.

188. The Quotations Page, Quotation Details, Thomas Jefferson (attributed),

difficult work and calculating and manipulating odds into one's favor is truly a skill.

*B. The Investing Paradox: Derivatives*

“If you bet [on] a horse, that's gambling. If you bet you can make three spades, that's entertainment. If you bet cotton will go up three points, that's business. See the difference?”<sup>189</sup>

In general, all investing involves some element of chance.<sup>190</sup> However, the existence of chance alone does not relegate investing to the doldrums of the human psyche to be avoided at all expense. Nearly all the activities associated with being human involve chance: driving a car, getting married, walking across the street, taking medicine, etc. How does one deal with this constant presence of chance? The answer is simple and inherently human—by utilizing the cost-benefit analysis. For example, when one crosses the street, one looks both ways prior to moving. By checking to see if there are any cars coming your way, you factor in the chance of getting run over versus the benefit of getting to the other side, and only when the chance of physical injury is so slim do we decide to walk. Advertisers even target this analytical apparatus. For example, the newest slogan for the arthritis medicine Celebrex is “Understand the risks. See the benefits.”<sup>191</sup> Insurance, also, is another example of this logical device in practice in that it is based on the exact premise of risk and reward.<sup>192</sup> Therefore, investing, like poker, and like all of the other facets of human existence is no different in its methodology.

Derivatives can be defined as an economic investment based on “speculation.”<sup>193</sup> The term “derivative” encompasses a wide array of financial products in which the actual conditions of return are based on an underlying stock, commodity, financial benchmark, stock index or other grouping of assets.<sup>194</sup> Two major types of derivatives are futures contracts and stock options.<sup>195</sup> These investments incorporate an element

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<http://www.quotationspage.com/quote/31912.html> (last visited Sept. 7, 2007).

189. MARK L. LARSON, TRADE STOCKS ONLINE 14 (2000) (quoting William F. Sherrod).

190. See Hurt, *supra* note 10, at 374.

191. Celebrex.com, <http://www.celebrex.com> (last visited Sept. 7, 2007).

192. While the comparison between insurance and gambling is overwhelming since insurance works on pure calculations of chance (the risk of injury or damage versus the benefit of sustained premium payments), it will not be discussed here in greater detail due to time and space constraints.

193. Hurt, *supra* note 10, at 382.

194. See Thomas Lee Hazen, *Rational Investments, Speculation, or Gambling?—Derivative Securities and Financial Futures and Their Effect on the Underlying Capital Markets*, 86 NW. U. L. REV. 987, 989 (1992).

195. *Id.*



of chance not found in ordinary stock investments, but one that is found in ordinary gambling activities: the element of time.<sup>196</sup>

In laymen's terms, a derivative entails a large amount of speculation. This is based on a very simple premise—nothing in the future is guaranteed. For example, if a small farmer can sell her entire season worth of crops, in advance to one buyer for \$10 a bushel, this might or might not be profitable or unprofitable depending on the season and the overall crop supply. If at the time the farmer harvests her crops, the going rate on the market for a bushel is \$5, by making the contract with the single buyer months in advance the farmer has turned a \$5 profit above what she would have gotten had she not made the contract. At the same time, if the price per bushel at the time of harvest was \$15, the farmer lost a potential \$5 per bushel sold. However, even though she may have sold her entire season's output at below the market price, she has ensured a profit at the rate of \$10 a bushel and just as importantly, can now account in advance for the amount she will make in profit without the worry of a bad harvest. This type of contract then acts as a security device.

However, in order for this type of contract to function there must be a buyer willing to purchase at said price. Those buyers can be referred to as "speculators" while the small prudent farmer can be deemed a "hedger."<sup>197</sup> The "speculator" in this example is entering into the contract merely as a wager on a price change. He may have some sort of information or may have hired the preeminent meteorologists in the nation and they have reported that in upcoming months the weather in the region is not going to be conducive to crop production and that by the time of harvest the supply will be so low that the demand will drive the price per bushel to \$15. Whatever the reasoning, this information is on what the "speculator" wagers. However, in a situation like this the "hedger" in most cases will be content with receiving the \$10 per bushel because of the uncertainty of the weather. Ultimately, both parties are pleased with their contract.

The role of the "speculator" is to provide liquidity in physical markets.<sup>198</sup> "These types of hedges based on countervailing financial positions provide useful vehicles for shifting risk."<sup>199</sup> However, as

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196. Hurt, *supra* note 10, at 383.

197. Note that the counterparty to the small farmer in this example does not necessarily have to be a "speculator." There are many situations in which both parties are "hedgers" in that both seek to reduce risk or market exposure. However, there are conversely many situations in which the counterparty is merely speculating on a price fluctuation.

198. See *Nymex NatGas Price Spike Leads to Questions About "Speculators"*, SEC. WK., Jan. 3, 2005, at 11.

199. Hurt, *supra* note 10, at 386.

mentioned previously, derivatives traders have a means by which to reduce their own risks brought about by speculation. Staying with the same small farmer example, if the date of harvest is approaching and the meteorologist's forecast was wrong, and it looks like a bushel will only cost \$5, the "speculator" can reduce the \$5 loss he is about to incur by taking an opposite position from the one he originally took with the small farmer with another "speculator," prior to the time of harvest. If the third party "speculator" feels as though the last two weeks before harvest are going to bring torrential floods which will cause the price to spike some, they may agree to a contract where the first speculator sells the second speculator the entire harvest he just purchased from the small farmer at \$7.50 a bushel, therefore reducing his exposure to potential loss. However, what happens when the actual physical product being transacted over never changes hands at the end of the time period, but only the amount owed by either party? Has this been an actual contract for the sale of goods or simply a wager on a price fluctuation? Is the physical settlement required to not constitute gambling? The answer to these questions for all intents and purposes is no, and in essence, this is precisely what is meant by a financial derivative.<sup>200</sup>

In the eyes of the law, all derivatives, both physical and financial, have walked a tumultuous line between legality and illegality.<sup>201</sup> The reasoning for such treatment being that "[d]uring the 19th century and the early 20th century, social reformers vigorously lobbied for prohibiting not only gambling, but also restricting and/or prohibiting trading in the futures and options markets as they thought these were also gambling."<sup>202</sup>

Currently, however, these transactions are allowed and are largely

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200. Cabot & Hannum, *supra* note 106, at 455 ("Prior to federal legislation that specifically authorized such trading, the great majority of courts held that a contract to speculate in the rise and fall of commodities was illegal gambling if there was no intent that the underlying commodities would be delivered.").

201. Don Chance, *A Brief History of Derivatives*, FIN. ENGINEERING NEWS, [http://www.fenews.com/fen41/teach\\_notes/teaching-notes.html](http://www.fenews.com/fen41/teach_notes/teaching-notes.html) (last visited June 17, 2007) ("Interestingly, futures/options/derivatives trading was banned numerous times in Europe and Japan and even in the United States in the state of Illinois in 1867 though the law was quickly repealed. . . . In 1922 the federal government made its first effort to regulate the futures market with the Grain Futures Act. In 1936 options on futures were banned in the United States. All the while options, futures and various derivatives continued to be banned from time to time in other countries.").

202. Ramchandra Akkihal, Suneel Maheshwari & Roger Adkins, *Casinos, Lotteries, and Markets*, 1 COASTAL BUS. J. 34, 36 (2002), available at <https://www.coastal.edu/business/cbj/pdfs/casinos.pdf> (citing J. Patrick Raines & Charles G. Leathers, *Financial Derivative Instruments and Social Ethics*, 13 J. BUS. ETHICS 197-204 (1994)).

unregulated in today's global economy.<sup>203</sup> However, this does not mean that these activities are in fact different. A telling point of this similarity is a statutory provision from the State of Illinois.<sup>204</sup> Within the section criminalizing gambling, there is a caveat regarding derivatives. The language of the statute states that:

Contracts to have or give himself or another the option to buy or sell, or contracts to buy or sell, at a future time, any grain or other commodity whatsoever, or any stock or security of any company, where it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, or the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in price thereof; [where certain other conditions are met] is not gambling within the meaning of this paragraph.<sup>205</sup>

Had these activities been so distinctly different, such a qualification would not be necessary. Therefore, this paragraph's inclusion by that state's lawmakers can be seen as a persuasive crystallization to the fact that these activities can fall under the same classification.

Additionally, it is useful to note that the argument that derivative contracts should be classified as gambling has been rejected by the courts. In *Deutschman v. Beneficial Corp.*, the defendant attempted to assert the argument that option traders should be entitled to less protection under the Securities Exchange Act because option trading is essentially gambling.<sup>206</sup> The court declined to accept this theory, noting that the price of option contracts depends closely on the price of the underlying stock, so that the risk in trading in options contracts is not much greater than the risk in trading stock.<sup>207</sup> The court then concluded that in practice, investing in the stock market is always a gamble, and it seems unfair to treat certain investment practices as entitled to less protection than others when all investments carry a risk of loss.<sup>208</sup>

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203. See Frank Partnoy, Enron and the Use of Derivatives, <http://www.aei.brookings.org/admin/authorpdfs/page.php?id=6> (testimony before the S. Comm. on Governmental Affairs) ("In other words, OTC derivatives markets, which for the most part did not exist twenty (or in some cases, even ten) years ago, now comprise about 90 percent of the aggregate derivatives market, with trillions of dollars at risk every day. By those measures, OTC derivatives markets are bigger than the markets for U.S. stocks.").

204. 720 ILL. COMP. STAT. ANN. 5/28-1 (West 2006).

205. *Id.* at 5/28-1(a)(4).

206. *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 507 (3d Cir. 1988).

207. *Id.*

208. *See id.*

However, the one undeniable aspect of this entire debate is that the skill of mathematical analysis that is used by a derivative trader is exactly parallel to that of a poker player.

[The year] 1973 marked the . . . publication of perhaps the most famous formula in finance, the option pricing model of Fischer Black and Myron Scholes. These events revolutionized the investment world in ways no one could imagine at that time. The Black-Scholes model, as it came to be known, set up a mathematical framework that formed the basis for an explosive revolution in the use of derivatives.<sup>209</sup>

Using this paradigm, it is clear that the skills involved in poker are not that different from the skills involved in finance; utilizing mathematics in order to generate profit while implementing a consistent analysis of risk versus reward.

While the utility of predictability in a commodity-based market is self-evidence (to reduce risk), when dealing with solely intangible financial derivatives, such a purpose becomes muddled. The utility that exists, however, is as important as its commodity based counterpart. Namely such value is two-fold: (1) security and (2) the opportunity to construct innovative asset and liability structures that achieve a combination of risk and return that would not be available utilizing the more traditional financial instruments.<sup>210</sup> The existence of derivative markets allow those individuals involved to “pursue creative business ventures more profitably and with more predictability. The speculators are able to incur the calculated opportunity losses on their contracts as well as benefit from gains when contracts appreciate in value.”<sup>211</sup>

Viewed objectively, this is simply exploiting the system for profitable gain by utilizing nothing more than one’s wits and employing a constant cost-benefit analysis—sounds a lot like poker to me.<sup>212</sup>

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209. Chance, *supra* note 201 (emphasis added).

210. Michael Krimminger, *Adjusting the Rules: What Bankruptcy Reform Will Mean for Financial Market Contracts*, FYI: AN UPDATE ON EMERGING ISSUES IN BANKING (FDIC), Oct. 2005, <http://www.fdic.gov/bank/analytical/fyi/2005/101105fyi.html>.

211. Akkihal, Maheshwari & Adkins, *supra* note 202, at 37.

212. This idea has recently been used in a commercial for FullTiltPoker.net, an Internet poker house. As a jab to the UIGEA, they advertised that their customers learn how to play poker by utilizing the same skills that are involved in the financial world, namely cost-benefit analysis. *FullTiltPoker.net: Who Says You Can't Mix Work and Play?* (Commercial), available at <http://www.fulltiltpoker.net/commercials.php> (“The board room table and the poker table, the only difference between them is a layer of felt . . . Reading risk and reward [at the poker table] isn’t much different than reading it on a spreadsheet.”). Ironically, T. Rowe Price, a mutual fund management company, advertises their services under the exact same premise in saying that “Successful investing is about balancing risk and reward.” T. Rowe Price (Commercial), available at <http://www.youtube.com/watch?v=mg5yJjL6dww&eurl=http%3A%2F%2Fwww%2Eohnozone%2Eenet%2Farchives%2F2007%2F01%2F21%2Dweek%2F>.

### C. *The Investing Paradox: Day-Trading*

“The only difference between gambling at a casino and day trading stock online is that you have to serve yourself drinks when sitting at your home computer.”<sup>213</sup>

Day trading refers to a trading strategy where an individual buys and sells the same security in a short period of time (often the same day) in an attempt to profit from small movements in the price of the security.<sup>214</sup> Interestingly, this is not the same thing as online investing which refers to the method of placing orders via the Internet to buy and sell securities as compared to the method of placing orders by speaking directly with a broker by telephone.<sup>215</sup> However, day-trading is in fact an Internet-era phenomenon for it allows direct trading by investors without the guidance of advised intermediaries,<sup>216</sup> hence the prevalent belief that they are one and the same.

Just like derivatives, day-trading incorporates skills that are nearly identical to that of playing poker. Although collectively called day trading, there are many sub-trading styles within day trading. A day trader is not necessarily very active. Depending on one’s trading strategy, the number of trades made in a day may vary from a few to a few hundred. However, some day traders focus on very short or short-term trading, in which a trade may last a few seconds to a few minutes. They buy and sell many times in a day, trading very high volumes daily.<sup>217</sup> “Day traders must watch the market continuously during the day at their computer terminals. It’s extremely difficult and demands great concentration to watch dozens of ticker quotes and price fluctuations to spot market trends.”<sup>218</sup> Therefore, for many day-traders, the speed at which they must analyze costs and benefits is nearly break neck.

This characteristic of day-trading is almost exactly congruent to poker. In the game of poker, the analysis necessary is also nearly instant. The players “can’t sit there for two minutes calculating odds . . . trying to figure out what [their opponents] are thinking.”<sup>219</sup> For one, the rules are

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213. Jimmy Cox, *The Pitfalls of Day Trading Stock Online*, [http://www.articles2k.com/article/176/76174/The\\_Pitfalls\\_of\\_Day\\_Trading\\_Stock\\_Online/](http://www.articles2k.com/article/176/76174/The_Pitfalls_of_Day_Trading_Stock_Online/) (last visited Sept. 7, 2007).

214. NASD, *Online Trading FAQ*, [http://www.nasd.com/InvestorInformation/MarketsTrading/OnlineTrading/NASDW\\_005931](http://www.nasd.com/InvestorInformation/MarketsTrading/OnlineTrading/NASDW_005931) (last visited June 17, 2007).

215. *Id.*

216. Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135, 154 (2002).

217. United States Securities and Exchange Commission, *Day Trading: Your Dollars at Risk*, <http://www.sec.gov/investor/pubs/daytips.htm> (last visited Sept. 7, 2007).

218. *Id.*

219. SKLANSKY, *supra* note 175, at 245.

so devised that an individual does not have an unlimited amount of time to come to a decision.<sup>220</sup> Furthermore, if hypothetically an individual was allowed to take as much time as necessary in coming to a decision, her competitors would quickly catch-on and be able to figure out with a great degree of certainty what her cards were, essentially making that player free money.<sup>221</sup> For that reason, “[p]oker tends to be a game for quick-thinking people.”<sup>222</sup> Clearly, the skill of speed that is so vital in one’s analysis associated with poker entirely overlaps with the mindset expected in day-trading.

Furthermore, one of the main skills of investing, let alone day trading, is the ability to forecast how markets will move. Like poker, this often times involves more than just crunching numbers. In poker, simply being able to formulate odds with the speed and precision of a calculator will not guarantee success.<sup>223</sup> “Variants like Texas Hold’em require so much skilled [sic] that computer scientists have been unable to create computer models that can match wits with the best poker players.”<sup>224</sup> If the game was strictly comprised of game theory, then the computer would always have the advantage, and yet this is not the case.

Expert poker players change strategies often during a game to throw off their opponents, but this is hard to capture, as machine learning techniques tend to require a large number of observations before they converge. Humans also exhibit intuition: a strong human player can determine the strategies of weak or average opponents after a few hands, a feat hard to match in an AI poker player.<sup>225</sup>

Many other factors are involved in becoming a successful poker player. These include amongst other things the understanding of positional play, the art of bluffing, and defensive play.<sup>226</sup> However, one very important skill that is entirely parallel to investing is the concept of psychology.

What is meant by the psychology of poker is:

[G]etting into your opponents’ heads, analyzing how they think, figuring out what they think you think, and even determining what they think you think they think. In this sense the psychology of poker is an

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220. *Id.*

221. *Id.* at 245–46.

222. *Id.* at 246.

223. *Id.* at 5 (“Nor is poker logic purely mathematical. Knowing the mathematics of poker can certainly help you play a better game.”).

224. Cabot & Hannum, *supra* note 106, at 497.

225. Mike Chase, Techniques for Opponent Modeling in Poker 1 (Oct. 28, 2005) (unpublished manuscript), available at <http://mike.jenandmike.ca/download/poker.pdf>.

226. SKLANSKY, *supra* note 175.

extension of reading opponents' hands, and it is also an extension of using deception in the way you play your own hand.<sup>227</sup>

Additionally, like in poker, the robotic savant who can mystify all by calculating odds at whim will not always be successful in investing. The reasoning, as mentioned, is psychology. Just like poker, there is a psychology to investing. This can be seen vividly through a quote by the great John Maynard Keynes<sup>228</sup> who said:

[P]rofessional investment may be likened to those newspaper competitions in which the competitors have to pick out the six prettiest faces from a hundred photographs, the prize being awarded to the competitor whose choice most nearly corresponds to the average preferences of the competitors as a whole; so that each competitor has to pick, not those faces which he himself finds prettiest, but those which he thinks likeliest to catch the fancy of the other competitors, all of whom are looking at the problem from the same point of view. It is not a case of choosing those which, to the best of one's judgment, are really the prettiest, nor even those which average opinion genuinely thinks the prettiest. We have reached the third degree where we devote our intelligences to anticipating what average opinion expects the average opinion to be. And there are some, I believe, who practise the fourth, fifth and higher degrees.<sup>229</sup>

However, as comparable as the skills involved in day-trading and poker are, a better comparison for day-trading would be gambling.<sup>230</sup> While in poker, the theory of long-term positive expectation produces a situation in which the odds of success are in the player's advantage, the odds in day-trading are stacked against the player—like gambling. Essentially, “[l]ike gambling . . . the more you play, the more you lose. Granted, market conditions can play a large part in the outcome, but most . . . cannot ‘beat the house’ in the long run by trading.”<sup>231</sup> This, of

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227. *Id.* at 236.

228. John Maynard Keynes was a British economist whose ideas, called Keynesian economics, had a major impact on modern economic and political theory as well as on many governments' fiscal policies. He is particularly remembered for advocating interventionist government policy, by which the government would use fiscal and monetary measures to mitigate the adverse effects of economic recessions, depressions and booms. Economists consider him one of the main founders of modern theoretical macroeconomics.

229. JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 156 (Macmillan & Co. 1954) (1936).

230. Matt Krantz, *Rolling the Dice: Day Trading Is Gambling*, USA TODAY, [http://www.usatoday.com/money/perfi/columnist/krantz/2006-01-31-day-trading\\_x.htm](http://www.usatoday.com/money/perfi/columnist/krantz/2006-01-31-day-trading_x.htm) (last visited Sept. 7, 2007).

231. Schatz, *supra* note 122 (providing a look at day-trading from the perspective of a former day-trader).

course, does not mean that an individual can never make money by day-trading.

If you ask these day traders to explain what they're doing, their explanations are usually plausible. And since markets' daily moves are random, there is a chance day traders can make money in the short term. But when they're explaining their "secret" to you, you need to sit back and pay attention and use your reasoning. Keep in mind even some blackjack players may have a lucky night or two, but over time, the odds will catch up with them and reclaim those winnings and then some.<sup>232</sup>

Yet, unlike Internet gambling, "day trading is neither illegal nor is it unethical."<sup>233</sup> If the two activities are so similar, why treat one as a leper and the other as an equal? And if day-trading online is different than gambling, why the caveat for it in the UIGEA?<sup>234</sup> In its legislative history, Congress deferred its findings to the NGISC. One of the major concerns raised by the Commission as a candidate for prohibition was that pathological gamblers are a group susceptible to problems with Internet gambling.<sup>235</sup> The fear being that in addition to the accessibility and inexpensiveness of the Internet, the "high-speed instant gratification of Internet games and the high level of privacy they offer may exacerbate problem and pathological gambling."<sup>236</sup>

However, these exact same concerns are associated with day-trading. For example, the United States Securities and Exchange Commission has a link on the Day-Trading portion of their website to the Connecticut Council on Problem Gambling's webpage. In order to find the reasoning for having such a link located on the SEC's website one needs to go no further than the title of the latter's link: "SOME INVESTORS MAY BE AT RISK FOR GAMBLING OUT OF CONTROL IN THE STOCK MARKET AND OTHER FINANCIAL MARKETS."<sup>237</sup> Problem gambling may occur in the traditional arenas of gambling, such as sports betting, casinos, or the lottery, but "[i]t can also be a problem in any financial transaction, including the financial markets, when money is risked in an attempt to gain more money."<sup>238</sup>

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232. Krantz, *supra* note 230.

233. United States Securities and Exchange Commission, *supra* note 217.

234. See Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)(E)).

235. NGISCR, *supra* note 2, at 5-5.

236. *Id.*

237. Connecticut Council on Problem Gambling, Investing and Gambling Problems, [http://www.ccpog.org/financial/investing\\_gambling\\_problems.asp](http://www.ccpog.org/financial/investing_gambling_problems.asp) (last visited Sept. 7, 2007).

238. *Id.*



And since we know that day-trading has a long-term negative expectation for the individual, the allure of the gamble exists. And yet we do nothing to stop it. In my understanding the reason is that those that profit from the pitfalls of being human when it comes to day-trading are domestic companies, while those that do the same from gambling are Caribbean basin nations and as such we allow one and forbid the other.

*D. Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*<sup>239</sup>—A Critique

Christine Hurt's article of the above title is a fascinating and expositive work on the incongruous approach between the current public policy stance of investing both physical and virtual, and that of gambling in both realms. Specifically, Hurt argues that the federal government's decision to treat online trading similarly to traditional trading provides a model for treating Internet gambling similarly to traditional gambling.<sup>240</sup> Her argument is based on a unique and useful model spectrum quantifying the range of speculation that permeates throughout gambling and investing. It is this speculation paradox that is the backbone of her analysis and it is a fairly accurate portrayal of the similarities ever present throughout this body of scholarship. Generally, this model assesses the qualities of various speculation activities, or activities where money is wagered in expectation of a future reward in a climate of uncertainty.<sup>241</sup> That uncertainty is what can be classified as speculation. As such, speculation exists in both investing and gambling. Her model creates a spectrum of activity based on the element of chance involved.<sup>242</sup>

On one end of the chance/skill spectrum, chance exclusively controls the return of an economic wager. On the other end of the spectrum, the skill of the wagerer controls the return to a greater extent. Note that placement assumes players have perfect skill in each activity; for someone with zero knowledge of poker or stock trading, that game becomes one of chance to that player. However, even the most skilled player cannot turn a game of pure chance into a game of skill. Furthermore, at no point in the spectrum does the element of chance disappear, as even in contests of skill, the impact of chance can never be eliminated.<sup>243</sup>

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239. Hurt, *supra* note 10.

240. *See id.* at 441.

241. *Id.* at 378.

242. *Id.*

243. *Id.*

Along the same axis as that of the speculation spectrum another gamut runs parallel.<sup>244</sup> Hurt proceeds to quantify the utility that is derived from each of the games/investment instruments similarly to that of the speculation paradigm. Mainly, those that are on the far left of the spectrum (games of pure chance) have a social utility of nothing more than entertainment while those at the opposite end (games of skill mixed with minimal chance) qualify as investing, a great social benefit.<sup>245</sup> Along the middle portion of the spectrum lies profiteering, far closer to the investing end.<sup>246</sup> And herein lies the fatal flaw of Hurt's analysis—her placement of poker along the spectrum as well as her placement of Derivatives and Day-Trading is wrong due to the concept of long-term positive expectation.

Hurt classifies games of pure chance as “L” games—games such as the lottery and roulette.<sup>247</sup> Slightly further to the right you have “W” games. These are games of “mixed skill and chance, with chance playing as important if not more important a role than skill.”<sup>248</sup> She classifies blackjack just to the right of “L” games and then subsequently Derivatives & Day Trading, Poker, and Sports Betting.<sup>249</sup> This arrangement, however, is fundamentally wrong. For one, those that are truly skilled (and as assumed above all parties in this spectrum are perfectly skilled) should have a sizeable advantage for profitability as compared to that of Sports Betting. As already mentioned, poker is mathematically profitable if played correctly under the premise of long term positive expectation.<sup>250</sup>

Furthermore, derivative trading has traits which ultimately reduce risk, and it can be done in a manner that almost certainly ensures profit in the long term.<sup>251</sup> In the context of both trading and investing, risk can be defined simply as uncertainty. Hence, Hurt's spectrum is flawed. A positive cash-flow can indeed be attained by derivatives and it can also be attained in poker.

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244. *Id.*

245. *Id.*

246. *Id.* The types of investments that can be categorized under this utility are Insider Sports Betting and Insider Trading.

247. *Id.* at 379-80.

248. *Id.* at 381.

249. *Id.* at 378.

250. *See supra* Part V.A.

251. For example, traders use the practice of arbitrage. This can be defined as “the nearly simultaneous purchase and sale of securities or foreign exchange in different markets in order to profit from price discrepancies.” When done properly, the transaction involves no negative cash flow at any temporal state, essentially a risk-free profit. MERRIAM-WEBSTER, *supra* note 120, at 59.

As such, Hurt's placement of both derivative trading, as well as poker, to the left on the spectrum of sports betting is not correct. Sports betting, unlike the aforementioned, has an element of chance not found in the other instruments. In poker, odds are mathematical, calculable, and known. In sports betting the element of chance to the one making the wager is dependent upon humans, with no mathematical accountability. Most sports bookies create a point spread or a "line."<sup>252</sup> Traditionally, the bookmaker sets this line so that the number of bets on one side of the line will be the same as the number of bets on the other side of the line.<sup>253</sup> This is done in an attempt to ensure profitability by having the winners and the losers offset and simply retaining the "vig."<sup>254</sup> The "vig" is a fee of each person's bet, usually ten percent of the wager.<sup>255</sup> For a person to make a consistent profit off of sports gambling, he would need to be the bookie. Otherwise, there is no mathematical formula or strategy to follow that can ensure such success because the elements of chance are not constrained by the laws of probability as are cards—there is no means of making a positive cash-flow. The element of chance in this scenario is a living, breathing human being. There is no means of accurately predicting, for example, whether the Indianapolis Colts will cover their three point line spread<sup>256</sup> in the AFC Championship game because the factors involved are not quantifiable. For this simple reason, Hurt's argument is defective.

More importantly, however, is the purpose of this critique. The intention is to provide an example of some of the current scholarship on the topic of poker. Like many state courts throughout the Union,<sup>257</sup> lumping poker into the category of gambling without an understanding of its intricacies and nuances is doing a disservice to those that love the game and appreciate the skills involved.<sup>258</sup>

## VI. WHAT SHOULD BE DONE AND WHY?

One element of Hurt's thesis, however, does have merit. That thesis

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252. See ARTHUR S. REBER, *THE NEW GAMBLER'S BIBLE* 276 (1996).

253. *Id.* ("[T]he ultimate goal is to establish a line that will attract approximately half of the action to each side of the wager.")

254. *Id.*

255. Offshore Sportsbook Betting and Casino Gambling Definitions, [http://www.offshore-sportsbook-casino.net/offshore-sportsbook\\_definitions.htm](http://www.offshore-sportsbook-casino.net/offshore-sportsbook_definitions.htm) (last visited Sept. 7, 2007).

256. For an example of a line, see New York Post Bettor's Guide, <http://www.nypost.com/sports/betting/reg/postline.htm> (last visited Sept. 7, 2007).

257. See *infra* Part VI.A.

258. It should be noted that by no means does this insinuate that all of the literature available today fails to understand poker. Much of the research done for this Note comes from very well thought out and knowledgeable works.

is simple:

[O]nline activities should not be regulated differently than physical activities merely because they are performed over the Internet, the SEC has chosen not to restrict online investing. Analogously, the federal government should allow states to regulate online gambling in the same way that those states choose to regulate similar physical gambling activities.<sup>259</sup>

What permeates throughout the article is the belief that since both gambling and investing are based on a sliding scale of speculation and utility, all online gambling should be allowed, if each individual state finds that to be appropriate.<sup>260</sup> Nevertheless, this approach of swaying the states to adopt wholesale Internet gambling similar to the way they adopted Internet investing to their physical counterparts in my opinion would not be the best avenue for the Legislature to take. One way in which the federal government (or as will be shown, the courts) may proceed is to maintain the legislation in its current incarnation and simply exclude poker from its status as “unlawful Internet gambling,”<sup>261</sup> due to the fact that it is a game of skill rather than chance. The other way poker could be freely played on the Internet would be by treating it as an exempted transaction congruously to derivatives and day-trading.<sup>262</sup> This in turn will allow American companies to develop Internet poker rooms which can be regulated under the watchful eye of the United States.

First, the game of poker should be excluded from prohibition pursuant to the UIGEA. The key terminology to focus on is found in the definitional portion of the Act which states that a bet or wager is:

[T]he staking or risking by any person of something of value upon the

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259. Hurt, *supra* note 10, at 441.

260. *See id.* at 440.

261. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(10)(A)) (“The term ‘unlawful Internet gambling’ means to 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.”).

262. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)(E)) (stating that the term “bet or wager” does not include “(i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act); (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act; (iii) any over-the-counter derivative instrument”). Note that the list goes on to include fantasy sports and a plethora of other financial instruments that would typically be classified as investments because the language of the statute taken literally would prevent these sorts of transactions, telling of the fact that the overlap between investing and gambling is merely an issue of rhetoric.

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 . . . .<sup>263</sup>

As shown, the game of poker, when played properly is a positive expectation game,<sup>264</sup> and as such is not simply dependent on chance. However the question of whether poker is a game of chance or a game of skill remains unsettled in the eyes of the law.

#### A. *Poker and the Courts*

The question of poker's placement along the skill-chance spectrum is not new to the realm of the courthouse. In determining whether chance governs, and the subsequent application of each state's individual gambling laws, courts generally employ one of two guides: (1) the pure chance doctrine or (2) the dominant factor test.<sup>265</sup> The former being defined as a scheme in which the person's judgment plays no part in the selection and award of the prize and the latter being a scheme where chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.<sup>266</sup>

Most jurisdictions favor the dominant factor test.<sup>267</sup> The dominant factor doctrine is essentially what the name implies. The court determines whether chance or skill is the dominant factor of the game, recognizing, similar to Hurt's article, that the distinction runs along that of a spectrum. In deciding where on the spectrum any particular game falls, the courts have devised a four part test. The elements in deciding whether ability governs are that: (1) participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment; (2) participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill; (3) skill or the competitors' efforts must sufficiently govern the result; and (4) the standard of skill must be known to the participants, and this standard must govern the result.<sup>268</sup>

Nationwide there is a disparity of where poker falls under this

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263. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)(A)) (emphasis added).

264. KEN WARREN, WINNER'S GUIDE TO TEXAS HOLD'EM POKER (1995).

265. *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973).

266. *Id.*

267. *Id.*

268. *Id.*

doctrine.<sup>269</sup> Some states have identified poker as a skill game,<sup>270</sup> while others have taken the opposite approach.<sup>271</sup> Still others have melded together the two ends of the spectrum,<sup>272</sup> while others still have not tackled the question at all. What is certain is that there is no uniformity between states as to what classification is appropriate for poker.

The Unlawful Internet Gambling Enforcement Act, being a federal statute, has no common law precedent on which to go by. Since gambling legislation has traditionally remained in the dominion of the states,<sup>273</sup> the federal courts will have the opportunity to base their decisions on either of the two state camps or proceed to put forth their own findings. An analysis of the state decisions will prove vital in showing the intellectual disparity between the legal opinions of the proponents of poker as a game of skill with that of its opponents.

For example, slightly more than a decade ago, a decision out of California concluded that traditional poker tournaments are games of skill based on the dominant factor test.<sup>274</sup> Additionally, the Montana Supreme Court defined poker as “a game played by individuals with one player pitting his skills and talents against those of the other players.”<sup>275</sup> Furthermore, the Washington Supreme Court has held that the state’s lottery statutes do not prohibit poker because poker is a game of substantial skill.<sup>276</sup> In the lower court’s finding of facts, the court cited a series of games, including poker, that were “predominantly games of skill and that one who is skilled will win consistently.”<sup>277</sup>

Conversely, many modern courts have held that poker is a game of chance, namely those in Nebraska,<sup>278</sup> New York,<sup>279</sup> North Carolina,<sup>280</sup> and, of course, Illinois.<sup>281</sup> In *People v. Mitchell*,<sup>282</sup> the court held that

269. See Cabot & Hannum, *supra* note 106, at 459.

270. See *Bell Gardens Bicycle Club v. Dep’t of Justice*, 42 Cal. Rptr. 2d 730, 749-51 (Cal. Ct. App. 1995) (finding that poker is a game of “skill” while Jackpot poker is a game of chance).

271. See, e.g., *People v. Mitchell*, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983); *Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400, 402 (Neb. 1975).

272. *Gaudio v. State*, No. 05-91-01862-CR, 1994 WL 67733, at \*2-3 (Tex. App. Mar. 7, 1994).

273. *NGISCR*, *supra* note 2, at 1-5.

274. *Bell Gardens Bicycle Club*, 42 Cal. Rptr. 2d at 746-48 (distinguishing Jackpot poker tournaments from traditional poker tournaments, with the former constituting a lottery and the latter a skilled game).

275. *Gallatin County v. D & R Music & Vending, Inc.*, 676 P.2d 779, 781 (Mont. 1984).

276. See *State ex rel. Schillberg v. Barnett*, 488 P.2d 255, 257 (Wash. 1971) (“Poker, when played for money, is a gambling game, but . . . it cannot reasonably be contended that it is a lottery.”).

277. *Id.* at 256.

278. *Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398 (Neb. 1975).

279. *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. City Crim. Ct. 1995).

280. *State v. McHone*, 90 S.E.2d 539, 539-40 (N.C. 1955).

281. *People v. Mitchell*, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983).

although the statute in question did have an exception for “bona fide contests for the determination of skill,” this exception did not apply to the game of poker.<sup>283</sup> As diverse as the varying opinions from those states that classify poker as a game of chance are, one glaring similarity pervades throughout this body of law: “Most of the court opinions from these states do not analyze the elements of poker when determining whether it is a game of chance; the opinions usually state that poker is a game of chance without analysis, discussion, or debate.”<sup>284</sup>

As for the UIGEA, poker should not constitute a “game subject to chance.”<sup>285</sup> The courts should look no further than the dissenting opinion in *People v. Mitchell*:

The State argues that poker is not a game of skill but is a game of pure chance or luck. This allegation is a canard. Anyone familiar with even the barest rudiments of the game knows better. Pure luck? Send a neophyte player to a Saturday night poker game with seasoned players and he will leave his clothes behind and walk home in a barrel. Pure luck? This is true of bingo or lottery. But it cannot be said of poker. The court should take judicial notice that poker is a game of skill. It cannot be gainsaid, of course, that there is an *element* of luck in poker. Of course there is. There is an element of luck in everything in life. Even the prosecution of a lawsuit contains an element of luck. But everything that contains an element of luck is not gambling.<sup>286</sup>

If the federal courts proceed to classify poker as a skill game, then the Act would not apply. Based on the verbiage of the definition of wager<sup>287</sup> poker would once again be freely playable on the Internet.

If the federal courts are to base their analyses on the dominant factor test, than poker would not be classified as a game of chance. Applying those elements, it is fairly evident that skill is the dominant factor. As shown, there is ample data upon which one can calculate an informed judgment.<sup>288</sup> The data is basic arithmetic applied on a consistent basis. For the second and fourth element, the argument may be made that the skill level is not equal throughout, and that the disparity of skill is not known. This in fact is entirely true. However, the opportunity to learn this skill is widely available. But, even more importantly, the

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282. *Id.*

283. *Id.* (internal quotations omitted).

284. Cabot & Hannum, *supra* note 106, at 461-62.

285. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)).

286. *People v. Mitchell*, 444 N.E.2d 1153, 1157 (Ill. App. Ct. 1983) (Heiple, J., dissenting).

287. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952 (to be codified at 31 U.S.C. § 5362(1)).

288. *See supra* Part V.

general consensus (even though there is no scientific proof for it) is that most poker players are quite savvy to the extent of the fundamental skills of the game. Very few novices play for stakes, and in turn, the second element is satisfied. As for the fourth element, the standard of skill would be known to all participants if poker were to be regulated on the Internet. Many creative ways can be established to keep the unsuspecting from being fleeced. One, for example, would be to create a ranking system similar to that of chess in which cumulative wins and losses are recorded, resulting in a ranking. Finally, the third element, like the first, has already been addressed to show that the competitor's skill sufficiently governs the result.<sup>289</sup>

### B. *The Utility of Poker*

Returning to Hurt's spectrum, in games and investment vehicles that are based on skill mixed with chance, with skill being the dominant factor, the correlating social utility scale ranges from Profiteering to Investing.<sup>290</sup> The efficacy of such utilities is beneficial to society. Moreover, the fact that the individual is profiting on his own accord only reaffirms the personality of the nation embodied by the Jeffersonian spirit<sup>291</sup> and it also supports the classical economic theory postulated by the great Adam Smith of the driving force behind capitalism—individual greed.<sup>292</sup> But, as mentioned previously, for such a system to work, the lost tax revenue needs to be retained within our borders or else the entire purpose of allowing the individual to profit in the manner in which she best sees fit is outweighed by the loss to the offshore websites. And, as has already been shown, restricting gambling to United States based websites is possible,<sup>293</sup> and not violative of the WTO.

Moreover, with the introduction of a web-based poker industry within the United States, there is tremendous growth potential for other businesses as well. For instance, it will be necessary for auditing firms as well as skilled tax professionals to work side-by-side with these sites in order to ensure the integrity of the poker providers. This increased

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289. See *supra* Part V.

290. Hurt, *supra* note 10, at 378.

291. See Wiltse, *supra* note 20, at 838-39.

292. See generally ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan ed., University of Chicago Press 1976) (1776) (expounding the theory that the invisible hand is what drives capitalism). "But it is only for the sake of profit that any man employs a capital in the support of industry; and he will always, therefore, endeavour to employ it in the support of that industry of which the produce is likely to be of the greatest value, or to exchange for the greatest quantity either of money or of other goods." *Id.* at 477-78.

293. See *supra* Part IV.



workload will generate a multitude of new skilled jobs for the nation—an added benefit.

Additionally, the business world has started to take note of the overlapping similarities between poker and investing. Recently, Jeff Yass, cofounder and managing director of Susquehanna International Group L.L.P., a major financial player, held a poker tournament where the grand prize was \$25,000 and a chance at a job offer at the company. The reasoning for the tournament—there is utility in poker. Yass was quoted as saying: “Poker and trading have a lot of similarities, such as making good decisions under pressure. It teaches you to deal with losing even when you make the right decision.”<sup>294</sup> What Yass was looking for is the players approach to their wagers. His logic: Poker parallels “the statistics-driven culture that has quietly made Susquehanna one of the big players on Wall Street.”<sup>295</sup> More so, Nolan Dalla, a spokesman for the Las Vegas based World Series of Poker tournament, said the game was a perfect laboratory for learning trading fundamentals such as game theory and the trade-off between risk and reward.<sup>296</sup> Furthermore, Stacey Briere Gilbert, a Susquehanna options analyst and former American Stock Exchange trader, said the company was looking for job candidates who “let the odds be their guide.”<sup>297</sup> Clearly, the world of investing is not following the perspective of the legislature in determining the value of poker.

Moreover, the federal government itself recognizes the potential of an individual to be in the business of gambling and as such, further solidifies the dual policy stance that exists today.<sup>298</sup> This occupational classification has been reviewed in many Tax Court cases over the years and there is now adequate precedent to help determine who qualifies as a professional gambler.<sup>299</sup> Those criteria are the same as those used to determine if any activity is a hobby or a true business venture, namely that there must be a profit motive, that profit must be shown in at least three of the last five years, a considerable amount of time must be spent

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294. Lowe, *supra* note 187.

295. *Id.*

296. *Id.*

297. *Id.*

298. See *supra* Part V (comparing the treatment of gambling to the treatment of investing).

299. For example, originally, the Tax Court in *Gentile v. Commissioner*, 65 T.C. 1 (1975) excluded gambling winnings from the definition of income because “carrying on a trade or business” was holding oneself out to others as engaging in the selling of goods and services. Later, *Gentile* was overruled in *Ditunno v. Commissioner*, 80 T.C. 362 (1983). Currently, *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), is arguably the law on this issue. In *Groetzinger*, the Supreme Court, devoting a substantial amount of time to his gambling efforts with the intent to earn a living from the activity, ruled that Groetzinger constituted a “trade or business.”

gambling, and a business operation must be evident.<sup>300</sup> Such laws prove that the federal government understands the potential for a person to sustain a living from an activity such as playing cards necessitated by long-term positive expectation. Therefore, such a position should once again be telling of the fact that restricting poker is hypocritical. If the government wants and receives their cut, the individual should be allowed to play.

Conversely, the utility that would be drawn from the potentially massive tax revenue to be generated by regulation has not even been explored yet. In a recent *New York Times* article, former New York Senator Alfonse D'Amato, in discussing his new position as lobbyist for the Poker Players Alliance, was quoted as saying, "[w]hen you have regulation, where you have openness, you can ensure you have a game that won't be unfairly cut or disadvantaged or manipulated."<sup>301</sup> The *Times* article also mentions that "[y]ou can also tax the winnings of players whose ups and downs are tracked online, a figure the poker alliance puts potentially in the billions."<sup>302</sup> It is obvious that the poker provider would have to go through the same rigorous financial examinations as any other large corporation, but with regulation, the individual will not be able to avoid scrutiny either. Since any given participant's entire playing activity can be logged and archived, there is no possibility for undisclosed income. This means that in fact every single dollar being won may be taxed, at the larger tax rate for gambling winnings.<sup>303</sup> Similar to the way states capture large swaths of tax revenue from lotteries, the federal government can from individual taxation, just by getting involved in Internet poker. The utility speaks for itself.

Interestingly, Hurt's thesis of the wholesale application of Internet gambling, since it is similar to that of Internet investing, is plausible and effective if that proposal is refined. Hurt states that in "stock market investing, the financial intermediaries are viewed as earning modest fees for assisting others to invest wisely," but the "house," or the casinos, are "detached hawkers who win every game."<sup>304</sup> Since in poker the participant is not playing against the "house," the website is simply earning a modest fee for giving players the opportunity to play. Therefore, the proper public policy would be to allow Internet poker because of the logistical similarities between the profit generating

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300. WALTER L. LEWIS, *THE GAMBLER'S GUIDE TO TAXES: HOW TO KEEP MORE OF WHAT YOU WIN* 19 (2003).

301. Rivlin & Richtel, *supra* note 5, at C1 (emphasis added).

302. *Id.*

303. See LEWIS, *supra* note 300.

304. Hurt, *supra* note 10, at 374.

mechanism of Internet brokerage houses like the Scottrade's and E\*Trade's of the world and that of Internet poker houses.

## VII. CONCLUSION

Aside from money, the purpose behind the UIGEA is fairly straightforward. It is referenced in the Act's congressional findings,<sup>305</sup> and encapsulated within the NGISC. The fact that Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry<sup>306</sup> is of major concern because traditional law enforcement mechanisms are often inadequate for implementing gambling prohibitions or regulations on the Internet, especially where such gambling crosses state or national borders.<sup>307</sup> That, coupled with the fear of underage and problem gamblers, was enough to halt the entire Internet gambling industry.

Since the world of sports gambling, roulette, blackjack (because Internet blackjack has a deck of infinite cards since it is based on an algorithm rather than tangible items, card counting is not a possibility) and assorted other casino games do not adhere to the theory of long term positive expectation, its restriction should be maintained—it satisfies the definition of “game of chance” and as such is prohibited under the UIGEA. But for the plethora of reasons already mentioned, poker should not fall under this prohibition. However, even though the statute on its face should not apply to poker, and even though the true purpose of this legislation's passing is financial in nature, this does not mean that the policy concerns raised by the NGISC are not real. Until they are addressed, poker still poses a problem.

Nevertheless, to forbid citizens to spend money that is entirely their own, be it from a checking account or from deposited cash,<sup>308</sup> is the same

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

306. *Id.*

307. *Id.*

308. *Id.* § 5363. The language of the statute that is pertinent to non-credit based fund transfers 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— . . .

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

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

(4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the

as denying that citizen a fundamental liberty—the pursuit of happiness.<sup>309</sup> By restricting the settlement of all payments, be it credit, checking, or other, seems excessive and entirely paternalistic. It truly does appear as though the parent has punished the child for not adhering to the parent's values. Yet, this does not have to be the case. We can establish Internet poker houses and allow for the individual to act as she best sees fit without violating the aforementioned public policy concerns.

First, the benefit of regulation at the expense of international exclusion is that the principle apprehensions postulated by the NGISC will not be violated. Closing off the borders to foreign competition allows for the entire system (the United States) to maintain its net wealth. Second, to appease the credit card industry and prevent scores of Americans from incurring debt, poker payments should only be settled on the basis of linking checking accounts to the virtual poker house or by the physical deposit of cash. Third, a multitude of creative ways can be established in which underage gambling is prevented—linking driver's licenses with checking accounts, biometrics, or any number of other methods to ensure that youngsters do not have access to this forum.

For these reasons, one of two approaches can be taken in regards to the UIGEA. One is that the statute should not be modified. Courts can determine that poker is shielded from the rubric of restricted transactions due to the “games of chance” language. As such, it should nonetheless be required to satisfy the policy concerns addressed by the NGISC. Analogous to the way the individual's spirit so embodied by Jefferson has evolved to virtues of the “greater good,” so too should poker incorporate the fears and concerns of the public. The second approach available would be to classify poker as an exempted transaction similar to the treatment of derivatives and day-trading under the UIGEA. Such action would be mainly due to the overlap in skills involved and overarching nature of these comparable activities.

American society is at a cross-road with regards to the issue of Internet poker. Do we flop and fold on the individual's rights or do we turn to our representatives and allow legislation to be raised that

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benefit of such other person.

309. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The phrase “pursuit of happiness” has appeared in at least one Supreme Court case, *Loving v. Virginia*, which focused on an anti-miscegenation statute. Justice Warren wrote “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is worth noting that the Declaration does not suggest a right to happiness itself; merely a right to pursue happiness. Thus, nobody can claim their rights are being violated simply because they are unhappy. However, one can easily claim that such right is being trampled if not allowed to spend earned money in the fashion deemed appropriate to the individual.

prohibits anything even remotely problematic? The one thing, however, that remains certain is that we should not sit by indolently and watch poker get checked down to the river. For in the words of Thomas Jefferson, “[a] society that will trade a little liberty for a little order will deserve neither and will lose both.”<sup>310</sup>

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310. *Williams v. Garrett*, 722 F. Supp. 254, 256 (W.D. Va. 1989) (quoting Thomas Jefferson).

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