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GAMBLING AND THE LAW^{®*}: THE FUTURE OF INTERNET GAMBLING

I. NELSON ROSE^{**}

I. TYPES OF INTERNET GAMBLING

Given the rapid developments made in interactive technology, it would be appropriate to label the activity being discussed as “at-home gambling” or “long-distance wagering,” since it is not necessarily conducted on the Internet. However, almost all legal and even quasi-legal operators taking bets from players’ homes and offices (even if they take most bets by phone) do have sites on the World Wide Web (“Web”) and are therefore in the business of Internet gambling. The typical arrangement is for players to contact an operator by dialing a server, such as America Online (“AOL”), using the modems attached to their home or office personal computers (“PCs”). Connections to the Internet are becoming available to everyone: PCs can be found in schools and libraries. They can even be found in restaurants; a Burger King restaurant in New York’s financial district installed twenty computers and a T1 line and is giving twenty minutes of Internet time for a minimum purchase of a meal costing \$4.99 or a breakfast costing \$3.29.¹ The best list of operators of Internet gambling websites is found in online gambling magazines such as *Rolling Good Times Online*,² *Gambling Times*,³ and *Blackjack Review Network*.⁴

Some computerized wagering systems, such as *Youbet.com*’s⁵ arrangement with Pennsylvania’s tracks, avoid online servers and the World Wide Web. Their bettors use modems to call the *Youbet.com* computer, which routes the messages to off-track betting operators’

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1. See Michel Marriot, *New ‘Combo’ Meal: Dine and Surf*, N.Y. TIMES, July 30, 1998, at G3.

2. See Rolling Good Times Online, at <http://www.rgtonline.com> (last visited Nov. 14, 2000).

3. See Gambling Times, at <http://gamblingtimes.com> (last visited Nov. 14, 2000).

4. See Blackjack Review Network, at <http://www.bjrnet.com> (last visited Nov. 14, 2000).

5. See *Youbet.com*, at <http://www.youbet.com> (last visited Nov. 14, 2000).

computers. There is no connection with the Internet. However, the use of a closed-loop computer system has not kept *Youbet.com* from the legal problems that afflict true Internet operators.⁶ From the punters' point of view it makes no difference that there is not a connection to the Internet because the PCs' modems are making the connection, and a modem can hang up from one system and dial the other with the press of a button.

Other technology is being developed, such as stand-alone Internet terminals that accept cash. Even the PC can be eliminated. For example, a system called MonaCall allows cybercasino gaming using only a touch-tone phone.⁷ At least eight states allow their licensed Off-Track Betting ("OTB") facilities to accept telephone wagers.

Gambling requires consideration.⁸ Therefore, only sites that accept money wagers are included in this discussion. Internet gambling sites require players to deposit "front money," which includes payment in advance, by credit/debit card, wire transfer, "snail-mailed" check, money order, or Internet funds like CyberCash, Inc. Competition has forced many operators to allow wagers to be made before the credit card transactions have cleared. This allows dishonest patrons to cancel the transaction if they lose their wager. Some casinos come with "no purchase necessary" labels. There are dozens of these sites that allow players to obtain a small number of chips for free, but most play is with chips purchased by credit cards. Nonetheless, the free alternative means of entry may categorize the

6. See, e.g., Greg Miller, *Online Gambling Site Stops Taking Wagers from State's Residents*, L.A. TIMES, Nov. 12, 1999, at C1 (describing suspension of service to California residents because of ongoing investigation by L.A. County D.A.'s office).

7. See MonaCall, at <http://www.monacall.mc/company.htm> (last visited Nov. 14, 2000). MonaCall is a Monaco based company that provides telecommunications and Internet services.

8. Law enforcement authorities have been almost unanimous in declaring, informally, that a game played for free on the Internet lacks consideration and is thus not gambling, even if the player has to sit through on-screen advertisements or jump from one website to another to enter. Florida regulators had indicated that free, no-purchase-necessary sweepstakes conducted on the Internet would be illegal unless the operations allowed free entries by mail. The regulators' theory was that players had to spend money in buying a computer or paying for Internet access. But even Florida has now rejected that position. In October 1999 the Florida Department of State announced that the State of Florida had reevaluated its position concerning online promotions and would no longer require a free offline method of entry, provided no other consideration is required in order to participate in the promotion. See Promotion Marketing Ass'n, Inc., *Law Bulletin*, Special Bulletin (Oct. 26, 1999).

games as non-gambling "sweepstakes" under some state laws as well as under federal law.⁹

Few legal operators disclose financial information, and estimates of illegal and gray market gambling of questionable legality are often little more than guesses. All statements of volume contained in this Article must be understood to be the author's best estimates. For example, until recently, the two most common forms of long-distance wagering appear to have been illegal bets on sports events by phone and legal bets on horse racing at licensed OTBs. Sports betting may still have the greatest dollar volume, but a search of the Internet reveals there are now more websites offering simulated casino gaming.

Betting on professional and college sports events was the first form of Internet wagering; operators, however, used their websites primarily to advertise toll-free or 900-telephone numbers. Even today, more money is bet with licensed overseas sports bookies by telephone than by computer. Players can bet (\$11 to win \$10) on real games against their licensed or illegal bookmaker. Bookies offer numerous variations, from parlay cards to propositions, betting on who will make the first touchdown or whether the quarterback will run right, left, or pass on the next play. Statistics from real games can be used to create fantasy sports leagues.¹⁰

Sports betting is still one of the most popular forms of at-home gambling. For decades, sports enthusiasts have placed bets by phone, with a friend or illegal bookie, and watched games on television. In fact, legal sports betting began to boom with the broadcasting of Monday Night Football. More importantly, most Americans live in a state with a state lottery. Casino gaming is legal in twenty-nine states and U.S. territories, which has increased gambling opportunities for Americans. Nonetheless, legal sports betting is not readily available. Economic theory suggests that where there is a demand for a product or service, such as sports betting, that is not being fulfilled through legal means, consumers will turn to gray markets or even to clearly illegal suppliers. Turning to illegal gambling markets increases especially when there is no chance of get-

9. See *FCC v. ABC*, 347 U.S. 284 (1954) (noting that Court held, in dealing with radio giveaways, that giveaways did not fall under scope of statute because there was not adequate consideration); see also 18 U.S.C. § 3104 (2000) (prohibiting "any lottery . . . offering prizes depending in whole or in part to lot or chance.").

10. See, e.g., All America Fantasy Sports, at <http://www.allamerica.com> (last visited Nov. 14, 2000); CBS Sportsline at <http://sportsline.commissioner.com> (last visited Nov. 14, 2000); Fantasy Sports Headquarters at <http://www.fantasy-sportshq.com> (last visited Nov. 14, 2000).

ting caught. Bettors believe in the integrity of the professional and college games on which they bet and have the ability to verify independently the results of the games. With Internet casinos, punters are playing against an unseen computer with an unknown computer program. Bettors have to trust that the sports bookie will pay off winning bets. Thus far, the online sports bookies themselves have not won general acceptance.

Online casinos have attempted to emulate real world gaming halls. Online games include blackjack, video poker and virtual three-reel slot machines, craps, roulette, baccarat, and keno.¹¹ Sites turn the PC screen into a virtual duplicate of a casino video slot machine. Software quality, graphics, sound, and especially speed vary widely. Many games are extremely slow because of the time needed to download illustrations, such as playing cards. Most sites allow "front-loading," the loading of images on a PC's hard drive with a CD or by downloading before play begins.¹² These games play as fast and are nearly as entertaining as their counterparts played in a live casino. Some sites allow chats so players may have social interactions with other players.¹³ Minimum and maximum limits on wagers also vary widely. Even with low stakes betting, the fastest games can run through hundreds of dollars per hour.

Technology allows linking online gaming with real world casinos. World Wide Web Casinos had advertised that it would link its Internet slot play with slot machines in its land-based casino in Antigua.¹⁴ The Home Gambling Network, Inc. obtained a patent in 1998 for a casino with video cameras connected to the Internet, so that table games like blackjack could be played at remote locations.¹⁵

A few governments are beginning to run lotteries online. Their primary marketing targets are locals. The Principality of Liechtenstein operates the largest Internet lottery open to non-re-

11. See, e.g., The Caribbean Cyber Casino, at <http://www.ccasino.com/games.htm> (last visited Nov. 14, 2000).

12. See *id.*; see also Casino On Net, at <http://www.entercasino.com> (last visited Nov. 14, 2000).

13. See, e.g., 2 AM Poker, at <http://www.2am.com> (last visited Nov. 14, 2000); Atlantic Interbet Casino, at <http://www.atlanticinterbet.com/partners.htm> (last visited Nov. 14, 2000); Planet Poker, at <http://www.planetpoker.com> (last visited Nov. 14, 2000).

14. See World Wide Web Casinos, at <http://www.casinovendors.com> (last visited Nov. 14, 2000).

15. See The Home Gambling Network, at <http://www.homegamblingnetwork.com> (last visited Nov. 14, 2000).

sidents.¹⁶ The Coeur d'Alene Indian tribe of Idaho had a similar operation until the tribe closed the website after adverse judicial decisions.¹⁷ Lottery games vary from passive, once a week drawings to instant tickets, which make them indistinguishable from slot machines. However, unlike traditional lotteries, many games do not have a pooling of players' funds to constitute the prize.

Bingo is growing on the Internet. Bingo comes in various formats, some of which only appear to be online interactive games. One form of true bingo involves at-home players playing their cards online, with and for money, against other players online, or conceivably against other players both online and in real bingo halls. Proxy play consists of at-home players being represented by a player or a computer acting as their agents in a live game played in a bingo hall. Proxy play can take the form of future play, where players buy cards which are then played on their behalf in live games. Proxy play can also take the form of past play, where players buy cards and watch previously taped bingo games on television. In at least one case involving proxy play, a tribe obtained an injunction allowing it to offer at-home past play of MegaBingo. The court held that the game was being played on Indian land, as required by federal law, and that the televised game was not relevant because players did not have to watch and could not actually participate.¹⁸

"No-purchase-necessary bingo" is beginning to catch up in popularity with similar casino games. The online casino operators attempt to skirt the requirement of consideration by contributing the prizes themselves. No-purchase-necessary bingo seems to be run more often with prizes put up by sponsors and thus more closely resembles traditional promotional sweepstakes. Unlike "no-purchase-necessary casinos" where most play is for real money, no-

16. See Liechtenstein Lottery, at <http://www.interlotto.li> (last visited Nov. 14, 2000).

17. See *AT&T Corp. v. Coeur d'Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998) (holding that plaintiff is not required to furnish Coeur d'Alene Tribe with toll-free interstate service for operation of National Indian Lottery because doing so violated state law). "The tribe's effort to obtain 800 Service so that a player can order chances while outside the limits of the Reservation would have the effect of maintaining a gaming activity off Indian lands and, consequently, takes the Lottery outside the protective preemption provided by IGRA." *Id.* at 1001.

18. See Indian Gaming Regulatory Act, 25 U.S.C. § 2703 (1988). In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA"), which exempted American Indian tribes from federal laws prohibiting the use of the mails, telephones, and television for gaming purposes in running Class II bingo games. In July 1995 the National Indian Gaming Commission ("NIGC") ruled that MegaBingo games being offered for play are Class II gaming. MegaBingo's proxy play is available at http://www.betnet.com/MegaBingo.htm#proxy_play.

purchase-necessary bingo often does not even allow real money to be wagered. This form of gambling has a potentially large market. In January 1999, the website Gamesville.com reported having 2849 players competing for a \$700 bingo jackpot.¹⁹

Off-Track Betting ("OTB"), in its broadest definition, allows betting on a horse or dog race not taking place where the bettor is. OTB was the first legal remote gambling service by wire. It began with intrastate intertrack wagers, permitted only when both tracks were conducting meets. Later, betting was expanded to allow OTBs at fairgrounds and other tracks, which were not having races on that day. It was a short step to interstate intertrack wagers. In 1970, New York finally authorized the first stand-alone OTB parlors.²⁰ This expansion was necessary to meet competition presented by faster, less skillful games introduced in the last four decades: state lotteries, gaming devices, and full casinos. Horse racing is slow by comparison, with twenty minutes between races. While licensed tracks have been in decline since the introduction of the first state lottery of this century in 1964, OTB has become a vital part of the parimutuel industry. Allowing bettors to wager on races taking place at other tracks creates non-stop betting action. The adoption of simulcasting, which allows bettors to see distant races live, has kept the U.S. horse racing industry alive.

Betting on races over the Internet was a natural development for parimutuel wagering. OTB had shown that there is no reason for bettors to be physically present at a track. OTB adopted computer technology early, and serious fans have been handicapping races with computers for decades. Further, as with sports betting, the outcome of wagers on horse and dog races can be verified independently.

A recent development has been gambling among players without the gambling entity either participating or taking a percentage of the winnings. Poker played on the Internet has seen the most growth. Players compete against each other online, either for "play money" or for real money. For instance, AOL has a poker room, which is currently limited to "play money."

Other activities that share all the characteristics of gambling but are not usually thought of as gambling are also booming on the Internet. Day trading, involving extremely short term bets on which way stocks and commodities and how their indices and op-

19. See Associated Press, *Bingo Mania* (Jan. 19, 1999), available at <http://www.rgtonline.com/gamespage/artlisting2.cfm/3069> (last visited Nov. 14, 2000).

20. See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 601 (McKinney 1970).

tions will move, has become a multimillion dollar a day business. On a larger scale, online stock trading has developed and is faster, cheaper and less intimidating than trading with a live broker. The increases in volatility and in prices of common shares, particularly with the shares of Internet companies, have also enticed new "investors" to take a risk and enticed experienced "investors" to buy and sell shares faster and to wager more money. Of course, more shareholders holding for short periods creates greater volatility, enticing individuals to try to guess the direction of short term market swings. At least one Internet gaming site has completely dissolved the line between betting and investing: it accepts bets on the fluctuations of the Dow Jones Industrial Average.²¹

II. WILL THE UNITED STATES LEGALIZE INTERNET GAMBLING?

The question presumes that Internet gambling is presently illegal under U.S. federal or state laws. This is probably true in some cases. But at the time this Article is being written there are no federal laws or regulations that specifically mention Internet gambling. Nevada,²² Louisiana,²³ Illinois,²⁴ Michigan²⁵ and South Dakota²⁶ are the only five states that have passed legislation that expressly makes it illegal under certain circumstances to accept wagers via the Internet. Dozens of bills are pending in state legislatures and in the United States Congress. The most important bill is the proposed federal Internet Gambling Prohibition Act ("IGPA"),²⁷ commonly entitled the Kyl Bill, after its author, Senator Jon Kyl (Republican from Arizona).

Adequately representing a client interested in becoming involved in Internet gambling requires a lawyer not only to determine whether current laws enacted prior to the invention of the Internet apply to this new and unexpected activity, but also to predict what statutes will be passed in the near future. A correct answer is vital

21. See Laurie J. Flynn, *Online Gambling Site Adds a Bet on the Dow*, N.Y. TIMES, Apr. 12, 1999, at C4.

22. See NEV. REV. STAT. 465.091-94 (1997).

23. See LA. REV. STAT. ANN. § 14:90.3 (West 2000).

24. See 720 ILL. COMP. STAT. 5/28-1(a)(12) (2000).

25. See MICH. COMP. LAWS ANN. § 432.202 (West 2000).

26. See S.D. CODIFIED LAWS §§ 22-25A-1 to -15 (Michie 2000).

27. S. 692, 106th Cong. (1999). Other important pending federal bills at this time are: the House companion bill to the "Kyl Bill," called the "Goodlatte Bill" (HR 3125); the proposed "Internet Gambling Funding Prohibition Act" (HR 4419 IH), introduced by John LaFalce and James Leach; and the "Comprehensive Internet Gambling Prohibition Act of 2000" (HR 5020), introduced by John Conyers on behalf of the U.S. Department of Justice.

because if current laws apply, the restrictions on Internet gambling are often felonies. But a determination of current law is hampered by the dearth of prosecutions and the complete absence of definitive appellate court decisions. A prediction of the content of future statutes is at best an educated guess, since legislation is shaped much more often by politics than by logic. The question is not academic. With the explosion of the Internet following so closely on the heels of the rapid expansion of legal gambling worldwide, lawyers are frequently asked whether this seemingly lucrative activity can be conducted online.²⁸

Even if we can determine whether Internet gambling is covered by existing criminal prohibitions, that answer alone will do little to help us predict how legislatures and courts will treat online wagers in the future. Changes in law always trail behind changes in society. So today's laws are the by-products of yesterday's concerns. Legislative restrictions on gambling remain in effect until political pressures force their re-examination; even then, lawmakers will not risk legalizing this morally suspect activity until they perceive that gambling has become acceptable to their constituents.

Anti-gambling restrictions rise and fall in repeated long-term cycles. Using history as a guide, it is possible to predict how the law of Internet gambling will evolve.

III. HISTORY OF REGULATORY TECHNOLOGY

A study of how the law has responded to changes in technology, particularly the technology of gambling, undercuts the conventional wisdom that online wagering will soon be made legal in the United States. Participants in academic and business conferences will often make the following comment: "Internet gambling will soon be so large that governments will have to legalize it so that they can tax it." As the following discussion will show, that is not how governments in the United States work. When morally suspect industries grow large enough to attract lawmakers' attention, the first responses are attempts to outlaw the activity. Virtually all Internet gambling bills introduced at the state or federal level have started as proposals to impose criminal penalties on operators, and sometimes on bettors. The history of the Internet itself demonstrates government's normal reaction to technological advances

28. Professor I. Nelson Rose is the author of *Gambling and the Law*®, an internationally syndicated column which is available at <http://www.gamblingandthelaw.com>. He receives, on average, at least one inquiry along these lines every day from entrepreneurs and members of the press.

tied to questionable activities: one of the first concrete federal Internet laws was a ban on Internet pornography.²⁹

Anyone who doubts that politics shapes legislation should examine the history of the Kyl Bill. It was first proposed as an amendment to the Crime Prevention Act of 1995.³⁰ In its early years, the Internet Gambling Prohibition Act proposed placing far more restrictions on gambling than the infamous Eighteenth Amendment's Prohibition on intoxicating liquors. It would have outlawed virtually everything from online gambling to online gambling magazines. The proposed restrictions against putting gaming information online were so broad, that it would have been dangerous for a licensed casino to advertise its legal activities on the World Wide Web.

The Kyl Bill's major weakness, aside from violating the First Amendment, was that it would have made it a federal crime merely to place a bet.³¹ The U.S. Department of Justice, not having fond memories of the Prohibition Era, has made it clear that it does not support a law that would require knocking on bedroom doors to go after \$5 bettors. In addition, the national horse racing industry, which depends upon off-track betting to survive, found that its computer operations might fall under the prohibitions on computer-assisted gambling. Similarly, the IGPA would have prohibited state lotteries from conducting their successful multi-state drawings, like Powerball. Therefore, the Kyl Bill had to be amended.

Every form of legal gambling that has a lobbying presence in Washington, D.C. was able to get an exception written into the bill. As passed by the Senate, the Internet Gambling Prohibition Act would still have outlawed all Internet gambling, but bettors have been dropped as potential violators of the Act, so only businesses would be committing crimes by conducting gambling online. Also excluded were:

1. Securities and commodities, as if day-trading were not gambling.
2. Closed-loop systems for placing bets on horse and dog races, including from a home PC in one state to an OTB operator in another.

29. See Communications Decency Act, 47 U.S.C. § 230 (1996); see also Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-06 (1998).

30. See 141 CONG. REC. S19113 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl). Senator Kyl stated that he has included a section making it illegal for individuals to gamble on the Internet if it is illegal in their state. See *id.*

31. See S. 692, 106th Cong. (1999).

3. Parimutuel pooling of bets between tracks.
4. State lotteries, including multi-state lotteries, so long as the betting PC was in a facility open to the general public.
5. Bets made for a fantasy sports league game or contest.
6. Closed loop intra-state systems, so bettors in Nevada could make wagers on sports events with licensed sports books in the state.

Politicians may talk about prohibition, but it is clear that in the future, the prohibition will extend only to gambling operations, which have little political power. For gambling operations with influence, mostly large established businesses, prohibition actually means clarifying the law to create partial legalization.

Nevada led the way in showing how an established industry can turn an attempt at prohibition into the legalizing of its business and the raising of barriers against potential competition. Nevada was the first state not only to outlaw, but also to legalize Internet gambling.³² In Nevada, making or accepting a wager over the Internet is now, by statute, a crime unless the operator is one of the state's licensees.³³ Similarly, South Dakota's newly enacted statutory prohibition on Internet gambling explicitly exempts the South Dakota state lottery.³⁴

One of the most recent state to prohibit/legalize Internet gambling is Michigan. On November 3, 1999, the Michigan House of Representatives passed House Bill 4689. The goal of House Bill 4689 was to make it a felony to place a bet on the Internet.³⁵ If enacted, House Bill 4689 would have allowed Michigan licensed gaming operations to take bets on the Internet, but only if expressly authorized by the legislature.³⁶ A month later, Senate Bill 562 passed in both houses and was signed into law by Governor John Engler.³⁷ Senate Bill 562 is broader than House Bill 4689 because it prohibits many activities, beyond gambling, from being conducted on the Internet. In Senate Bill 562, however, the crimes are no longer given names. Instead, the new law prohibits the use of the

32. See NEV. REV. STAT. ANN. 465.091-94 (1997).

33. Although the legislature has authorized online betting, there have been no regulations promulgated to date. Therefore, no Nevada licensee is operating Internet gambling from within the state. Currently, operators are awaiting clarification of federal laws.

34. See S.D. CODIFIED LAWS § 22-25A-15 (Michie 2000).

35. The bill would have added a new section, 315B, to the Michigan Penal Code.

36. No Michigan gaming operations were expressly authorized by the legislature to take bets.

37. See MICH. COMP. LAWS § 750.145(d) (2000) (amending Public Act 235).

Internet to commit or attempt a list of specified crimes, defined purely by references to existing statutes. Gambling on the Internet, for example, is not prohibited. Senate Bill 562 only makes it a crime to use a computer for communicating with a person with the purpose of "committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under sections 301, 302, 303, 304, 305, 305a, or 311 of this act or section 18 of the Michigan Gaming Control and Revenue Act, the Initiated Law of 1996, MCL 432.218."³⁸ While these sections are the state's anti-gambling statutes, they expressly exclude all forms of legalized gambling in the state. This means the prohibition on using the Internet for gambling is far from universal. Michigan's state lottery, racetracks, bingo, and casinos do not even have to seek a second approval from the Legislature, as they would have had to under House Bill 4689, to play their games online.³⁹

There will be many obstacles for legal gaming operators. Most states do not have the political and economic situation of modern-day Nevada, with an economy built around legal gambling. Although Michigan, South Dakota and the U.S. Senate also authorized existing forms of legal gambling to use the Internet, under the guise of prohibition, two states, Louisiana and Illinois, adopted Internet gambling prohibition laws that actually outlaw all online wagers. Whether other states and the House of Representatives opt for full prohibition or prohibition only of non-licensed gaming will depend upon the political influence and savvy of licensed operators.

Because the United States is a federation, states will always have the choice of completely outlawing all Internet gambling, even in the unlikely event that Congress were to lift all federal sanctions. Some states, like Utah, will follow that path. Under the thriving doctrine of federalism, the federal government will try to assist the prohibitionist states to keep their citizens free from operators based in foreign jurisdictions.

Even with express state authorization, few licensed U.S. operators will take bets online as long as the federal law remains unclear, threatening criminal prosecution and loss of the all-important gaming license. Some OTB outlets, however, are accepting phone and computer bets from out-of-state punters. Their willingness to risk violating federal law is not based on any legal precedent. Rather,

38. *Id.*

39. As with the case of Nevada's licensees, Michigan's legal gambling operations will wait until the federal law is clarified before taking bets online.

they are relying on the federal Department of Justice's complete lack of interest in going after state-licensed OTBs. The Department of Justice has limited its few criminal complaints to American citizens licensed in foreign countries who were taking bets from the United States. Some state attorneys general, on the other hand, have been aggressive, at least against Internet operators over whom they can clearly exercise personal jurisdiction. Local law enforcement has gotten involved, when the operator is physically within its jurisdiction. For example, the District Attorney of Los Angeles County seized computer files and records of *YouBet*, forcing the large horse-betting website to move out of the state and pay a \$500,000 "contribution" to problem gambling programs.⁴⁰ Even the OTB operations that ignore potential federal laws, publicly declare that they will not accept wagers from states where betting on horse races is illegal.

Federal, state, and local law enforcement officials will continue to make more showy raids and file more showy criminal and civil complaints against Internet operators. Add this scrutiny to the uncertainty surrounding existing federal laws, and the net effect will be to prevent almost all large, legitimate operators from becoming involved in online gaming through their U.S. based operations. Companies which have applied or contemplate applying for a license in a U.S. jurisdiction are even reluctant to accept wagers from Americans through their foreign-licensed subsidiaries. Meanwhile, competitive legitimate operators without U.S. ties will be developing their gambling websites under licenses from foreign countries. Questionable operations, many of whom do not even claim to be licensed, will flourish.

Eventually, those states who wish to license operators and allow citizens to wager online will be allowed to do so. As more developing countries turn toward legalization, taxation and regulation, and as more states pass enabling statutes, the U.S. federal government will be forced to shift away from a complete prohibitionist position to one of reluctant tolerance. Federal permission will, at first, be limited to state-licensed operations, if for no other reason than foreign and non-licensed operators have no lobbying presence in Washington. Both legal and illegal gambling has always been a state "police power" issue. Therefore local and state governments have the duty to protect citizens' health, safety, and welfare. The federal government becomes involved only when it is required, as

40. See Greg Miller, *Online Gambling Site Stops Taking Wagers from States*, L.A. TIMES, Nov. 12, 1999, at C1.

with Indian gaming. Under the Commerce Clause and the doctrine known as "our Federalism," it is difficult to understand how the federal government could justify intervening if states choose to allow their citizens to make or accept Internet wagers from other states with identical policies.⁴¹ If no interstate commerce is involved, the federal government should play no role whatsoever. Therefore, the federal government would not have the Constitutional power to prevent Nevada from deciding that its public policy favors allowing its citizens to wager online with other individuals who are also physically located in Nevada. Even when interstate commerce is involved, the federal government should not interfere if legislatures in Nevada and Michigan should decide that it is acceptable for their citizens to gamble online with operators licensed and operating in the other state.

As legal gambling, both on and off the Internet, continues to proliferate around the world, many state lawmakers will authorize reciprocal agreements with other states and countries, which have trustworthy regulation of online operators. Whatever federal restrictions currently exist will eventually have to have exceptions carved out, to allow states to decide for themselves how they want to address Internet gambling.

IV. THE THIRD WAVE OF LEGAL GAMBLING

The spread of gambling in the United States, which began toward the end of the twentieth century, was described as the third wave of legal gambling.⁴² Twice before in American history, legal gambling has spread across the nation, only to crash down in scandal and complete prohibition. Today's third wave has its roots in the re-legalization of casinos in Nevada in 1931 and the reopening of racetracks during the Depression. The movement gained strength with the rediscovery of the state lottery in the 1960s and swelled into new directions with the opening of casinos in Atlantic City in 1978.

But the modern tidal wave of legal gambling can be traced to a single day. On April 1, 1991, low-limit riverboat casinos opened in Iowa. The images of picturesque paddle wheels plying the Mississippi were broadcast by every network, voicing the message that

41. *See, e.g.*, *Pic-A-State PA, Inc. v. Pennsylvania*, 42 F.3d 175, 179 (3d Cir. 1994) ("[T]he 1994 Crime Control Act expressly authorizes interstate compacts regarding the sale of interests in out-of-state lotteries."); *see also* 18 U.S.C. § 1301 (2000).

42. *See generally* I. NELSON ROSE, *GAMBLING AND THE LAW* (1986).

riverboat casinos were safe, at least safe enough for conservative Iowa. Six months later, riverboat casinos, with no betting limits, opened in Illinois.

Every year Americans pay approximately \$7.5 billion for movie tickets at the nation's 6900 theaters (33,418 movie screens). About \$10 billion is spent on compact discs, including all forms of prerecorded music; the total is still less than \$13 billion.⁴³

By comparison, in fiscal year 1999, lotteries operating in thirty-seven states, the District of Columbia and three U.S. possessions, sold more than \$48.5 billion in lottery tickets.⁴⁴ Adding together parimutuel betting on horses, dogs and jai-alai, total "action" in casinos and on slot machines, wagers on sports, bets made in licensed card rooms, and expenditures before prize payments in charity gaming and Indian bingo, results in a total amount bet legally in the United States estimated over half-a-trillion dollars.⁴⁵ Looking only at revenue, Americans spent more money on gambling, \$54.3 billion, than they did on all live events, including concerts, plays, all movie theaters, all spectator sports, and all forms of recorded music combined.⁴⁶ In 1994, for the first time, adults in America spent more money on their gambling games than they did on toys for their children.⁴⁷

It is not just the money, but rather the general availability of gambling that is at issue. Legal gambling has become such an accepted part of American life that it is often not even noticed, even when its impact is extraordinary. The May 20, 1996 issue of *Forbes* magazine featured a cover story entitled *Getting Rich Outside Corpo-*

43. The actual total in 1997 was only \$12.2 billion. See *Weekday Trader: Slow Business-2: Movie Costs Cause Concern*, DOW JONES NEWS SERVICE, May 27, 1998, at 20:04:00; see also *1994 Southern Economic Survey-The Urban South*, ATLANTA CONST., Apr. 17, 1994, at R-11.

44. See Eugene Martin Christiansen, *The 1998 Gross Annual Wager*, INT'L GAMING & WAGERING BUS., Aug. 1999, at 17, 25 (noting that territories affected include Puerto Rico, Virgin Islands and Northern Mariana Islands).

45. See *id.* at 25. The actual dollar figure is \$677.4 billion. However, this number, called the "handle," is inflated, because it includes all wagers. For example, if a player bets \$25 and wins and then bets \$25 and loses, a total of \$50 has been wagered, even though no money has changed hands. Therefore, a more accurate number for making comparisons with other industries is the gross revenue or "win," (i.e. the amount players lose). Since this is money left behind by customers after the gambling transaction, it corresponds nicely with gross revenue or sales from other retail businesses.

46. See Eugene Martin Christiansen, *The United States Gross Annual Wager: 1997*, INT'L GAMING & WAGERING BUS., Aug. 1998, at 9, 17.

47. See Eugene Martin Christiansen & William E. Cummings, *The United States Gross Annual Wager*, INT'L GAMING & WAGERING BUS., Aug. 1995, at 29 (noting total sales of durable toys and goods was \$39.0 billion, compared to \$39.9 billion in gross revenue for gambling).

rate America. In a story on unusual millionaires, the writers and editors did not notice, or feel it newsworthy, to report that two of the four individuals pictured on the cover made their money from gambling. One was a professional poker player, the other the chairman of the Mashantucket Pequot tribe, owners of the world's largest casino. An indication of how respectable gambling has become is that the United States Supreme Court, for the first time, is hearing a number of major and minor cases involving legal gambling. The most dramatic reversal of the law's traditional antipathy toward gambling came in the Supreme Court's 1986 decision that a full-time gambler could declare himself to be in the trade or business of gambling for tax purposes.⁴⁸ The case involved a handicapper who spent all his time at the track, yet at the end of the year had lost more than he had won.

The future of gambling depends not entirely upon technology; the proliferation of legal gambling is shaped by historical legal baggage, feelings of morality and tradition, demographics, social and psychological factors and pure irrationality. For example, the Constitution of Mississippi outlaws lotteries but does not outlaw other forms of gambling. In *Knight v. State*,⁴⁹ the Mississippi Supreme Court ruled that charity bingo is not a lottery.⁵⁰ Therefore, the court ruled that the state legislature could authorize bingo without putting the issue before the voters.⁵¹ The next year, the state legislature authorized riverboat and dockside casinos. Mississippi has become the third largest casino state in the nation but still does not have a state lottery. The Constitution of Missouri also outlaws only lotteries. Accordingly, in *Harris v. Missouri Gambling Commission*,⁵² the Missouri Supreme Court ruled that any game of pure chance is a lottery.⁵³ Therefore, the state legislature did not have the power to authorize casinos with slot machines.⁵⁴

Gambling spreads in a haphazard manner that is only partially predictable. In the broadest view, the future of Internet gambling can be extrapolated by looking at patterns established in the past, but even those patterns are subject to change.

48. See *Commissioner v. Groetzinger*, 480 U.S. 23 (1986) (holding that for purposes of determining whether gambling losses were "trade or business deductions," full-time gambler may be engaged in "trade or business" under § 162(a) and § 62(1) of Internal Revenue Code of 1954).

49. 574 So. 2d 662 (Miss. 1990).

50. See *id.* at 669.

51. See *id.*

52. 869 S.W.2d 58 (Mo. 1994).

53. See *id.*

54. See *id.* at 62-64.

V. CYCLES OF LEGALIZATION

Like a prophecy fulfilled, it looks as though we are doomed to repeat our history, having failed to learn the lessons of the past. Twice before in American history, players could make legal bets in almost every state, but these waves of legal gambling eventually came crashing down in scandal and ruin. In places like the Wild West, law was mainly to protect the weak; it certainly was not supposed to interfere in a person's daily life. But in the long-settled cities of the East Coast, the law was an essential, omnipresent control for "civilized" life. Even today, Americans are not sure of what role law should have in society. Should the law be used only against acts that everyone agrees should be illegal, like murder? Or, should law be used as a tool to enforce morality, like Prohibition?

The United States has the most trouble dealing with the morally suspect industries such as alcohol, drugs, abortion, and gambling. Although the Prohibition Era is the best example, there have always been limits and prohibitions that large numbers of the population violated on a fairly regular basis, often without even knowing they had broken the law.

The anti-gambling prohibitions epitomize the traditional approach taken by American laws. These laws are not only designed to protect people from themselves. They are part of a greater moral framework, designed by policy-makers as a reflection of an imagined, ideal society. The voting public also accepts this concept of the role of law. Surveys and election results have shown that voters want most of the anti-gambling laws to stay on the books, even if they do not want those laws actively enforced.⁵⁵

Perhaps our cycles of complete prohibition changing to complete permissiveness and back again can be explained by the tendency of Americans to go to the limits, and beyond. Congress passed the Indian Gaming Regulatory Act with the image of tribal bingo halls in mind. Entrepreneurs took the poorly written law and used it to create some of the largest casinos in the world. Legislators in mid-western and southern states thought they were legalizing picturesque riverboats. Operators brought in 40,000 square-foot barges and built dockside casinos that are indistinguishable from non-floating casinos.

Gambling has had a recurring, consistent pattern throughout American history, beginning in the earliest colonial period and per-

55. See T.W. Mangione et al., *Citizen Views of Gambling Enforcement*, in GAMBLING IN AMERICA, Appendix 1, 240-300 (1976).

sisting up to the most recent elections and actions of state legislatures. When all forms of gambling are illegal, there is pressure for legalization, beginning with one game and then gradually extending to all forms.⁵⁶ Although it may be illegal, many people are gambling, either at social games or underground commercial lotteries, race books or casinos.⁵⁷ The anti-gambling laws are difficult to enforce, and the general population does not want arrests made anyway, if it means taking police resources away from more serious crimes. The result is widespread evasion of the law, leading to disrespect and corruption of law enforcement and the legal system.⁵⁸ The response by the public is a demand for reform – for something to be done to prevent involvement by officials in these areas of moral ambiguity.⁵⁹ The perceived solution is often a demand for legalization. If it is not a crime, there would be no reason to bribe law enforcement or public officials.

Sometimes the breakthrough in the universal prohibition on gambling comes from the legalization of a seemingly benign form. Charity bingo is often seen as a relatively harmless game, a means of raising needed money for worthy causes, not as a form of dangerous gambling.⁶⁰ Of course, the reality can be far different. Today, charity bingo is the least regulated form of commercial gambling and thus the most susceptible to cheating by insiders. State lotteries are sold as a voluntary tax. The California Lottery even took the official position that buying a lottery ticket is not gambling, but merely a fun way to raise money for education.⁶¹

Once one form of gambling has been legalized, the anti-gambling arguments based on morality begin to fade away. Legalization of gambling seems to correspond with a general trend toward permissiveness in society. The Victorian morality that says nothing is permitted is replaced by the belief that everything is permitted, so

56. See ROSE, *supra* note 42, at 13 (1986).

57. See *id.* at 8.

58. See *id.* at 9 (noting Knapp Commission study of corruption in New York Police Department, which it concluded that giving Police power to make gambling arrests for crimes that everyone commits leads to selective enforcement). Without correct supervision, the Knapp Commission concluded that the selective enforcement created an environment ripe with police bribery. See *id.* (stating individual officers could make between \$300 and \$1500 in pre-inflation 1972 dollars).

59. See *id.* at 19 (noting pattern in first and second waves of legal gambling).

60. See *id.* at 2 (noting that state legislatures legalized bingo provided that proceeds would go to charity).

61. See Nancy Skelton, *Lottery Ads Speak Not of Gambling: "This Will be Fun!,"* L.A. TIMES, Sept. 9, 1985, at 3 (quoting first lottery brochure distributed around state). "[L]otteries aren't gambling, simple as that," stated Brad Fornaciari, advertising agent for the California Lottery. *Id.*

long as you do not hurt another person. Gambling is the least harmful of the victimless crimes.

People see the state legalization of one game as the moral approval of gambling in all forms and see hypocrisy in the remaining prohibitions. Even the legalization of a game by a neighboring state can lead to a decline of the moral barriers against gambling. It is difficult for a state official to argue that a lottery would be immoral when his constituents are going across the state line by the millions to buy tickets.

Once the idea of legalized gambling has been accepted, at least in principle, and even if only with a single game, proponents can direct discussion away from morality and toward cost/benefit analyses of various other games that might be legalized. Once all of the states in a region offer the same game, the first to legalize a new game earns an advantage and can siphon off the disposable income of its neighbors, until they also legalize that form of gambling. A domino effect is created, as can be seen by the spread of state lotteries from state to state throughout the Northeast, and now, across the nation.

Meanwhile, the police and prosecutors are finding it increasingly difficult to enforce those anti-gambling laws that are still on the books, and venality is growing. Even the police begin to recognize hypocrisy in trying to prohibit a wager when an almost identical game is legally promoted by the state. Again, there are cries for reform and for a relaxation of all laws prohibiting gambling.

Most states are presently at the point of encouraging relaxation of gambling prohibition. The wave of legalized gambling is still rising throughout the nation. In the past, the wave continued to grow until many forms of gambling became legal, widespread and commercialized. In the past, at this later stage in the cycle, everyone seemed to be playing, and the money involved was staggering. The few prohibitions that still existed were virtually ignored by the police, and venality and corruption became widespread and open.

Historically, the next stage has been a devastating deluge of public scandals. Legal gambling is very big business keeping very few paper records. Of the more than \$600 billion that is bet each year, most is in the form of untraceable cash. It is not difficult to understand the temptation to rig the outcome of a legal game. But cheating can be devastating to the long-term acceptability of the game. Players can live with adverse odds, but rigging cannot be tolerated, particularly when it results in winners not being paid. Adding well-publicized incidents of cheating to public disclosures

of official corruption and a reawakened morality will result in a call for sweeping reform. Reform may encourage turning out of office all tainted officials and closing down the corrupt games.

What appears to be the final stage of the cycle is the revolt by the majority of the population, the sweeping in of an era of reform, and moral fervor, and with it an attempt to outlaw gambling forever. Statutes and even constitutional amendments are passed to ensure the prohibitions on gambling. Of course, this stage of prohibition only leads, inevitably, to the next stage where demand once again builds for a legalization of some forms of gambling.

VI. ELECTIONS SHOW A TIDAL CHANGE IN ATTITUDES TOWARD LEGAL GAMBLING

Opponents of legal gambling often claim victory when a gambling initiative or referendum is defeated. One spokesman for an anti-casino group in Ohio referred to victory over pro-gambling initiatives stating, "We thumped it pretty good."⁶²

Anti-gambling activists are wrong on both counts. Opponents have almost nothing to do with gaming's electoral defeats. More importantly, November 1996 marked the greatest victory in American history for legal gambling, particularly casino gaming. Unprecedented breakthroughs occurred in virtually every area of the country. Many states' citizens voted pro-casino. For example, for the first time in American history, the citizens of a state voted, in the face of active opposition, to bring in new, high-stakes casinos. In fact, the voters of two states, Michigan and Arizona, approved new casinos without limiting the size of wagers or restricting the gaming onto riverboats or mountaintops.

In Louisiana, local citizens throughout the state voted unanimously, in the face of active opposition, to retain high-stakes casinos. Six parishes in Louisiana have riverboat casinos, and Orleans Parish has a land-based casino. All seven voted to keep their casinos.

Finally, commercial gambling won scattered victories in every region of the country, even in the most conservative states: twenty-three additional parishes in Louisiana approved the option of establishing new riverboat casinos; Jefferson County, West Virginia approved up to 1000 Video Lottery Terminals (slot machines) at the Charles Town race track; Michigan rejected a ban on bingo for po-

62. Dennis Camire, *Michigan One Bright Spot for Gambling Interest in Tuesday's Elections*, GANNETT NEWS SERVICE (Nov. 6, 1996), available at 1996 WL 4390146 (reviewing November 1996 election results for public gambling initiatives).

litical fund-raisers; and Marion County, Indiana voted in favor of building a harness racetrack outside Indianapolis.

Following the 1996 election, William Safire wrote a column stating that the results showed people have grown tired of state-sponsored gambling.⁶³ In fact, the election showed exactly the opposite.⁶⁴ For example, all seven parishes in Louisiana that had casinos voted by margins up to seventy-one percent to twenty-nine percent to keep them. Statewide, voters approved riverboat casinos fifty-eight percent to forty-two percent.⁶⁵

News articles written immediately after that election called the results mixed, contrasting these wins against an even greater number of losses: counties voted to keep out casinos or slot machines in Iowa and Mississippi; Washington state refused slots for tribal casinos; thirty-five parishes in Louisiana voted to throw out video poker after mid-1999; and casino initiatives lost in Arkansas, Colorado, Guam and Ohio.

Lumping the number of victories on one side with defeats on the other gives the false impression that outcomes like this are normal. What is not recognized is that thirty years ago, proponents of casino gaming would have lost every election. The significance of the 1996 elections and what the results portend must be seen in the context of the history of legal gambling in this country.

The votes to keep casinos, and especially to bring in new ones, indicate that there has been a tidal change in the way Americans feel about legal gambling. Voters, for the first time ever, have accepted local gaming as a normal part of their lives. Voters have, in the past, approved state lotteries. They often vote in favor of horse racing. But in dozens of attempts over the past 200 years, never before had the citizens of a state voted, in the face of active opposition, to bring in new, high-stakes casinos. In 1996 it happened twice: in Michigan and Arizona.

The election in Louisiana was also of historic significance. The state legislature had made high-stakes casinos legal without a statewide vote of the people. The Louisiana law-makers further legal-

63. See William Safire, *Political Gambling*, N.Y. TIMES, Nov. 21, 1996, at A29 (stating that "across the country the moral blight of organized, big league casino and riverboat gambling - and the public disgrace of state sponsored gambling - took a licking from people who have grown tired of being taken for suckers.").

64. See *id.*

65. See Gary L. Burhop, *In '96, Gambling Gained New Voter Acceptance*, N.Y. TIMES, Nov. 26, 1996, at A12 (stating that "voters in every Louisiana parish with riverboat casinos approved the continuation of casino gaming, by margins as large as 71 percent to 29 percent."). Statewide, Louisiana voters approved riverboat gaming fifty-eight percent to forty-two percent. See *id.*

ized an unlimited number of video poker machines. The corruption that followed, including criminal convictions proving infiltration by organized crime into a video poker company, created a backlash. Republican Murphy J. "Mike" Foster ran and won the governorship on an anti-gambling platform. He then led the fight to outlaw all gambling.

But voters rejected the idea of prohibition. Instead, they carefully differentiated between tainted video poker and well-regulated casinos, which were bringing in tourist dollars. Over half the parishes voted to get rid of their video poker machines, but the pro-casino vote was a landslide.

Organized anti-gambling activists have almost never been a significant factor in elections. In 1990, professors William N. Thompson of the University of Nevada Las Vegas and John Dombink of the University of California Irvine, published their study examining virtually every election up to the date of publication.⁶⁶ Professors Thompson and Dombink found that statewide casino campaigns never succeeded, as long as a single powerful political actor was opposed.⁶⁷ They called this the "veto factor."⁶⁸

Until November 1996 the veto factor had held true for all statewide votes for high-stakes casinos. Thus, the campaigns to bring casinos to Ohio and Arkansas in 1996 had as little chance of succeeding as the Florida campaigns had in 1994 or 1978.

But something new and unprecedented occurred in Michigan and Arizona. There, all political voices seemed to be unified in opposition to casinos. The governors of both states actively campaigned against the initiatives. Yet, for the first time ever, statewide voters approved new high-stakes casinos.

Why are voters accepting legal gambling as a regular part of their lives? One answer is the power of incremental change: the unthinkable becomes commonplace if taken in small doses. When Michigan voters approved casinos for Detroit, the state already had eleven high-stakes Indian casinos. Two of the most profitable casinos in the world were already open in Windsor, Ontario, across the river from Detroit. Arizona's Governor Symington had already signed compacts with sixteen tribes, and in November, voters told him to let the five tribes that had been left out also have casinos.

66. See JOHN DOMBRINK & WILLIAM N. THOMPSON, *THE LAST RESORT: SUCCESS AND FAILURE IN CAMPAIGNS FOR CASINOS* 11 (1990) (analyzing success and failure of statewide casino campaigns).

67. See *id.* at 93-97 (explaining four major factors of veto model).

68. See *id.* at 98-170 (analyzing eighteen casino legislation campaigns).

West Virginia already allowed VLTs at four other racetracks. Indiana already had other racetracks.

The implications for Internet gambling are clear. As the opportunities to bet become commonplace on the World Wide Web, and advertisements and "play money" versions that are aimed at Americans enter nearly every home with a PC, gambling, which has been less visible, will become commonplace. Legalization of well-regulated forms of online gaming will follow if the controls imposed by comparable nations, like Australia, succeed.

The November 1996 elections were not "a mixed bag," as is so often claimed. The results show that voters often are accepting legal gambling as a regular part of their lives. The reason is also clear: an entire generation has grown up in a world with state lotteries and casinos in Atlantic City. Older voters also accept legal gambling as the norm.

The tidal change in the public's attitude toward legal gaming was confirmed two years later. Proponents of legalized gaming won virtually every race in the November 1998 elections. In some cases, it may have been merely coincidental, but in a nearly complete sweep, wherever legal gambling was even a minor issue, it was victorious. Polls conducted by casino companies have found that a majority of the country views casinos as merely another form of entertainment. While polls sponsored and released by special interest groups are suspect, it is improper to claim that millions of voters, in state after state, voting in favor of legal gambling, are also suspect.

Proposition 5 in California received the most attention. Proponents of Indian casinos had enormous financial and political resources. The size of the landslide, sixty-three percent to thirty-seven percent, shows California voters simply do not fear casinos or slot machines anymore. In Missouri, voters approved "riverboat" (actually "boats in moats") casinos for the third time. The Missouri Supreme Court keeps striking it down, and the state's voters keep reinstating it. Proponents have lost only one low-turnout special election. In a referendum, fifty-six percent of voters in Kenosha, Wisconsin refused to ban casino gambling. The vote is the first step in converting Dairyland Greyhound Park into a multimillion dollar casino to be owned by the Menominee Indian tribe.

Racetracks have always had more support than casinos but still often lost at the polls. For example, in 1980 New Jersey voters would not approve something as innocuous as Sunday racing. By 1998, voters adopted a constitutional amendment allowing the state

legislature to authorize off-track betting and even telephone wagering. It is safe to assume that an electorate that would approve telephone betting on horse races would accept the exact same wagers made on the Internet.

It may be pure coincidence, but the triumph at the polls was so complete that gambling won battles it did not even know it was fighting. For example, three of the leading opponents of Internet gaming lost their races: Attorneys General Skip Humphrey came in third in his race for governor in Minnesota; Jay Nixon will not be going from Missouri to the U.S. Senate (although he remains Attorney General); and in California, Dan Lungren lost to Gray Davis, who is also much more friendly toward Indian gaming. Only the defeat of Senator Jon Kyl of Arizona, who was not up for re-election, would have been more significant for Internet gaming.

Anti-gambling forces did have a couple of victories. A nasty fight in Maryland ended with a win for incumbent Governor Parris Glendening, a vocal opponent of racetrack slot machines. Even here, surveys showed that gambling was not an issue; voters were most concerned about education.

Gaming opponents rarely can gather enough signatures to get a repeal on the ballot. They failed in 1998 in both Michigan and Mississippi. But the vocal opposition can sometimes force fearful legislators to let the voters decide. The anti-gambling movement can claim only two straight wins in 1998: in Arizona and Missouri. Both states voted to outlaw cockfighting.

VII. THE IMPACT OF TECHNOLOGY ON LEGAL GAMBLING

Although it is possible to see the general trends and cycles in gambling, it is impossible to predict exactly how Internet gambling will develop, because the games depend so much on technology. Author Daniel J. Boorstin analyzed the differences between what he calls the new "Machine Kingdom," and the traditional designations of the "Animal, Vegetable and Mineral Kingdoms."⁶⁹ In the Animal Kingdom, for example, species evolve through natural selection and survival of the fittest, by adapting to their environment.⁷⁰ Machines, on the other hand, create their own environment, particularly by creating demand.⁷¹ The development of the Internet in general and gambling on the 'Net in particular illustrate how the

69. DANIEL J. BOORSTIN, *CLEOPATRA'S NOSE* 125-57 (Ruth F. Boorstin ed., 1994).

70. *See id.* at 127-36 (discussing Charles Darwin's theory of evolution).

71. *See id.*

invention creates a demand that did not formally exist, because the technology itself did not exist.

The law can react to unexpected technological developments. However, inventions cannot be uninvented. If the demand has been created, technology will eventually find ways of getting around the legal barriers.

Boorstin points out that the “most potent machines assimilate all environments;” radios, for example can be found everywhere.⁷² In 2000, it is the Internet. The Internet also ties in nicely with the most potent inventions for gambling: the video screen and computer. Every form of gambling, from lotteries, to bingo, poker, horse racing, and casinos, can now be played on a screen for money. Through the Internet, that screen can be on the players’ PCs.

Boorstin enumerated ways in which new inventions affect human experience.⁷³ Internet gambling gives rise to dramatic examples supporting his conclusions. First, “inventions expand experience;” technology creates its own demand.⁷⁴ Internet gambling created the ability to experience new forms of gambling, such as a casino existing on a video screen, and in a new location: the player’s own home. This has created a need for more and better cybercasinos.

Second, “inventions redefine experience,” old distinctions are dissolved or fogged over; they create new units and new boundaries.⁷⁵ Modern technology has played havoc with traditional legal categories. Gambling law developed discreet categories to handle the only games that were available over the centuries; there are separate statutes for lotteries, slot machines, casino gaming, parimutuel betting and bookmaking. But what is blackjack played on a PC? Are the games in an Internet casino truly a form of casino gaming? There is no real casino, not even a deck of cards. Bookmaking? Wagering information is sent over wires, but is a game played against a machine legally the same as a wager made on a contest? A machine is involved, so maybe online blackjack is a slot machine. The player is actually only punching in numbers, so maybe it is a lottery.

72. *Id.* at 138.

73. *See id.* at 160-65 (listing ways as expansion and redefinition of experience, creating penumbras, intrusiveness and irreversibility).

74. BOORSTIN, *supra* note 69, at 161.

75. *Id.* at 162.

And then there is the jurisdictional question: where does the bet take place? "Inventions are increasingly intrusive. The advance of technology in our times attests our increasing inability to exclude novelties or their consequences from our daily lives."⁷⁶ It is hard to imagine a more dramatic example than the Internet. Gambling is now inextricably tied to the Internet. With even the most advanced child protection screens on the families' PCs, can parents keep their children from learning about and eventually experimenting with Internet gambling?

VIII. CONCLUSION

It is difficult to judge today whether Internet gambling is good or bad for society in the long run. Our nation has grown by its need for the unnecessary, another name for human progress. Law constantly has to adjust to technological developments in gambling, designing new means of control. As Boorstin put it, "for us, invention has become the mother of necessity."

Internet gambling is not going to go away. There is general agreement that a complete prohibition is impossible to enforce, while complete legalization without regulation would cause untold social harm, particularly to children and compulsive gamblers. Lawmakers at all levels and in all branches of government are now faced with the necessity of finding a way to control this constantly evolving invention.⁷⁷

76. *Id.* at 164.

77. For additional information, see AMERICAN BAR ASSOCIATION - CENTER FOR CONTINUING LEGAL EDUCATION, GAMING ENFORCEMENT II (1998); ANTHONY CABOT, THE INTERNET GAMBLING REPORT (1997); ANTHONY CABOT, INTERNET GAMBLING REPORT II (1998); Harley J. Goldstein, *On-line Gambling: Down to the Wire?*, 8 MARQ. SPORTS L.J. 1 (1997); Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L. REV. 667 (1996); Jenna F. Karadbil, *Casinos of the New Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413 (2000); Joseph Kelly, *Internet Gaming: What are the odds for on-line betting sites and casinos reaching their full potential?*, 148 NEW L.J. 455 (1998); Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117 (2000); Claire Ann Koegler, *Here Come the Cybercops 3: Betting on the Net*, 22 NOVA L. REV. 545 (1998); Scott M. Montpas, *Gambling Online: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163 (1996); Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7 (1996); Symposium: *The Internet and the Sovereign State: The Role and Impact of Cyberspace on National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 415 (1998); Mark G. Tratos, *Gaming on the Internet*, 3 STAN. J. L. BUS. & FIN. 101 (Winter 1997); John Edmund Hogan, Comment: *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONST. L.J. 815 (1998); Tom W. Bell, *Internet Gambling: Popular, Inexorable, and (Eventually) Legal* (Mar. 8, 1999), at <http://www.cato.org/pubs/pas/pa-336es.html>; Internet Gaming International - Newsletter, Mary Ann Liebert, Inc., at www.liebertpub.com.

