

HOW SHOULD THE PAST INFORM THE FUTURE? REVIEWING REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES¹

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I. INTRODUCTION

Predictions for the growth of Internet gambling² in the United States confidently intone that it is not a matter of if, but when, the US will embrace this new market for gambling.³ Technological innovations for online gaming products have dazzled the world with their creativity.⁴ Although the US prides itself on its leadership in matters of commerce and technology, it is curiously behind the curve when it comes to Internet gambling. Globally, over 30 countries pro-

¹ REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES (Anthony Cabot & Ngai Pindell eds., 2013).

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² This article uses the terms “gambling” and “gaming” interchangeably, setting aside any implication that “gaming” is friendlier or more benign, or that “gambling” is pejorative. To draw fine lines between the terms would be to make a distinction without much difference. See, e.g., M. Neil Browne et al., *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?*, 78 NEB. L. REV. 37, 40 n.11 (1999); C. Jeremy Pope, Comment, *Losing the Battle but Winning the War: The Federal Government’s Attempts to Regulate Internet Gaming through Utilization of the Wire Act and Other Means*, 74 MISS. L.J. 903, 903 n.1 (2005). Some distinguish the terms somewhat differently, and suggest that online “gaming” is more about the story—think World of Warcraft—whereas “gambling” is primarily concerned with the chance to profit. See Symposium, *The Law & the Future of Gaming*, 16 SMU SCI. & TECH. L. REV. 127, 144 (2013); see also Bradley S. Fiorito, Comment, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1335 n.75 (2006) (suggesting that “gambling” involves actual wagers, whereas “gaming” does not).

³ See, e.g., *2013 Gaming Industry Forecast: Introduction*, CASINO ENTERPRISE MGMT., Jan. 2, 2013, available at <http://www.casinoenterprisemanagement.com/articles/january-2013/2013-gaming-industry-forecast-introduction>; see also Robert W. Stocker II & Peter J. Kulick, *Welcome to Legalized I-Gaming in North America*, CASINO LAW., Autumn 2013, at 21, available at <http://www.gaminglawmasters.com/magazines/casino/CLFall2013SMALLER.pdf> (suggesting that policymakers have grown comfortable with the concept of Internet gaming, and as a result, their focus has shifted from whether to allow it “to how to regulate [it]”).

⁴ See, e.g., Marian Green, *The Future of Gaming is Now*, CASINO ENTERPRISE MGMT., Oct. 1, 2013, available at <http://www.casinoenterprisemanagement.com/articles/october-2013/future-gaming-now> (“[T]he pace of digital technology and related trends speeds up throughout society . . . [and is] pushing the envelope for innovation on and off the casino floor.”).

vide for and regulate online gambling in some form or another, including large European countries such as France and Italy, and countries within the United Kingdom.⁵ In contrast, Internet gambling currently has a modest presence in the US.⁶ On the other hand, the US has an almost unrivalled depth of experience in the regulation of brick and mortar casino gambling.⁷ Ultimately, if Internet gambling is to flourish in the US, or in any jurisdiction, it will require a robust and trustworthy regulatory framework that inspires confidence. How will this framework be established? What are its vital elements?

Addressing these questions is an impressive new book, *Regulating Internet Gaming: Challenges and Opportunities*, edited by gaming law attorney and professor, Anthony Cabot and Associate Dean at the University of Nevada, Las Vegas William S. Boyd School of Law, Ngai Pindell. The eleven separately-authored chapters of the book provide a detailed, comprehensive picture of many of the components of an effective regulatory system for Internet gambling. The book does not limit its scope to Internet gambling issues in the US. Indeed, it draws substantially from experiences of jurisdictions around the world. However, the relative infancy of online betting in the US, and the market potential of the country, makes the US an important “emerging” jurisdiction. Therefore, the book’s prescriptions of the features for an appropriate Internet gambling regulatory template will be useful as the debate about Internet gambling in the US continues. Likewise, any jurisdiction considering development and regulation of an Internet gaming industry will benefit from the lessons of this book.

The Editors’ Note to the book provides a perspective that informs the orientation and theme of the book throughout. The editors see Nevada’s legalization of online gaming in 2013 as a signal event because it marked the initial American foray into licensing online gaming products.⁸ Until that time, the licensing and offering of Internet gaming products, in many instances products consumed by gamblers in the US, had been the province of a handful of countries throughout the world.⁹ But in establishing their *online* gaming protocols, these jurisdictions had drawn upon the wealth of experience of the US casino industry in regulating brick and mortar casinos. The synergy between the US and other countries, and that existing between brick and mortar regulation and regulation of online gaming, is the thread that runs throughout the book. As the

⁵ See David O. Stewart, *Online Gambling Five Years After UIGEA*, AM. GAMING ASS’N 4–5 (May 2011), http://www.americangaming.org/sites/default/files/uploads/docs/final_online_gambling_white_paper_5-18-11.pdf; see also GAMBLING COMPLIANCE, MARKET BARRIERS 2013/2014: A EUROPEAN ONLINE GAMBLING STUDY 8 (2013), <http://www.gamblingcompliance.com/files/MB3%20Exec%20Summary.pdf> (providing a Europe-specific map categorizing the various regulatory schemes across the continent).

⁶ Only three states—Delaware, Nevada, and New Jersey—have legalized online gaming. See *N.J. to Start Internet Gambling Nov. 26*, USA TODAY (Oct. 4, 2013), <http://www.usatoday.com/story/news/nation/2013/10/04/apnewsbreak-nj-to-start-internet-gambling-nov-26/2921703/>.

⁷ This article references “brick and mortar,” “land based,” and “terrestrial” gaming. For this Article’s purposes, the three terms are interchangeable because each term describes the same thing: gaming that takes place at a physical location rather than in cyberspace.

⁸ REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at ix.

⁹ *Id.*

Editors' Note itself states, "This book builds on the experiences of both American and international regulatory systems to describe current approaches and suggest best practices for the development of Internet gaming regulation and infrastructure globally."¹⁰

It is this blend of descriptive experiences and prescriptive "best practices" orientations that makes the book such a valuable tool.

II. BOOK ORGANIZATION

As noted, the book contains eleven chapters, and does not group chapters into additional sections. It seems helpful, however, to think of the book as having two primary components, with one other chapter being *sui generis*. One set of chapters focuses on the regulatory requirements for establishing the business of Internet gambling. This includes Licensing (chapter 1), Accounting, Audits, and Recordkeeping (chapter 2), Taxation of Regulated Internet Gambling (chapter 3), Technical Compliance (chapter 4), and Financial Transactions and Money Laundering (chapter 6). These chapters discuss the fundamental regulatory principles directed at those setting up an Internet gambling business. They are targeted predominantly at the relationship between regulator and licensee. Who can operate an online gaming business? What are the attributes of a licensable entity? How should these businesses be required to keep their books so they can be meaningfully audited? What is the proper model for taxing these business entities? How detailed do regulations of actual online game operation need to be? What checks can we install to prevent diversion and laundering of funds? These are the nuts and bolts questions and concerns any proposed regulatory system must address.

While also addressing components of a regulatory regime, the other group of chapters deals with issues that focus attention more on the gamblers themselves. This includes The Protection of Customer Funds (chapter 5), Internet Gambling Advertising Best Practices (chapter 7), Responsible Gaming (chapter 8), Ensuring Internet Gaming is Free from Fraud and Cheating (chapter 9), and Age Verification (chapter 10). The questions here have a different tenor. How does one make sure the gambler and the gaming operator aren't taken advantage of by cheating and fraudulent activity? What mechanisms are needed to protect the gambler from having his banked funds looted by the operator? How does one identify the "problem gambler" and protect him from himself? Similarly, how does one identify the underage gambler and block his participation? What is the appropriate role of regulators in restricting marketing for online gambling? This material inevitably addresses regulation as well, but the gambler's interest in these issues is much more easily observed than in the former set of chapters.

There is one chapter that doesn't fit this model: Proposal for an International Convention on Online Gambling (chapter 11).¹¹ All the other issues the book chapters address have analogues in the terrestrial gaming world. Licens-

¹⁰ *Id.*

¹¹ Marketa Trimble, *Proposal for an International Convention on Online Gaming*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES 353, 353-88 (Anthony Cabot & Ngai Pindell eds., 2013).

ing, accounting, taxing, money tracking, technical issues, fund security, problem and underage gambling, cheating prevention—all of these are issues for which brick and mortar casinos are also subject to regulation. Chapter 11, however, focuses on the characteristics of Internet gambling that lend themselves to an international convention on online gambling that would enhance and inform national regulation. It examines these issues without reference to the terrestrial gaming environment. This chapter is discussed more specifically in a subsequent section of this article. Apart from this, however, the book lends itself to organization and review along the lines set out above. This article examines how the book addresses the regulation of online gambling, and the ways in which the regulation of online gambling is necessarily and appropriately different from the regulation of land-based gambling.

III. THE FUNDAMENTALS OF REGULATING THE ONLINE GAMING BUSINESS ENTITY

A. *Licensing: Keeping the Bad Guys Out*

There is no area of gaming in which licensing standards are not central to the regulatory process. In chapter 1, gaming attorney Anthony Cabot “recommends a model approach for government licensure of the Internet gaming industry.”¹² The model approach differs from a “best practices” analysis because “no best licensing practices exist” for Internet gaming and because governments will reach different decisions regarding the appropriate specifics of their regulatory structure.¹³ As Cabot notes, the licensing template for online gaming is essentially the same as that used for terrestrial casinos. Five major considerations form the basis of this process:

- Breadth: what is the requisite connection to the gaming industry that warrants licensing?
- Depth: how far down into a licensable entity does the need to license individuals go?
- Level of Review: how “intense” is the investigatory process; i.e., how much information is collected?
- Criteria: what are the characteristics a licensing body requires of an applicant?
- Standards: how rigidly are the criteria applied?¹⁴

So, how does the licensing process differ when online gaming is the object of regulation, rather than a brick and mortar facility? In applying the factors identified above, it is the breadth of the inquiry that seems to be most affected with online gaming. Both forms of gambling extend licensing scrutiny to owners, those who would be entitled to profits, and some lenders and creditors. Further, the manufacturers of games for brick and mortar casinos require licensing just as they do in online settings. But the Internet gaming milieu cre-

¹² Anthony Cabot, *Licensing, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES*, *supra* note 1, at 1.

¹³ *Id.*

¹⁴ *Id.* at 11–12. These factors also have relevance to brick and mortar casinos. See ANTHONY N. CABOT & KEITH C. MILLER, *THE LAW OF GAMBLING AND REGULATED GAMING: CASES AND MATERIALS* viii–ix (2011).

ates distinct challenges because so many operators, “hosted service providers,” gaming software providers, and manufacturers of system platforms and game content are involved. As for software providers, the author notes that “the complexity of game software may go beyond the capacity of many regulatory agencies to understand or test,”¹⁵ and that “[e]ven with a state-of-the-art laboratory, some aspects of Internet gaming sites are so complex that unscrupulous persons can still exploit them without detection.”¹⁶ This suggests that in the brave new world of Internet gaming, licensing will be especially important “to the extent that regulators do not have the money, expertise, or technical resources to assure that the games are fair and honest through testing and enforcement.”¹⁷ In other words, regulators may be dependent to a significant extent on the character of game operators, and licensing “unsuitable” entities would be especially damaging to the integrity of the regulatory structure.

One implication of the complexity and resource issue is that a state like Nevada, with years of experience in brick and mortar regulation and a well-established regulatory resource infrastructure, will have a decisive advantage over states that are late to the game. Nevada regulators have trumpeted this advantage, and many people feel that primacy of regulation in the Internet field is of critical importance.¹⁸

Internet gambling also involves a number of non-gaming related service providers that regulators may choose to license. For example, payment processors have traditionally been a fundamental part of online gaming.¹⁹ While not involved in actually administering the gambling experience, payment processors handle player funds and possess significant player data. Somewhat surprisingly, however, the author concludes that licensing these entities, “is not an especially pressing matter.”²⁰

The chapter also gives detailed attention to another of the licensing factors—the criteria applied to applicants by regulators. As part of this discussion, the author poses an important question: what should US jurisdictions do about “Internet operators that have directly or indirectly (through their licensee) accepted US players” without state or federal law in the US authorizing such

¹⁵ Cabot, *supra* note 12, at 19.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., NEV. REV. STAT. § 463.745(1) (2013); Dave Neese, *State Watch: Internet Gaming Turns Christie into a Gambler Man*, TRENTONIAN (Apr. 15, 2013), <http://www.trentonian.com/article/TT/20130415/NEWS01/130419820> (suggesting New Jersey’s decision to legalize Internet gaming was motivated in part by a desire “to establish New Jersey’s global primacy” in the field); Letter from Brian Sandoval, Governor, State of Nev., to Sen. Harry Reid; Sen. Mitch McConnell; Rep. John Boehner; and Rep. Nancy Pelosi (Oct. 25, 2012) available at <http://quadjacks.com/wp-content/uploads/Sandoval-Letter-to-Congress-Gaming.pdf> (expressing support for a federal Internet gambling bill because it allowed for continuing and robust state authority—an important aspect for “a state that jealously guards its primacy in the regulation of gaming”).

¹⁹ See Andrea L. Marconi & Brian M. McQuaid, *Betting and Buying: The Legality of Facilitating Financial Payments for Internet Gambling*, 124 BANKING L.J. 483, 485 (2007) (“Many gambling Web site operators use payment processors . . . to collect their payments from the bettor or buyer.”).

²⁰ Cabot, *supra* note 12, at 22.

action?²¹ Should this be viewed as a flouting of the law, and therefore disqualifying? The author suggests that the answer is far from clear, and may vary from jurisdiction to jurisdiction.²² In fact, there are several wrinkles to the widely-debated “bad actor” issue.²³

First, the author addresses the contention that any operator who accepted bets from US players after October 16, 2006, the Unlawful Internet Gambling Enforcement Act (UIGEA)’s effective date, was aware they were not acting lawfully, and that this should be a disqualifying factor for licensing.²⁴ Along these lines, legislation proposed in California has suggested a December 31, 2006 date.²⁵ There is one problem, however: application of a UIGEA deadline suggests that UIGEA made accepting online wagers from US players illegal. Yet, a widely shared view is that whatever UIGEA *did* do, it did *not* make online gambling illegal.²⁶ UIGEA uses the term “unlawful Internet gambling” by reference to what is unlawful in states or according to federal law, rather than declaring Internet gambling illegal itself.²⁷ It thus begs the question of whether Internet gambling truly is illegal. UIGEA attempts to choke off the money supply to online gambling businesses by criminalizing the process through which credit cards are used to fund online gambling accounts.²⁸ Consequently, the use of UIGEA as a *per se* disqualifying red line has dubious merit.

Second, as the author points out, different types of online gambling might call for different deadlines. In 2001, the Court of Appeals for the Second Circuit upheld Jay Cohen’s conviction for accepting online sports wagers from US players.²⁹ While UIGEA may arguably be a relevant date for acceptance of wagers from US players on poker and games of chance, those accepting *sports*

²¹ *Id.* at 48.

²² *Id.*

²³ A bad actor is an individual or company that has previously violated the law yet is seeking a license under new or amended legal requirements, and a bad actor statute or clause permits the licensing authority to consider that past violation when determining whether the applicant is currently suitable for a license. See Melissa Jean Horne, Note, *Bad Actor Statutes: An Environmental Trojan Horse?*, 48 VAND. L. REV. 771, 772–73 (1995). For a sample bad actor clause that is applied to land-based gaming, see IOWA CODE § 99F.7(8)–(9) (2011).

²⁴ Cabot, *supra* note 12, at 48.

²⁵ *Id.* at 48 n.81. The bill Cabot mentions has since been resubmitted in the latest legislative session. A few provisions are amended—most notably, the license duration was extended from five years to ten years—but the December 31, 2006 cutoff date remains the same. See S.B. 51, 2013–2014 Reg. Sess., art. 4 (Cal. 2013) (to be codified at CAL. BUS. & PROF. CODE § 19990.23(h)(8)) (providing that any license applicant who operated or had an interest in a business that accepted wagers from US players after that date would be deemed unsuitable to operate an Internet gambling site).

²⁶ See, e.g., Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 45 (2010); Josh Chumbley, *Follow the Yellow Chip Road: The Path to Legalizing Internet Poker*, 36 S. ILL. U. L.J. 547, 552 (2012); Andrew M. Nevill, Note, *Folded Industry? Black Friday’s Effect on the Future of Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL’Y 203, 210 (2013).

²⁷ See Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(10)(A) (2012).

²⁸ See *id.* § 5363(1).

²⁹ *United States v. Cohen*, 260 F.3d 68, 70–71, 78 (2d Cir. 2001).

wagers after Cohen's conviction was affirmed clearly knew they had a flimsy legal basis for doing so.

Third, a Nevada law passed in 1997 "prohibits a person who is not licensed in Nevada from accepting or receiving a wager over the Internet from a person located in Nevada."³⁰ Is 1997 the appropriate red line date? The author's thorough treatment of this issue persuasively illustrates that a cutoff date approach is a bit simplistic and needs to be utilized carefully.

One other variation on disqualifying licensing factors is not mentioned in the chapter. This concerns the "Black Friday" prosecutions. On April 15, 2011, federal prosecutors unsealed indictments against the operators of the three most popular online poker sites, alleging they violated UIGEA by tricking banks into processing billions of dollars of payments for poker players.³¹ Additionally, the indictments alleged a scheme of fraud, bribery and money laundering by these operators.³² The story of what followed has been widely chronicled elsewhere,³³ but one important issue relates to the companies—and the principals thereof—that were involved. Should the people involved in either the criminal proceedings or the accompanying civil litigation be *personae non grata* if they seek to be licensed by state or federal online gaming regulators? Again, the question may not have a clear answer.³⁴ For example, Nevada has inserted a bad actor clause into its interactive gaming laws aiming to prohibit these operators from ever receiving a license unless they expressly submit to US jurisdiction and waive several defenses to further liability, while New Jersey has eschewed such a limitation.³⁵

Because online gambling in the US is in its beginning stages, the licensing process will likely struggle to find its bearings. As a basic template for the

³⁰ Cabot, *supra* note 12, at 49 (citing NEV. REV. STAT. § 465.092 (1997)). The statute has since been qualified; operators outside Nevada may now accept wagers from Nevadans if the jurisdiction in which the operator is licensed has signed an agreement or compact with Nevada allowing them to do so. See NEV. REV. STAT. § 465.094(5) (2013).

³¹ See Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds 1 (Apr. 15, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf>.

³² See *id.*

³³ See, e.g., Lawson v. Full Tilt Poker Ltd., 930 F. Supp. 2d 476, 481 (S.D.N.Y. 2013) (chronicling the various indictments and subsequent civil suits brought by players attempting to recover funds from the seized operators); Nick Sortal, *For Poker Players, No Life After Black Friday*, SUN SENTINEL (Apr. 12, 2013), http://articles.sun-sentinel.com/2013-04-12/business/fl-poker-decline-wpt-041213-20130412_1_full-tilt-poker-world-poker-tour-online-poker; Nevill, *supra* note 25, at 207, 213–17.

³⁴ See Steve Ruddock, *A Comparison of Online Gambling in New Jersey, Nevada, and Delaware*, NEWARK STAR-LEDGER (Oct. 1, 2013), http://www.nj.com/onlinegamblingnj/index.ssf/2013/09/a_comparison_of_online_gamblin.html (comparing the three states that have already legalized Internet gambling and noting no two have approached this issue identically).

³⁵ Compare 2013 Nev. Laws Ch. 2 (A.B. 114), §§ 3, 10(6)(a)–(b) (amending NEV. REV. STAT. § 463.750), with Hoa Nguyen, *American Indian Tribes Oppose New Jersey's Internet Gambling Measure*, THE AEGIS (Apr. 27, 2013), available at 2013 WLNR 10378352. Perhaps New Jersey omitted a bad actor clause in an attempt to attract experienced operators and compete with Nevada, especially given the fact that online play in New Jersey recently began in November 2013. See *N.J. to Start Internet Gambling Nov. 26*, *supra* note 6.

issues that need to be addressed and a thoughtful analysis of what the US can learn from the rest of the world, chapter 1 is an invaluable resource for regulators and those interested in the development of Internet gambling businesses.

B. *The Money*

A theme that runs through several of the chapters focuses on the basics of the regulatory scheme and the need for regulators to identify the purposes of their regulation of the Internet gaming model. Without such an understanding, regulators will struggle to develop a coherent and workable set of rules. The regulatory purposes that inform the regulation of terrestrial gaming will likely differ in important respects from the regulatory purposes affecting online gaming. In chapter 2 (Accounting, Audits, and Recordkeeping), attorney Peter Kulick clearly demonstrates how important it is for regulators to be aware of these differences. As he notes:

The economic model, cost structure, means of operating games and the roles of suppliers differ in the Internet gaming industry from that of the land-based gaming industry. Accordingly, effective Internet gaming laws and regulations must be sensitive to these differences and embrace regulatory approaches that adhere to the realities of the Internet gaming industry.³⁶

1. *Identifying It*

What are these “realities” to which the author is referring? Perhaps the most significant feature is that the “flow of money in the operation of an Internet gaming operation differs from brick and mortar casinos.”³⁷ Typically, a player will use a credit or debit card to transfer money to the Internet gaming operator.³⁸ The funds transferred are then held in an account in the player’s name.³⁹

As the author notes, standard accounting practices are not well suited to land-based casinos because of the millions of dollars that change hands from player to casino to another player.⁴⁰ Requiring a complete record of each gaming transaction would quickly bring the action to a halt. Instead, casinos use a form of aggregate accounting where revenue results are observed over a stated period of time.⁴¹ But in one important sense, the conventional method of funding Internet accounts may offer advantages in the auditing and accounting processes. Online gaming—indeed, all online activity—leaves an electronic trail that can be stored and later retrieved for accounting and audit purposes. This “affords the opportunity to depart from aggregate accounting.”⁴² Internal controls must be established and adhered to for either form of accounting to operate effectively.⁴³ But as the author explains, the internal controls for brick

³⁶ Peter J. Kulick, *Accounting, Audits, and Recordkeeping*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 55, 57.

³⁷ *Id.* at 58.

³⁸ *Id.* at 58-60.

³⁹ *Id.* at 60.

⁴⁰ *Id.* at 63-64.

⁴¹ *See id.* at 64.

⁴² *Id.*

⁴³ *See* CABOT & MILLER, *supra* note 14, at 48-49.

and mortar casinos are not completely transferable to online gaming.⁴⁴ The challenge for regulators is to be sensitive to the ways in which internal controls for online gaming need to depart from the traditional protocols developed over the years for land-based casinos. While the land-based casino setting offers guidance, best practices for Internet gambling will likely be a product of reference to jurisdictions that have an established online regulatory regime. Many of the “guiding principles” for audits, accounting, and record-keeping identified by the author show the influence of these jurisdictions.⁴⁵

2. *Taxing It*

Few would doubt that states do not allow and regulate gambling just for the sheer enjoyment of players. Tax revenue produced from gaming activity is an integral component of the dynamics of legalized gambling.⁴⁶ Indeed, the licensing and accounting/audit prescriptions discussed in the book exist in part because of the need to insure that the taxing entity receives the revenues prescribed by law. This won’t happen if unscrupulous people are licensed, or if accounting practices are not scrupulously followed.

There is considerable debate in the US regarding the proper tax rate for casinos,⁴⁷ and wide variation in the rates states assess.⁴⁸ But whatever the rate, the general consensus seems to be that the taxable *amounts* for land-based casinos are the proceeds—after paying out wins, but before paying expenses—

⁴⁴ See Kulick, *supra* note 36, at 56-57 (“While Internet gaming and land-based gaming share a common underlying activity, the practical means of conducting gaming and the business model differ.”).

⁴⁵ See *id.* at 84–85.

⁴⁶ See John Warren Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 *DRAKE L. REV.* 51, 82 (1994) (“Gambling is generally legalized for the purpose of capturing tax revenues.”).

⁴⁷ See, e.g., Eugene Christiansen, *The Impacts of Gaming Taxation in the United States*, AM. GAMING ASS’N (June 2005), http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/the_impacts_of_gaming_taxation.pdf (acknowledging the competing virtues of high tax rates that “satisfy government’s immediate fiscal needs” and low rates that “shift the policy emphasis . . . toward [long-term] economic development”). For a more philosophical and constitutional perspective, see William N. Thompson, *Gambling Taxes: The Philosophy, the Constitution and Horizontal Equity*, 17 *VILL. SPORTS & ENT. L.J.* 389, 410–15 (2010).

⁴⁸ See 2013 State of the States: the AGA survey of Casino Entertainment, AM. GAMING ASS’N 11–22 (2013), http://www.americangaming.org/sites/default/files/uploads/docs/aga_sos2013_fnl.pdf (providing a state-by-state casino economic impact analysis and noting the tax rate in each state). For example, Colorado imposes a “[g]raduated tax rate with a maximum tax of 20%,” while Florida levies a flat 35% rate. *Id.* at 11–12. Illinois has a graduated tax rate that may fluctuate between 15% and 50% of gross revenue. *Id.* at 13. Maine taxes both the amount wagered *and* the gross gaming revenues. *Id.* at 15. The lowest rate is, perhaps unsurprisingly, in Nevada, with a maximum of 6.75%. *Id.* at 18. The highest rate is in Pennsylvania, where slot machines are taxed at 55%. *Id.* at 21. Variation in tax rates even within a state is common. See, e.g., *id.* at 13, 15 (noting Indiana and Louisiana tax riverboats and land-based casinos differently from racinos); *id.* at 21 (noting Pennsylvania taxes slot machines and table games at different rates); see also IOWA CODE § 99F.11 (2013) (providing for differing tax rates depending upon the type of casino—riverboat, land based, or racino—and the presence or absence of other gaming venues in the same county).

realized by the gaming entity.⁴⁹ Taxing Internet gambling, however, presents a unique set of problems. In chapter 3, tax attorney Sanford Millar sets out the two basic models for this taxation: 1) taxing gross gaming revenues (GGR), or 2) taxing gross deposits. Millar supplies a succinct and helpful analysis of how these models differ and the benefits and drawbacks of each, as well as recommendations for which model better achieves the objectives of consumer protection and generation of tax revenue.

Simply put, a GGR model requires operators to pay a percentage of their “revenues”—that is, the amount wagered by players, less the amount returned to players as winnings, with deductions for specified expenses.⁵⁰ A deposit model, on the other hand, requires the operator to pay a percentage of the amount of money players deposit into accounts for wagering with that operator.⁵¹ So which approach do operators prefer? Millar says operators generally prefer the GGR model, and they “lobby heavily to implement GGR tax models in countries proposing new online gambling legislation.”⁵² Why this preference? In addition to the fact most established operators are more familiar with a GGR model, the primary reason is the perception that it lowers the business risk for operators, because they are being taxed only on the profits they realize.⁵³ But as the author points out, from a licensing jurisdiction’s perspective, the GGR model has several shortcomings.

The most important problem with the GGR is that taxes are collected retroactively, after a set period of time for measuring profits has elapsed.⁵⁴ This complicates the process of the taxing entity receiving taxes on a timely or predictable basis.⁵⁵ Moreover, the revolving nature of customer accounts and the payment of promotional credits to customers make tax revenue expectations even more problematic. GGR amounts would have to be calculated periodically, adding to the transaction costs of tax collection, a problem made worse when multiple jurisdictions are involved.⁵⁶ The deposit model, on the other hand, is more efficient and predictable for a taxing jurisdiction because it is based not on profits after the gambling has occurred, but on player deposits beforehand.⁵⁷ Likewise, it is “game neutral,” unlike the GGR setting in which the tax calculation is complicated due to the variety of game types.⁵⁸

Millar cogently argues that the objections to the deposit model raised by operators may be overstated.⁵⁹ An operator needs to examine all aspects of a

⁴⁹ See, e.g., IOWA CODE § 99F.1(1) (defining “adjusted gross receipts”—which are used to calculate an operator’s tax burden under § 99F.11—as “gross receipts less winnings paid to wagerers”); John E. Anderson, *Casino Taxation in the United States*, 58 NAT’L TAX J. 303, 306 (2005) (“The precise definition of the tax base varies from state to state, but the essential tax base in all cases is . . . gross gambling receipts minus payout for prizes.”).

⁵⁰ Sanford I. Millar, *Taxation of Regulated Internet Gambling*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 87, 90.

⁵¹ *Id.* at 91.

⁵² *Id.* at 92.

⁵³ *Id.* at 90.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 90–91.

⁵⁷ *Id.* at 91.

⁵⁸ *Id.*

⁵⁹ See *id.* (describing critics’ concerns with the deposit tax model as “overly simplistic”).

jurisdiction's tax collection model in making business decisions, not just the form of the basic model. Tax rates, collection methods, and overall tax liability should be the focus. Further, a deposit tax model lends predictability to the operator because it is more straightforward and efficient.⁶⁰ Nevertheless, operators believe that business risks are higher with the deposit model. For example, they fear that funds may be deposited, and therefore be subject to tax, but not put into play by the gambler.⁶¹ They also fear that a malicious competitor could deposit money into an account and immediately withdraw it so as to impose a tax liability on the operator.⁶² However, the author says this is an unlikely scenario.⁶³ Additionally, many of these business risks can be mitigated by allowing operators to charge customers for early withdrawals, and providing tax credits for such withdrawals.⁶⁴ Finally, issuing tax credits for funds withdrawn by players at the end of a payment period effectively converts the deposit tax into a "net deposit tax," further reducing business risk for operators.⁶⁵

In a detailed and informative chart, Millar sets out the online taxing policies of many jurisdictions around the world.⁶⁶ It is a dizzying array of treatments. In addition to the two basic taxing models described above, there are also hybrid taxation models that differentiate between types of gambling.⁶⁷ Australia is one such hybrid jurisdiction. As the author notes, "Australia's approach to Internet gambling is complex, particularly because each state and territory—like each of the United States—regulates its own gaming activities, subject to a few national restrictions."⁶⁸ In Australia, monopoly models, under which government directly or indirectly operates online gaming sites, exist alongside license fee models, under which private operators are taxed for their online activities.⁶⁹ This seems to hold promise as a model for the US, the author suggests.⁷⁰ Online casinos could be taxed at a moderate rate using a GGR approach, while lotteries and bookmakers could be subject to a net deposit model.⁷¹ In their various forms, hybrid models allow for flexibility in the multi-jurisdictional setting the US presents. The author puts it succinctly: "Despite their complexities, hybrid models could also be tailored for each specific jurisdiction. Different states have very different existing gambling markets, so each could adopt a model that suits its regulatory, economic, and social needs."⁷²

⁶⁰ *Id.*

⁶¹ *Id.* at 91–92.

⁶² *Id.* at 92.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 118–21.

⁶⁷ *Id.* at 92–93.

⁶⁸ *Id.* at 108.

⁶⁹ *See id.* (using the Australian state of New South Wales as an example; that state has a monopoly model for its lottery but a license fee model for sports betting and keno).

⁷⁰ *See id.* at 118.

⁷¹ *Id.*

⁷² *Id.*

If operators prefer the GGR model and jurisdictions prefer the deposit model, which model of taxation should a player prefer? Does the deposit model place limitations on the funds a player would have available for gambling, and impose restrictions and penalties for withdrawals? While the player's interests here might seem to be secondary to the tension between operator and taxing entity, they should not be forgotten. A taxation model that would effectively shift the tax burden to the player may not be the best course of action.

Millar's treatment of the tax issue skillfully analyzes a difficult and arcane issue, and comprehensibly describes the available taxation models along with the benefits and drawbacks of each. Taxation questions will be prominent as Internet gambling grows in the US, and when taxation models are considered, Millar's work will be a valuable reference for this discussion.

But even when a suitable tax model is established, other threats to the accrual of tax revenues to licensing governments exist. Without a detailed set of provisions for insuring the smooth operation of online games, technical problems can stanch the flow of tax proceeds. In chapter 4, Richard Williamson describes in careful detail the importance of a wide range of technical compliance issues: testing and authenticating software, system recovery, game interruption, and data storage and security, to name just a few.⁷³ These are the critical nuts and bolts that determine the success of an Internet gaming platform. While land-based casinos deal with technical compliance issues as well, online gaming lives or dies by its ability to manage these challenges. It is difficult to imagine a better detailed outline of these issues than the one Williamson supplies in the book.

3. *Keeping the Money Clean*

Another threat to the tax revenues flowing to licensing jurisdictions has considerable notoriety. This is the problem of money laundering. Attorney Stuart Hoegner identifies money laundering as, "the single biggest regulatory matter Internet gaming regulators face from a transactional standpoint."⁷⁴ Perhaps because of the developing nature of Internet gaming regulation and the speed, international nature, and anonymity of many Internet transactions, there is an assumption that online gambling is ripe with opportunity for money laundering. Establishing best practices to curtail money laundering seems to be an essential part of the online regulatory process.

⁷³ Richard Williamson, *Technical Compliance*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 123, 123–60. The comprehensive list of topics Williamson discusses over the course of his chapter illustrates just how important technical compliance is and just how many potential problems can arise. The list includes software testing and authentication; system recovery; game interruption; control over software changes; random number generators; interoperability; internal controls to detect and prevent errors or irregularities; system modifications; emergency approvals; system maintenance; data security; data storage; disaster recovery; time synchronization; player terms of use; account registration and controls; prevention of multiple accounts; rules governing or even prohibiting fund transfers between player accounts; responsible gaming features; account access controls; and player protections—including from artificial player software, often called "bots."

⁷⁴ Stuart Hoegner, *Financial Transactions and Money Laundering*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 187, 187.

What is money laundering? Simply put, it is a way of disguising the source of illegally generated funds by processing them through a legal enterprise.⁷⁵ The chapter poses the dual questions of how extensive the problem is, and whether Internet gaming really is an effective means of money laundering. Answering these questions is important because, almost by definition, anti-money laundering protocols make business operation more expensive for legitimate operators, and overreaction can chill business opportunities. Hoegner suggests that despite some claims that the Internet gambling money laundering problem is extensive, the quantitative evidence as to the pervasiveness of money laundering is far from clear.⁷⁶ In fact, many commentators suggest the problem is overstated, and that, for example, “Internet gambling properly regulated is already difficult to launder money through.”⁷⁷ Jurisdictions may be better served using “more nuanced and less alarmist formulations” in establishing best practices.⁷⁸

Whatever the extent of the problem, there are widespread global efforts to address the issue. One of the most prominent efforts is the initiative of the Financial Action Task Force (FATF) recommendations for money laundering. The FATF was established by the G7 countries in 1989, and has 36 members, including 34 member jurisdictions and two international organizations.⁷⁹ FATF has issued forty recommendations on money laundering, which the chapter examines.⁸⁰ Several of these recommendations serve as the basis for the author’s suggestions on best practices, and warrant specific reference.

First, one of the most effective measures against money laundering is for Internet gambling to be regulated.⁸¹ Prohibition promotes efforts to launder money through online gambling; regulation makes it more difficult.⁸² The ironic effect of UIGEA is that it prohibited honest, regulated credit card processors from being involved in Internet fund transfers.⁸³ Money laundering thrives in an unregulated environment.

Second, regulators need to identify areas where there are particular vulnerabilities and direct resources there, rather than taking a “check-box” approach where one size fits all.⁸⁴ This is what the author terms a “risk-based” approach to regulation.⁸⁵ This is essential for online gaming because technological and market change will be so fluid that without flexibility, regulators will be overwhelmed and will squander regulatory resources on ineffective measures.⁸⁶

⁷⁵ *Id.* at 188.

⁷⁶ *See id.* at 196 (identifying several reasons why money laundering’s prevalence is difficult to quantify).

⁷⁷ *Id.* at 198 (quoting Joseph M. Kelly et al., *How Vigilant Should We Be against Money Laundering?*, 13 *GAMING L. REV. & ECON.* 278, 282 (2009) (internal quotation marks omitted) (comments of Mark Clayton, a Nevada gaming attorney)).

⁷⁸ *Id.* at 197.

⁷⁹ *FATF Members and Observers*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/> (last visited Mar. 6, 2013).

⁸⁰ *See Hoegner, supra* note 74, at 202–08.

⁸¹ *Id.* at 232.

⁸² *Id.*

⁸³ *Id.* at 233.

⁸⁴ *See id.* at 234.

⁸⁵ *Id.*

⁸⁶ *See id.* at 234–35.

Third, transparency of business, customer, and regulatory relationships is essential. Anonymity is to be avoided. Nevada's history of requiring transparency in its regulation of casino gaming is one which should be emulated by other jurisdictions, the author recommends.⁸⁷ Of course, this history of regulation is the structural advantage Nevada enjoys over other jurisdictions as brick and mortar regulations are adapted to the online setting.

Similarly, transactions must be traceable. This means gaming transactions can be followed to their source and can be reconstructed if necessary.⁸⁸

Finally, regulators need to have and exercise broad control over many parts of the structure of online gaming. Availability of records is essential. Some jurisdictions may condition licensure on the existence of a local corporation that is otherwise subject to the laws of that jurisdiction.⁸⁹

Of course, best practices are complicated by the fact that money laundering would not be effective unless there is cooperation among jurisdictions. One regulatory body has little chance of preventing money laundering on its own.⁹⁰

As far as the US is concerned, money laundering in the gaming realm is extensively governed by federal law. The Financial Crimes Enforcement Network (FinCen) operates as a bureau within the Department of the Treasury.⁹¹ FinCen implements regulations requiring casinos to report currency transactions exceeding \$10,000 (CTRs), and establishes guidelines to prevent "structuring" of financial transactions so as to evade the financial trigger.⁹² Additionally, casinos must report suspicious patron activity by submitting a form (Suspicious Activity Report—Casinos, or SAR-C), with suspected money laundering being a prime concern.⁹³ While these provisions aren't always scrupulously adhered to,⁹⁴ they carry a substantial disincentive for operators to be

⁸⁷ *Id.* at 236–37.

⁸⁸ *Id.* at 239.

⁸⁹ *See id.* at 241.

⁹⁰ *See* International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, FIN. ACTION TASK FORCE 11 (2013), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

⁹¹ 31 U.S.C. § 310(a) (2012); *see* Treasury Order 180-01 (Mar. 24, 2003), *available at* <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to180-01.aspx>; *FinCEN's Mandate from Congress*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/statutes_regs/bsa/ (last visited Apr. 4, 2014).

⁹² 31 C.F.R. § 1021.311 (2013); *see* 31 C.F.R. § 1010.100 (2013); FinCen Advisory No. FIN-2009-A003, *Structuring by Casino Patrons and Personnel* (July 1, 2009), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2009-a003.pdf; FinCen Guidance No. FIN-2008-G007, *Recognizing Suspicious Activity—Red Flags for Casinos and Card Clubs* (Aug. 1, 2008), *available at* http://www.fincen.gov/statutes_regs/guidance/html/fin-2008-g007.html.

⁹³ 31 C.F.R. § 1021.320(a)(1), (a)(2)(i), (b)(1) (2011).

⁹⁴ *See* Michael Luo, *Las Vegas Casino Settles in Money-Laundering Inquiry*, N.Y. TIMES, Aug. 28, 2013, http://www.nytimes.com/2013/08/28/us/las-vegas-casino-settles-in-money-laundering-inquiry.html?_r=1& (reporting that the Las Vegas Sands Corporation agreed to pay the US government over \$47 million as a penalty for permitting structured transactions from—and failing to file a SAR-C about—"a Chinese businessman with a pharmaceutical company in Mexico who was . . . the biggest all-cash gambler in the history of the Venetian," and who specifically instructed the Venetian that he did not want the government to know about his fund transfers).

cavalier about such matters. In any event, the existence of this federal regime will relieve states of the need to develop their own set of money laundering provisions for online gambling. Still, there will undoubtedly be challenges in adapting these measures to the online world.

IV. GAMBLING ONLINE: HOW DO WE PROTECT THE PLAYER?

As noted in the Introduction to this review, a portion of the book focuses less on how to regulate the licensee and more on how to protect the player of online games. The material within the set of five chapters with this emphasis makes it clear that the necessary protections are numerous. An Internet gambler needs to be assured that his funds are secure and that he is getting a fair game. As a matter of social policy, regulators need to establish mechanisms to protect people from playing too much, and prevent others from playing at all. Finally, regulators need to discern the proper limits on marketing the availability of online products.

A. *Thwarting Thieves and Stopping Swindlers*

In chapter 5, entitled *The Protection of Customer Funds*, attorney Nick Nocton refers to several instances around the world in which customer funds were either threatened or actually lost.⁹⁵ The most notorious US case involves Full Tilt Poker; customer funds on deposit with the operator were not secured and many customers lost part or all of their money.⁹⁶ These examples make clear that ensuring customer fund security is an essential part of Internet gambling regulation. But, as the author tells us, there are reasons why complete protection of customer funds may not be achievable, and why “securing the safety of a customer’s funds is a far-from-straight-forward task.”⁹⁷ The primary reason is that a customer loses control over his funds when he instructs his bank to transfer money to an online gambling operator.⁹⁸ When the money is transferred, whether through the use of a credit card or otherwise, the player becomes a creditor of the operator.⁹⁹ Moreover, funds deposited with the operator go into an account the operator has with its own bank, and the operator

⁹⁵ Nick Nocton, *The Protection of Customer Funds*, in *REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES*, *supra* note 1, at 161, 163–64. Nocton mentions four specific instances in which companies allegedly misused funds or otherwise had “accounting irregularities:” Sporting Options in 2004, and three 2012 incidents—Worldspreads Limited, Purple Lounge, and 5050 Poker.

⁹⁶ See *Full Tilt Poker’s Ill Founder Pleads Guilty But Avoids Prison*, L.A. TIMES (Apr. 16, 2013), <http://articles.latimes.com/2013/apr/16/business/la-fi-poker-guilty-20130416> (“Full Tilt Poker founder Raymond Bitar [was] accused of using online player funds to finance [the] company in what prosecutors called a Ponzi scheme.”). The United States recently retained a settlement company to process Full Tilt repayments, and the process began in September 2013. *Full Tilt Poker Refund Process Begins Today with Email Notices to Players*, OFF SHORE GAMING ASS’N (Sept. 16, 2013), http://www.osga.com/artman/publish/article_10697.shtml. In February 2014, the first round of repayments were made, “totaling approximately \$76 million.” FULL TILT POKER CLAIMS ADMINISTRATION, <http://www.fulltiltpokerclaims.com/index.php> (last updated Apr. 1, 2014).

⁹⁷ Nocton, *supra* note 95, at 165.

⁹⁸ *Id.* at 164.

⁹⁹ *Id.* at 165.

then becomes a creditor of that bank.¹⁰⁰ Not straightforward indeed. And yet, for an effective model of online gambling to exist, regulators must address this problem for the players' sake, and for the sake of the market itself. Players' incentive to participate will disappear if they do not have confidence in the security of their money.¹⁰¹ So what is to be done?

Generally, there are two basic models which can serve as the basis of regulation. On the "restrictive end of the spectrum" is the "full reserve" approach that has been established in Nevada.¹⁰² According to Nevada Gaming Regulation 5A.125, an online gaming operator must maintain a reserve equal to the amount of money held in players' gaming accounts.¹⁰³ This reserve can take the form of "cash, cash equivalents, an irrevocable letter of credit, a bond, or a combination" of these, and the reserves must be calculated on a daily basis.¹⁰⁴ Additional extensive requirements are set out in the regulations.¹⁰⁵

In contrast to the full reserve approach is the use of trust accounts. Under this approach, beneficial ownership of the funds remains with the customer until the customer uses those funds to gamble.¹⁰⁶ A survey of jurisdictions around the world indicates that there is more flexibility accorded operators outside the US.¹⁰⁷ This seems understandable given the infancy of online gaming in the US; especially in a post-Full Tilt Poker world, regulators here will likely err on the side of restrictive provisions. One salutary effect of the Full Tilt Poker debacle is that customers are far more aware of the issue of fund security.¹⁰⁸

There is one important point relating to fund security that bears emphasizing. According to the author, when the online gambler is playing casino games like blackjack, or betting on sports, they "typically do not deposit and leave large sums with the gambling operator for use in future gambling sessions."¹⁰⁹ However, in "community" games like online poker, it is more common for operators to hold large sums of money for players on an ongoing basis.¹¹⁰ Fund security regulations should account for the difference between these forms of gambling, the author suggests.¹¹¹ But the Nevada "full reserve" provisions do not do this. Why? Because Nevada authorized *only* online poker, and not

¹⁰⁰ *Id.*

¹⁰¹ See Stewart, *supra* note 5, at 8 (noting that especially after Black Friday, "customers were uncertain about when they would be able to recover funds they had deposited with operators who were leaving the market, and . . . were understandably leery of gambling online again"—resulting in greatly reduced traffic to Internet poker websites).

¹⁰² Nocton, *supra* note 95, at 170.

¹⁰³ Nev. Gaming Reg. 5A.125(2) (2014).

¹⁰⁴ Nev. Gaming Reg. 5A.125(1), (6).

¹⁰⁵ See generally Nev. Gaming Reg. 5A.125.

¹⁰⁶ Nocton, *supra* note 95, at 165.

¹⁰⁷ See *id.* at 172–84.

¹⁰⁸ See *id.* at 161 ("Players are increasingly aware of the risks involved in depositing funds . . . particularly after high-profile cases [like] that of Full Tilt Poker.").

¹⁰⁹ *Id.* at 163.

¹¹⁰ See *id.*

¹¹¹ See *id.* (suggesting fund security measures are "no longer merely a question of covering potential exposure"—as is typical for operators offering games like bingo and slots—but are also a question "of ensuring the protection of potentially very significant customer deposits").

casino games.¹¹² The detailed reserve requirements in Nevada may be appropriate for poker, and may constitute an admirable “gold standard” of regulation of that game.¹¹³ But this approach may not be suitable for all operators and for all games. Instead, regulators may be better served by establishing an individualized “risk based” approach to fund security.¹¹⁴

This chapter does a superb job outlining the subtleties of fund security. As the author makes clear, although this issue is important to an effective regulatory system, a “one size fits all” template may be self-defeating.¹¹⁵ No matter the template, no system can provide complete security of funds,¹¹⁶ and some systems may place excessive, mechanical restrictions on the industry.¹¹⁷ Ultimately, the author offers two measures that, in one form or another, can serve as the anchors of regulation: first, establishment of segregated bank accounts for player funds, with bank acknowledgement of the players’ interests; second, a bond or some other form of financial instrument requirement that covers at least the amount of the players’ balances.¹¹⁸ As jurisdictions establish their online gaming regulatory structures, fund security will be of paramount importance, in the US and elsewhere.

It is certainly an investment of trust on the player’s part to gamble real money online. How can an online gambler be assured that he is getting a fair game? Can operators cheat them out of their money? What regulatory measures need to be in place to prevent this? In chapter 9, titled *Ensuring Internet Gaming that is Free from Fraud and Cheating*, Alan Littler says that the “prevailing European discourse” on this issue focuses on the importance of protecting consumers from “unscrupulous or untrustworthy operators.”¹¹⁹ But this is an incomplete and misleading view of the problem, he writes.¹²⁰ Because they are subject to a variety of criminal and regulatory sanctions, licensed operators stand to gain very little by cheating players.¹²¹ Additionally, an operator’s rep-

¹¹² Nev. Gaming Reg. 5A.140(1)(a) (2014) (“Operators shall not accept or facilitate a wager on any game other than . . . poker and its derivatives.”). Although Nevada authorized only poker, residents can still establish accounts with sports books or race books within the state and make bets using “communications technology approved by the Board.” NEV. REV. STAT. § 463.016425(1)(b) (2013). That activity is permissible because it is expressly not within the definition of “interactive gaming,” and Regulation 5A only governs interactive gaming. *Id.*; see Nev. Gaming Reg. 5A.010.

¹¹³ See Nocton, *supra* note 95, at 186.

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 161 (“[T]he question of what is ‘best practice’ is a subjective one and must take into account the unique circumstances facing each jurisdiction.”).

¹¹⁶ See *id.* at 168.

¹¹⁷ See *id.* at 185 (questioning whether a trustee-type system might be impractical “in view of the volume and frequency of transactions”).

¹¹⁸ *Id.* at 184–85.

¹¹⁹ *Id.* at 300.

¹²⁰ See *id.* at 301 (“[T]he prevention of cheating and fraud is unlikely to be solely a one-perspective problem.”).

¹²¹ See, e.g., IOWA CODE § 99F.4(6), (12) (2013) (vesting the Iowa Racing and Gaming Commission with authority to “take appropriate disciplinary action against a licensee”—which may include fines, suspensions, and license revocations—or even “institute appropriate legal action for enforcement”); OHIO REV. CODE § 3772.03(A) (Lexis Nexis 2012) (authorizing the Ohio Casino Control Commission to penalize casino operators for actions that damage “the integrity of casino gaming”).

utation can be damaged by participation in cheating, with consequent devastation to revenues.¹²² This is true for all types of casino games as well as sports betting.

A fact to which regulators may not give adequate attention is that *operators* can be victimized by cheating and can be used as “conduits for cheating or fraudulent activities by third parties.”¹²³ Furthermore, a player is more likely to be cheated by *another player* than by the operator.¹²⁴ The chapter prescribes a number of practices that can help to identify fraud, collusion, and cheating by players. They include procedures for opening and logging onto player accounts, monitoring cashouts from accounts, and analyzing player activity to determine in-play cheating.¹²⁵ For example, two players always sitting at the same virtual poker table would raise suspicions that they were colluding.¹²⁶ Fraud management systems are a critical requirement for online operators; safeguards need to be inserted at multiple stages of the online gaming process.¹²⁷ One of the advantages of the online environment as it relates to fraud, collusion, and cheating is that Internet transactions leave a trail of data that can be examined and evaluated.¹²⁸ An operator can mine the data to detect anomalous behavior that may suggest cheating. But according to the author, these are measures that operators often undertake for their own protection rather than because of regulatory prescription. Apart from the establishment of “generic provisions,” Littler writes, “[r]egulatory agencies pay little, if any, attention to measures or the need to implement measures to combat fraud against an operator.”¹²⁹

Perhaps the biggest obstacle to addressing the fraud and cheating problem is endemic to the regulation of gaming generally—namely, the “fragmentation” of regulatory measures and authority along jurisdictional lines.¹³⁰ When jurisdictions act severally, the efficiency of initiatives to combat fraud will suffer.¹³¹ The cross-border nature of many fraudulent activities makes national, international and industry cooperation essential, and is the way in which, “[w]ith time and experience,” the best regulatory practices will be generated.¹³² Especially in the online gambling world, a jurisdiction that believes it can go it alone will likely find its regulatory objectives cannot be realized.

¹²² Alan Littler, *Ensuring Internet Gaming that is Free from Fraud and Cheating*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 295, 327.

¹²³ *Id.* at 301.

¹²⁴ *See id.* at 329.

¹²⁵ *See id.* at 324–25.

¹²⁶ *Id.* at 324.

¹²⁷ *See id.* at 325. Betfair, one company that offers a fraud management system, touts the system’s “neural learning capabilities” that continuously analyze player trends and patterns “to identify anomalous behavior” and adjust the system’s thresholds accordingly. *See id.*

¹²⁸ *See id.* at 324.

¹²⁹ *Id.*

¹³⁰ *See id.* at 329.

¹³¹ *See id.* at 329–30 (suggesting that a lack of cooperation “weakens the response and the use of information gathered . . . [because] cheating and fraud occur in a cross-border context”).

¹³² *Id.* at 330.

B. Who is Gambling? Someone Who Shouldn't Be?

In chapter 8, attorneys Frank Catania Sr., Gary Ehrlich, and Antonia Cowan examine the problems of “Responsible Gaming” in the Internet sphere. As they write, “those who profit from . . . gaming must formulate and implement policies to minimize any harm resulting from that activity, especially to the most vulnerable members of society.”¹³³ The issue of problem gambling has been called the “Achilles Heel” of the industry.¹³⁴ Tales of ruined lives, broken families, lost jobs, and suicide cast an ugly shadow over an activity that the industry likes to refer to as “entertainment.”¹³⁵ Ultimately, for both altruistic and selfish reasons, the gaming industry has an interest in addressing the issue of problem gambling.

Any discussion of the issue needs to begin by defining the problem and measuring its scope. What is meant by the term “gambling problem,” or “gambling disorder?” While the authors maintain there is no standard definition of the term, they do refer to the clinical criteria for a “gambling disorder” as set forth in the new edition of the Diagnostic and Statistical Manual for Psychological and Psychiatric Disorders.¹³⁶ In a non-clinical context, a gambling problem may be characterized by gambling behavior that creates a disruption in a person’s psychological, physical, social, or vocational life.¹³⁷ Such actions as pre-occupation with gambling, “chasing losses,” loss of control over gambling in spite of serious negative consequences in a person’s life, and lying about one’s gambling are characteristics of a problem gambler.¹³⁸ Perhaps in a sense, there is a “know it when you see it” quality to identifying a person whose gambling activity has created chaos in some aspect of his or her life.

The articulation of precisely what constitutes problem gambling is functionally related to the condition’s prevalence. Yet, there is serious disagreement among researchers and experts on the extent of problem gambling. The authors cite studies finding that “approximately 1 percent of adults meet the existing

¹³³ Frank Catania, Sr. et al., *Responsible Gaming*, in *REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES*, *supra* note 1, at 273, 273.

¹³⁴ See, e.g., Ronald M. Pavalko, *Casino Gambling: Competing with Other Forms of Entertainment*, in *INDUSTRY STUDIES* 194, 208 (Larry L. Duetsch ed., 3d ed. 2002); Michael Jonas, *The Casino Debate’s Achilles’ Heel: “Problem Gamblers” Account for a Disproportionate Share of Casino Revenues*, COMMONWEALTH (Sept. 15, 2011), <http://www.commonwealthmagazine.org/Voices/Back-Story/2011/Summer/010-The-casino-debates-Achilles-heel.aspx>; *Official Warns ‘Net Gamers About Problem Gambling*, LAS VEGAS SUN (June 28, 1999, 11:10 AM), <http://www.lasvegassun.com/news/1999/jun/28/official-warns-net-gamers-about-problem-gambling/>. However, problem gambling is not necessarily the *only* thing identified as an Achilles heel for the gambling industry. See Stewart, *supra* note 5, at 24 (identifying payment processing activities as an Achilles heel specifically for the online gaming sector); John Warren Kindt, *Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?*, 82 OR. L. REV. 221, 224 (2003) (“[T]he Achilles’ heel of the gambling industry was the process involving the legal discovery of information.”).

¹³⁵ See Catania, *supra* note 133, at 276.

¹³⁶ See *id.* at 276–77.

¹³⁷ *What is Problem Gambling?*, NAT’L COUNCIL ON PROBLEM GAMBLING, <http://www.ncp-gambling.org/i4a/pages/index.cfm?pageid=3286> (last visited Feb. 17, 2014).

¹³⁸ *Id.*

criteria for gambling disorder, while an additional 2-3 percent can be considered problem gamblers.”¹³⁹ But some researchers have suggested these numbers are misleading. First, critics contend, these studies of the prevalence of problem gambling evaluate only whether individuals have had a gambling problem in the last year, not whether the person has *ever* had a problem.¹⁴⁰ Lifetime prevalence rates are higher than annual rates, and are a better reflection of the fact that gambling problems may wax and wane over the years.¹⁴¹

But the bigger problem with the 1 percent number, some critics assert, is that it is expressed as a share of the adult population *generally*, not those adults who gamble regularly.¹⁴² It is misleading to say that 1 percent of adults have a gambling disorder when a large percentage of adults don’t gamble at all, or gamble only rarely.¹⁴³ The more relevant percentage for measurement is among those who gamble *regularly*, and that number is much higher than 1–3 percent, critics argue.¹⁴⁴

However one measures these numbers, there are legitimate concerns about the features of Internet gambling that may aggravate problem gambling. As the authors point out, features such as Internet gambling’s “24/7 availability, its faster speed of play, the variety of games offered, the smaller permissible bet size, players’ anonymity and isolation, the possibility that players may gamble while impaired or under the influence, and players’ decreased perception of the value of money,” may contribute to the problem.¹⁴⁵ There is evidence that an increasing percentage of problem gamblers are those whose gambling is predominately or exclusively on machines, rather than on table games or sports betting.¹⁴⁶ Does the Internet “machine,” the computer, pose a similar threat that will produce higher numbers of problem gambling? The best that can be said is that “[l]ittle evidence supports a conclusion that online play *causes* problem gambling.”¹⁴⁷ The fact is that we know very little about how extensive this problem is or has the potential to be.

Nevertheless, as the authors note, the nature of online gambling provides operators with technological and data-based capabilities to reduce the incidence of problem gambling that land-based gambling doesn’t offer.¹⁴⁸ These initiatives can focus on either the gambler himself, or on the games and conditions

¹³⁹ Catania, *supra* note 133, at 278 (citing Malcom K. Sparrow, *Can Internet Gambling Be Effectively Regulated? Managing the Risks*, at 61 (Dec. 2, 2009), available at <http://www.hks.harvard.edu/fs/msparrow/documents—in%20use/Can%20Internet%20Gambling%20Be%20Effectively%20Regulated—Managing%20the%20Risks—12-02-2009.pdf>); *FAQs—Problem Gamblers*, NAT’L COUNCIL ON PROBLEM GAMBLING, <http://www.ncpgambling.org/i4a/pages/Index.cfm?pageID=3315> (last visited Feb. 17, 2014).

¹⁴⁰ NATASHA DOW SCHÜLL, *ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS* 319 n.57 (2012).

¹⁴¹ *Id.*

¹⁴² *Id.* at 15.

¹⁴³ *Id.* at 320 n.58.

¹⁴⁴ *See id.* at 15.

¹⁴⁵ Catania, *supra* note 133, at 278.

¹⁴⁶ *See* SCHÜLL, *supra* note 140, at 14 (“By the mid-1990s in Las Vegas, the vast majority attending local meetings of the self-help group Gamblers Anonymous . . . played machines exclusively.”).

¹⁴⁷ Catania, *supra* note 133, at 278.

¹⁴⁸ *Id.* at 278–79.

of play.¹⁴⁹ The chapter examines some of the practices employed in many jurisdictions. These include allowing for players to set limits on their deposits, wagering, or losses.¹⁵⁰ A number of jurisdictions provide for gambler imposed “time-outs,” and for “self-exclusions.”¹⁵¹ Particular emphasis is placed on the best practices relating to conveying information to players that enables them to make informed decisions about their gambling activity.¹⁵²

As noted above, online gaming operators have the ability to gather data from the online player’s gambling activity. Just as certain activity may indicate cheating, other activity may serve as a “red flag” for problem gambling. Progressive increases in the amounts bet and time spent gambling, and requests for increases in deposit limits or bonuses, among other things, may be an indication of a gambler in over his head.¹⁵³ According to the authors, however, “experts” in the industry downplay the helpfulness of such information. There is “not yet enough information at the present time to know what the tracking criteria and ensuing interaction should be.”¹⁵⁴ Therefore, “tracking play to detect problem gambling is not recommended at this time.”¹⁵⁵

The authors note that some jurisdictions require “reality checks,” such as pop up messages notifying players when they have been playing for an extended period of time or a visible clock in real time.¹⁵⁶ Overwhelmingly, however, the best practices and recommendations that are described place the responsibility on the player to diagnose and to remedy his gambling problem; he needs to consult resources to help with his gambling problem and use such measures as self-exclusions and time outs. This focus treats the issue as one relating to the gambler’s psychiatric profile rather than as a function of the type of gambling in which he is engaged.¹⁵⁷ Clearly, there is a need for additional study of this interaction between player and “machine” before regulators can feel confident that “the most vulnerable members of society” are protected.

There is less disagreement when the discussion turns to the need to prevent minors from gambling online. For operators, the business and legal risks of minors gambling online are dramatic, as penalties for violations of underage gambling laws and the inability to collect gambling debts from minors provide strong incentives to verify a gambler’s age.¹⁵⁸ From a societal policy perspective, the interests that warrant robust efforts to verify a gambler’s age are also

¹⁴⁹ *Id.* at 279.

¹⁵⁰ *Id.* at 284.

¹⁵¹ *See id.* at 285–87. Jurisdictions with these provisions include Gibraltar, Antigua and Barbuda, and Nevada.

¹⁵² *Id.* at 290.

¹⁵³ *See id.* at 291–92.

¹⁵⁴ *Id.* at 291 (quoting CENTRE FOR THE ADVANCEMENT OF BEST PRACTICES, RESPONSIBLE GAMBLING STANDARDS FOR REMOTE GAMBLING PREPARED FOR NOVA SCOTIA GAMING CORP. 29 (2009)).

¹⁵⁵ *Id.* at 292.

¹⁵⁶ *Id.* at 291.

¹⁵⁷ *See* SCHÜLL, *supra* note 140, at 14 (noting that “the preponderance of research” also tends to treat the issue this way).

¹⁵⁸ *See, e.g.,* IOWA CODE § 99F.15(2) (2013) (making it a simple misdemeanor to permit “a person under the age of twenty-one years to make a wager”); MISS. CODE ANN. § 75-76-155(1)-(2) (2013) (providing penalties for permitting underage gambling, including a fine, jail time, or both); *State v. Boardwalk Regency Corp.*, 548 A.2d 206, 207 (N.J. Super. Ct.

clear. Some research has shown that between 4 and 7 percent of 6th, 8th, and 11th grade youth reported they had gambled for money on the Internet.¹⁵⁹ Moreover, for adolescents, “Internet gambling has been associated with higher levels of heavy alcohol use and poorer academic performance compared to non-Internet gambling.”¹⁶⁰

The author of chapter 10 on Age Verification, Blair Richardson, offers the perspective of one who has considerable experience in the age verification industry.¹⁶¹ As he describes, the gold standard of age verification has become websites’ “use of government-issued ID databases.”¹⁶² This has replaced the “pseudo-verification” of age by self-reporting plus possession of a credit or debit card.¹⁶³ After all, those cards are issued to minors widely and without age verification.¹⁶⁴ The trend to this new form of age verification through databases can be traced to the Prevent All Cigarette Trafficking (PACT) Act that was enacted in 2010.¹⁶⁵ The law was a critical step forward¹⁶⁶ because it required those selling cigarettes online to verify age “through the use of a commercially available database or aggregate of databases, consisting primarily of data from government sources, that are regularly used by government and businesses” to verify age.¹⁶⁷ This standard lends itself well to use for online gaming. In fact, this seems like one area of Internet regulation where the US has established a standard that is at least as good as that of any foreign jurisdiction.

C. Advertising Restrictions: Out of Sight, Out of Mind?

It seems somewhat odd to view limitations on advertising as a form of consumer protection, but in the US, the government’s battle against gambling advertising has a lengthy history. As attorney Lawrence Walters describes in

App. Div. 1988) (affirming civil penalties assessed after a casino “allow[ed] two underage persons to gamble”).

¹⁵⁹ See IOWA CONSORTIUM FOR SUBSTANCE ABUSE RESEARCH AND EVALUATION, UNIV. OF IOWA, 2010 IOWA YOUTH SURVEY: STATE OF IOWA RESULTS 46 (2011), available at http://www.iowa.gov/odcp/docs/IYS_state_report_2010.pdf; IOWA CONSORTIUM FOR SUBSTANCE ABUSE RESEARCH AND EVALUATION, UNIV. OF IOWA, 2008 IOWA YOUTH SURVEY: STATE OF IOWA RESULTS 36 (2009), available at http://publications.iowa.gov/9234/1/iys_statereport_2008.pdf; see also MELVIN E. Gonnerman, Jr. & Gene M. Lutz, CTR. FOR SOCIAL AND BEHAVIORAL RESEARCH, UNIV. OF N. IOWA, INTERNET POKER: A PUBLIC HEALTH PERSPECTIVE 14 (2011), available at <http://www.iowa.gov/irgc/StudyIDPH%20Report.pdf> (citing these two studies).

¹⁶⁰ See GONNERMAN & LUTZ, *supra* note 159, at 15 (citing Marc N. Potenza et al., *Correlates of At-Risk/Problem Internet Gambling in Adolescents*, 50 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 150, 154 (2011)).

¹⁶¹ Richardson is General Counsel and Chief Privacy Officer for Aristotle, a compliance vendor. *J. Blair Richardson, Jr.*, ARISTOTLE, <http://aristotle.com/about-us/team/j-blair-richardson-jr/> (last visited Feb. 17, 2014).

¹⁶² J. Blair Richardson, *Age Verification*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES, *supra* note 1, at 331, 334.

¹⁶³ See *id.* at 335.

¹⁶⁴ See *id.*

¹⁶⁵ Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, §2A(b)(4)(A), 124 Stat. 1087, 1091-1092 (2010); see also Richardson, *supra* note 162, at 339.

¹⁶⁶ See Richardson, *supra* note 162, at 339 (calling the law “a significant development in the field of online age verification”).

¹⁶⁷ 15 U.S.C. § 376a(b)(4)(A)(iii)(II) (2012).

chapter 7, *Internet Gambling Advertising Best Practices*, “online gambling advertising is inconsistently regulated and often unaddressed.”¹⁶⁸ In the US, the legal status of online gaming advertising is complicated by the inclination of some to ignore the difference between the legality of online gambling and the legality of advertising that activity.¹⁶⁹ Yet, the government’s power to regulate these two spheres differs. Walters discusses two cases that resulted from actions taken by the US Department of Justice (“DOJ”) in 2003 that threatened online media with prosecution if they offered advertising of online gambling.

The first involved a company called Casino City Network that advertised lawful overseas companies offering online casino games and sports betting.¹⁷⁰ Casino City sought a declaratory judgment that its actions were not subject to criminal statutes against “aiding and abetting” illegal activity. Because the DOJ had not actually threatened Casino City with prosecution, however, the federal district court declined to rule on the merits of Casino City’s claim.¹⁷¹ Nevertheless, the court observed that the speech involved—the advertising—was not protected by the First Amendment because “it was misleading and contained information regarding illegal activities, namely Internet gaming.”¹⁷² After this categorical declaration of the illegality of all online gambling, the DOJ was emboldened to pressure advertising outlets like Google, Microsoft, and Yahoo! to cease such advertising.¹⁷³ The companies paid over \$31 million in fines to settle claims that they had facilitated illegal activity by allowing this advertising.¹⁷⁴

The second case occurred in 2007 and involved the company BetOnSports (“BoS”), along with its owner David Carruthers.¹⁷⁵ Although BoS offered online gambling only in jurisdictions where online gambling was legal, it argued that advertising that might reach US players was legal as well.¹⁷⁶ But the court accepted the government’s argument that because Internet gambling was illegal in the US, advertising could be prohibited as well, and issued an injunction against BoS.¹⁷⁷ This ruling led to a guilty plea, which ended the case before a final ruling on the issue could be reached.¹⁷⁸

These cases underscore the DOJ’s efforts to treat online gambling advertising as illegal because of its determination that online gambling itself is ille-

¹⁶⁸ Lawrence G. Walters, *Internet Gambling Advertising Best Practices*, in *REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES*, *supra* note 1, at 249, 249.

¹⁶⁹ *See id.* at 250.

¹⁷⁰ *Id.* at 252.

¹⁷¹ *Id.*

¹⁷² *Id.* at 252–53; *Casino City, Inc. v. U.S. DOJ*, No. 04-557-B-M3, slip op. at 14–15 (M.D. La. Feb. 15, 2005), *available at* <http://www.gambling-law-us.com/Articles-Notes/Casino-City-Decision.pdf> (“[T]he speech in which plaintiff wishes to engage is misleading because it falsely portrays the image that Internet gambling is legal. . . . Because plaintiff’s speech concerns misleading information and illegal activities, it does not fall within speech that is protected by the First Amendment.”).

¹⁷³ Walters, *supra* note 168, at 253.

¹⁷⁴ *Id.*

¹⁷⁵ *See United States v. BetOnSports PLC*, No. 4:06CV01064 CEJ, 2006 WL 3257797, at *2 (E.D. Mo. Nov. 9, 2006).

¹⁷⁶ *See Walters, supra* note 168, at 253.

¹⁷⁷ *See BetOnSports PLC*, 2006 WL 3257797 at *9.

¹⁷⁸ Walters, *supra* note 168, at 254.

gal. As Walters points out, until the legal status of Internet gambling is established more clearly, these efforts will likely continue.¹⁷⁹ The chapter doesn't mention the potential effect on advertising of the 2011 DOJ Memorandum, which opined that the federal Wire Act applied only to sports betting.¹⁸⁰ But, the restrictive approach to the advertising issue is a clear indication that the US has miles to go before it becomes a mature online gaming jurisdiction. The growth of Internet gambling will require a parallel growth in the recognition and protection of the "expressive activity" of advertising.

V. AN INTERNATIONAL CONVENTION FOR ONLINE GAMBLING?

As this book effectively illustrates throughout, jurisdictions have very different policy bases and orientations in their regulation of Internet activity, including online gambling. Given these substantial differences, any prospect for a uniform approach seems remote. So what would an international Convention for Internet gambling accomplish? As Professor Marketa Trimble suggests in chapter 11, an international Convention on online gambling could facilitate each jurisdiction's ability to enforce its polices on Internet gambling, while still respecting the different approaches taken by other jurisdictions. In short, all jurisdictions would benefit from inter-jurisdictional cooperation, whether they permit or forbid online gambling activity.

There are several benefits that could flow from the terms of such a Convention. For example, they could provide for enforcement assistance whereby jurisdiction X that prohibits online poker seeks assistance from jurisdiction Y that allows it. Imagine a poker operator that offers games to the residents of jurisdiction X, but has all its assets and officers in jurisdiction Y. Jurisdiction X might be able to seek the help of jurisdiction Y to make the operator filter its content for online poker, so that residents of jurisdiction X could not access it.¹⁸¹ This cooperation is preferable to one jurisdiction using geo-location technology or firewalls, the author notes, because it provides an enforcement mechanism that reaches across borders.¹⁸²

One can imagine that agreements for exchanging information could have other benefits.¹⁸³ They could be a useful weapon against money laundering efforts, which almost always have an international character. Sharing information about fraudulent activities and cheating likewise can thwart criminal activity. Information about problem gamblers can also be subject to Convention terms in a way that allows for cross-border enforcement of self-exclusion

¹⁷⁹ *Id.* at 254–55.

¹⁸⁰ Virginia A. Seitz, *Memorandum Opinion for the Assistant Attorney General, Criminal Division: Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act 12* (Sept. 20, 2011), available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

¹⁸¹ Trimble, *supra* note 11, at 373.

¹⁸² *See id.* at 374.

¹⁸³ Interestingly, the discussion about international cooperation essentially mirrors the one occurring in the US about federal versus state-by-state regulation. The benefits of Professor Trimble's Convention—for example, uniformity, collaboration, and pooling resources—are very similar to the ones highlighted by advocates of a federal regulatory approach in the US. *See infra* Part VI.

requests.¹⁸⁴ Of course, some jurisdictions may have concerns that Convention terms would dilute their “territoriality,” or licensing power. But as Professor Trimble notes, jurisdictions that responsibly regulate online gaming “already require their licensees to comply with the laws of other jurisdictions,” so there would be no real surrender of authority.¹⁸⁵

Professor Trimble’s proposal does not seek a uniform law for Internet gambling—indeed, she says that “[g]iven the diversity of national opinions, it would be pointless” to do so—and she acknowledges the uncertain state of the law in the US.¹⁸⁶ At this point, as states wade more deeply into the online waters, and while Congress continues to dither, it might be premature to expect that states just beginning to establish a regulatory framework would be ready to embrace a Convention. Yet, it is precisely because jurisdictions are now searching for “viable solutions” to the regulation of online gambling, Professor Trimble argues, that a convention would be timely.¹⁸⁷ Ultimately, the timing of a Convention is the only real question that exists; cooperation among jurisdictions is inevitable, necessary, and appropriate. This will be true in the US, regardless of where the regulatory structure is established, as it will be elsewhere.

VI. OTHER “CHALLENGES” OF REGULATING INTERNET GAMBLING

A considerable portion of the book, and an even greater portion of this review, focuses on implementation of best practices in the US Internet gaming market. Of course, the US is not the only emerging market for Internet gambling, and the text lends itself to application for other jurisdictions as well. Moreover, the book provides an excellent opportunity for already-established I-gaming jurisdictions to examine and perhaps improve upon their own regulatory models.

Because the book is substantially focused on a “best practices” approach to Internet gaming regulation, it is understandable that the book does not analyze the full range of political and public policy issues relating to online gaming. In some instances, however, the policy and political questions being debated in the US are functionally related to the regulatory issues the book addresses. Considering some of these questions provides valuable context.

For example, perhaps the central question to ongoing discussion of Internet gambling in the US is whether the US Congress will, and should, adopt a model for federal regulation of Internet gambling. For the last several years, Congressional proposals to license online poker have been floated, discussed, and then abandoned.¹⁸⁸ The initiatives show little sign of either being discon-

¹⁸⁴ Trimble, *supra* note 11, at 383.

¹⁸⁵ *Id.* at 385.

¹⁸⁶ *Id.* at 366–67 (“In the United States, bills have been introduced at the federal level to both legalize and regulate some or all forms of Internet gambling; however, individual states hold opposing views on online gambling.”).

¹⁸⁷ *Id.* at 357.

¹⁸⁸ See Darren Heitner, *Federal Online Poker Legislation: Coming to America or Shipwrecked in Congress?*, FORBES (Sept. 19, 2013, 8:19 AM), <http://www.forbes.com/sites/darrenheitner/2013/09/19/federal-online-poker-legislation-coming-to-america-or-shipwrecked-in-congress/> (explaining why a 2012 federal bill “never made it past the floor of the House of

tinued or adopted,¹⁸⁹ and the gaming commentariat has likewise shown little fatigue for discussing the issue.¹⁹⁰ Currently, Congress's inaction has effectively left the issue to the states.¹⁹¹

The wisdom of a federal plan for online poker seems obvious to those who support it. There is a risk that without uniform standards among states, conflicting regulatory objectives and provisions will produce a patchwork pattern of regulation and an inefficient (unprofitable) marketplace.¹⁹² An overarching federal template, one that would still leave much of the actual regulation to the states, is necessary to instill confidence and growth, proponents contend.¹⁹³

Opponents of a federal approach advance a plethora of states' rights arguments. Gambling regulation has historically been a matter for states to address, they argue, and differences among state regulatory standards can be addressed

Representatives"); see also Gary Mihoces, *New House Bill Would Clear Way for Regulated Internet Poker*, USA TODAY (June 24, 2011, 4:43 PM), http://usatoday30.usatoday.com/sports/poker/2011-06-24-house-bill-regulated-internet-poker_n.htm; Liz Benston & Karoun Demirjian, *Harry Reid Rushes Effort to Legalize Internet Poker*, LAS VEGAS SUN (Dec. 7, 2010, 2:00 AM), <http://www.lasvegassun.com/news/2010/dec/07/reid-pushes-online-poker-bill/> (calling the 2010 proposal the "last, best chance for a while to fast-track an effort to legalize Internet poker").

¹⁸⁹ See, e.g., Dan Friedman, *Rep. Pete King Proposes Federal Legalization of Online Gambling*, N.Y. DAILY NEWS (June 6, 2013, 9:29 PM), <http://www.nydailynews.com/news/national/rep-king-proposes-legalization-online-gambling-article-1.1365671>; Darren Heitner, *U.S. Government Seeks to Set Internet Poker Free. . . Through New Regulations*, FORBES (July 15, 2013, 9:45 AM), <http://www.forbes.com/sites/darrenheitner/2013/07/15/u-s-government-seeks-to-set-internet-poker-free-through-new-regulations/> (summarizing a 2013 proposal—the Internet Poker Freedom Act—that is different from King's bill, but recognizing "[i]t has a long way to go [before] becoming law"); see also Howard Stutz, *New Online Poker Bill Introduced in Washington*, LAS VEGAS REV. J. (July 11, 2013, 4:26 PM), <http://www.reviewjournal.com/business/casinos-gaming/new-online-poker-bill-introduced-washington> (contrasting King's proposal with the Internet Poker Freedom Act by noting that King's bill "would allow all forms of online casino gambling, not just poker").

¹⁹⁰ See, e.g., Stewart, *supra* note 5, at 18–19; Keith C. Miller, *The Internet Gambling Genie and the Challenges States Face*, 17 J. INTERNET L. 1, 19–21 (2013); Chumbley, *supra* note 26, at 553–58.

¹⁹¹ See Miller, *supra* note 190, at 19.

¹⁹² See Stewart, *supra* note 5, at 18; Patrick Fleming, *Diversity of Online Gambling Landscape Creates Ambiguity*, JURIST (Jan. 10, 2012, 12:01 PM), <http://jurist.org/hotline/2012/01/patrick-fleming-online-gambling.php>; Geoff Freeman, Op-Ed, *Policymakers Must Get on Board with Online Gambling*, LAS VEGAS REV. J. (Sept. 19, 2013, 12:49 AM), <http://www.reviewjournal.com/opinion/policymakers-must-get-board-online-gambling>.

¹⁹³ See I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 679 (2012) (maintaining that "a national regulatory scheme. . . . would not fundamentally change the states' regulatory schemes"); Shylene B. D'Addario, Note, *The Legalization of Internet Gambling: Why the Clock is Ticking on Prohibition*, 38 RUTGERS COMPUTER & TECH. L.J. 90, 115–16 (2012) ("Once new federal regulation is in place, statehouses should quickly impose complementary regulation[s] Statehouses should work with their local casinos and Native American tribes to tailor regulation to the needs of the state."). Under the Internet Poker Freedom Act of 2013, a proposal introduced in Congress in July 2013, a federal Office of Internet Poker Oversight would simply designate "qualified regulatory authorities"—such as states or tribes—that in turn would be responsible for actually making license determinations, enforcing disciplinary actions, assessing civil penalties, and establishing problem gambling assistance programs. See Internet Poker Freedom Act of 2013, H.R. 2666, 113th Cong. §§ 103–106 (2013).

by the states themselves, and the marketplace.¹⁹⁴ Agreements among states would tend to normalize the standards.¹⁹⁵ Moreover, states would be able to respond better to technological breakthroughs than the dysfunctional United States Congress.¹⁹⁶

There is little the book could have added to the substance of this debate, as it has been extensively treated elsewhere.¹⁹⁷ Moreover, speculation on what the future holds would not be consistent with the book's "best practices" orientation. But it is worth considering whether, and how, the regulatory model for online gaming in the US would be different depending on whether it emanated from the federal government or the states. The book surveys the law of jurisdictions from around the gaming world to glean suggestions and best practices. But few of these jurisdictions have a federal structure similar to that of the US.¹⁹⁸ If the federal government in the US establishes a regulatory model, there will be considerable uniformity of regulation. Alternatively, if states are the entities establishing the regulatory framework, the models of regulation they create will inevitably differ according to the interests each regulating state identifies. Especially because the sizable potential for Internet gambling is just starting to be realized in the US, the reader would benefit from consideration of how resolving this political issue would affect the landscape of regulation.

¹⁹⁴ See, e.g., Jamisen Etzel, Note, *The House of Cards is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 199, 243–44 (2012) (suggesting that state cooperation "could solve many problems related to interstate competition while maintaining state control . . . [and could] mitigate market failures without relying on additional federal laws"); *Internet & Mobile Gaming*, CASINO ENTERPRISE MGMT., Feb. 1, 2013, available at <http://www.casinoenterprisemanagement.com/articles/february-2013/inter-net-mobile-gaming> (predicting that "primary responsibility for the regulation of Internet gambling will be at a state level," because states can "cooperate so that things that are relatively easy to agree on—like geolocation verification, age and identity verification, [and] technical standards for the systems—can be standardized"); Letter from Steven Grossman, Chairman, Mass. State Lottery Comm'n, to Senator Harry Reid & Senator Jon Kyl (Oct. 31, 2012), available at <http://www.mass.gov/treasury/docs/10-31-2012-reid-and-kyl-letter.pdf> (objecting "in the strongest possible terms" to "draconian federal limitations" which ignore the fact that "[g]aming historically has been subject to state regulation").

¹⁹⁵ See *Internet & Mobile Gaming*, *supra* note 194 ("We're right in the start of a new industry, which gives us the opportunity to . . . get all this stuff consistent so that the systems they're using in different states are the same and [there are] not different versions for different states.").

¹⁹⁶ See *id.* (acknowledging "a pretty challenging legislative congressional environment . . . [in which] Congress doesn't seem to be able to agree or get much of anything done"); Miller, *supra* note 190, at 21 ("[T]he dysfunctional relationship between Congress and the President makes any sort of agreement on legislation permitting electronic gambling seem fanciful."); cf. Jeffrey D. Zentner, Note, *State Regulation of Unsolicited Bulk Commercial E-mail and the Dormant Commerce Clause*, 8 VAND. J. ENT. & TECH. L. 477, 499 (2006) ("It would be best for states to continue to regulate . . . as they are able to be more responsive in a speedier manner and experiment with various regulatory schemes without requiring the participation of the entire United States Congress.").

¹⁹⁷ See, e.g., Miller, *supra* note 190, at 20–21; King, *supra* note 26, at 66–75; Nevill, *supra* note 26, at 228–29.

¹⁹⁸ Australia is most similar, because "each state and territory—like each of the United States—regulates its own gaming activities, subject to a few national restrictions." Millar, *supra* note 50, at 108.

Another issue that has been a constant source of debate is whether online gambling should be limited to poker, or opened to all forms of casino gambling. The Editors' Note declares that Assembly Bill 114, signed by Nevada Governor Sandoval in February of 2013, "legaliz[ed] online gaming in Nevada."¹⁹⁹ In fact, the Bill was limited to online poker.²⁰⁰ This is of no small consequence, as the difference between the two forms of gambling is fundamental.

With poker, an online operator makes its money by "raking" from the pool of money players are contesting.²⁰¹ This is usually a percentage of this pot of money.²⁰² Consequently, because the house is not a player, there is no statistical house advantage in poker.²⁰³ Online casino games like blackjack, craps, or slot machines are another matter, however. Here, the gambler is playing against the house, and the house enjoys a statistical edge that, over time, produces its winnings.²⁰⁴

Why is this significant? As noted, Nevada has legalized only online poker. In contrast, New Jersey and Delaware have both legalized casino games as well as poker.²⁰⁵ Because of the very different nature of the poker-only model vis á vis casino games, one might wonder how, if at all, a state's regulatory provisions would be affected by which games are allowed. When the house is a direct player in the game, do regulators need to be more vigilant about the fairness of games? Because poker is a solitary activity while casino games are not, are problem gambling issues different when casino games are involved?

This issue takes on added significance because many proposals for legalizing online gambling in the US involve *only* poker.²⁰⁶ Indeed, poker has

¹⁹⁹ *Editors' Note, supra* note 7, at ix.

²⁰⁰ *See* NEV. REV. STAT. § 463.016425 (2013) (defining "interactive gaming"); Nev. Gaming Reg. 5A.010 (2013) (explaining that Regulation 5A governs interactive gaming); Nev. Gaming Reg. 5A.140(1)(a) (2013) ("Operators shall not accept or facilitate a wager on any game other than . . . poker and its derivatives."). All Assembly Bill 114 did was remove a provision requiring Nevada to wait until federal law authorized interactive gaming before allowing interactive gaming licenses to become effective. *See* Assemb. Bill 114, § 10, 77th Reg. Sess. (Nev. 2013) (repealing NEV. REV. STAT. § 463.750(2)(h)). Thus, the limitation in Regulation 5A still holds true.

²⁰¹ David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation of Online Poker*, 12 J. HIGH TECH. L. 450, 466 (2012).

²⁰² *Id.*

²⁰³ Michael A. Tselnik, Note, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1646 (2007).

²⁰⁴ Robert Hannum, *Casino Mathematics*, UNLV CTR. FOR GAMING RESEARCH, <http://gaming.unlv.edu/casinomath.html> (last updated June 5, 2012, 9:45 AM) (listing the approximate statistical house advantage for most popular casino games and noting that "the house always wins—in the long run—because of the mathematical advantage the casino enjoys"); *see also* Miller, *supra* note 190, at 25–26.

²⁰⁵ *See* DEL. CODE tit. 29, §§ 4803(l)–(n), 4826 (2013) (authorizing state lottery officials to operate internet table games, internet ticket games, and an internet lottery, as defined in § 4803); N.J. STAT. §§ 5:12-5 (listing authorized games), 5:12-28.1 (including all authorized games within the scope of permissible Internet gaming).

²⁰⁶ *See, e.g.*, Internet Poker Freedom Act of 2013, H.R. 2666, 113th Cong. § 107(a) (2013); S. 51, 2013–2014 Reg. Sess. (Cal. 2013) (to be codified at CAL. BUS. & PROF. CODE § 19990.14(a)); S. 1068, 85th Gen. Assemb., 2013–2014 Sess., § 6(2)(a) (Iowa 2013) (to be codified at IOWA CODE § 99F.4E(2)(a)).

acquired a favored status in the debate of online gambling, and has sometimes been called “America’s Game.”²⁰⁷ The reasons for this are partly historical and cultural, and partly the product of skillful marketing by those seeking to have a poker-only online model. Nevertheless, legislative and popular support for legalizing the full scope of online casino games is much lower than for poker alone.²⁰⁸ This dichotomy is an important dynamic that informs the regulatory challenges presented by online gambling.

Along similar lines, much of the book draws on the experiences and practices of other countries as a guide for the development of “best practices.” Yet, most of the jurisdictions surveyed do not limit licensed online gaming to poker. Rather, they widely permit casino games.²⁰⁹ How valid are comparisons between regulation of “poker only” models and those providing for licensed casino games? In the chapter on protecting consumer funds, Nick Nocton suggests this can be problematic. He observes that while Nevada’s requirement that operators have cash reserves exceeding the amount of player funds “may represent a gold standard for consumer funds protections with regard to poker . . . it does not necessarily lend itself as well to the regulation of all forms of gambling, nor perhaps to all jurisdictions.”²¹⁰ It might have been worthwhile to examine this issue in other settings as well.

One final note on a poker-only model that warrants attention is the issue of liquidity. In the Internet poker context, “liquidity is a measure of how many gamblers it takes to make for an attractive gambling opportunity, especially as it relates to drawing persons from gambling platforms not [licensed] by the state.”²¹¹ What makes an online poker site desirable, in addition to the very important matter of security of funds, is when the player has a number of games from which to choose, at different stakes levels.²¹² The number of other poker players to compete against affects the “action” available.²¹³

²⁰⁷ See, e.g., *State v. Randall*, 256 P. 393, 394 (Or. 1927) (referring to “the great American game of poker”); CABOT & MILLER, *supra* note 13, at 584; Anthony Cabot & Robert Han-num, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 447 (2005) (collecting sources that agree “the game the world now knows as poker is uniquely American”); James McManus, Op-Ed, *No More Bluffing*, N.Y. TIMES (Aug. 24, 2012), http://www.nytimes.com/2012/08/25/opinion/poker-an-american-pastime-and-a-game-of-skill.html?_r=1& (“Poker is America’s card game, some say its national pastime.”).

²⁰⁸ See Miller, *supra* note 190, at 21–22.

²⁰⁹ See Millar, *supra* note 50, at 118–21 (providing a chart of surveyed countries with a column containing the “online game categories” permitted in each jurisdiction, and showing that many jurisdictions permit online casino games either expressly or through comprehensive regulation).

²¹⁰ Nocton, *supra* note 95, at 186.

²¹¹ Miller, *supra* note 190, at 24; see SALLY GAINSBURY, *INTERNET GAMBLING: CURRENT RESEARCH FINDINGS AND IMPLICATIONS* 15 n.2 (2012); Stewart, *supra* note 5, at 6, 9.

²¹² Miller, *supra* note 190, at 25; see IOWA RACING & GAMING COMM’N, *REPORT ON THE POSSIBLE REGULATION OF INTRASTATE INTERNET POKER IN THE STATE OF IOWA* vi (2011), available at <http://www.iowa.gov/irgc/StudyIntrastate%20Internet%20Poker.pdf>.

²¹³ See Chris Sieroty, *Panel Says Critical Mass Matters for Online Poker*, LAS VEGAS BUS. PRESS, May 16, 2011, available at 2011 WLNR 11490654 (“Poker players want to be able to play a game at any hour . . . That requires having a large enough pool of players to play against.”).

The liquidity issue will be especially important in the US if the regulatory structure for Internet gambling is established by individual states—not the federal government—and the games allowed are limited to poker. A central operating principle of state-regulated Internet gambling is to require players to be physically located within the state offering the gambling.²¹⁴ Sophisticated “geo-location” technology has been developed that helps to insure this.²¹⁵ But unless a state has a population large enough to generate a significant number of poker players and games, players will not find the games attractive or lucrative enough to warrant migrating from poker games offered by an offshore unregulated provider.²¹⁶ A state like California with a large population and a large number of poker players won’t be affected.²¹⁷ But smaller states certainly will. It appears likely that even Nevada, which has been aggressive in establishing an online poker regulatory structure, will face liquidity issues.²¹⁸

So, what can be done about the liquidity problem? One way to address it is to allow casino games as well as poker.²¹⁹ As noted, this is what has been authorized in New Jersey and Delaware. Liquidity is not relevant to casino games because each player is competing against the house. No “critical mass” of players is necessary. Again, it seems important to consider the possibility that a casino-based Internet regulatory structure will have different features than a poker-only one. The difference between games where the operator does not participate as a player and makes money through a “rake,” and games where the house/operator is a direct contestant with a statistical edge, is neither subtle nor unimportant.

Another way of addressing liquidity issues for online poker is to allow for “shared liquidity”—that is, to allow jurisdictions to pool their players and games to create more of both and make the games more attractive.²²⁰ Many proponents of online poker regard this as important, if not essential, to the feasibility and growth of this product.²²¹ In establishing online poker, the

²¹⁴ See, e.g., DEL. CODE tit. 29 § 4826(b); N.J. STAT. §§ 5:12-28.1, 5:12-100(h)(6); S. 51, art. 5, 2013–2014 Reg. Sess. (Cal. 2013) (to be codified at CAL. BUS. & PROF. CODE § 19990.35(b)); S. 768, 27th Legislature, 2013 Reg. Sess., § 2-13(b)–(c) (Haw. 2013).

²¹⁵ See King, *supra* note 26, at 58–59.

²¹⁶ IOWA RACING & GAMING COMM’N, *supra* note 212, at vi (“A network that does not have a high level of liquidity may not meet expectations Subsequently, players may not make the transition to a network with less perceived or actual liquidity.”).

²¹⁷ See Ingo Fiedler, UNIV. OF HAMBURG INST. OF L. & ECON., ONLINE POKER: THE ONLINE POKER DATABASE OF THE UNIVERSITY OF HAMBURG (OPD-UHH) 28 (2012), available at http://www.wiso.uni-hamburg.de/fileadmin/bwl/rechtderwirtschaft/institut/Ingo_Fiedler/On_linepoker_and_the_OPD-UHH.pdf (estimating that California is home to over 175,000 online poker players).

²¹⁸ See Sadonna Price, *Nevada Casinos Need Extension to Test Online Poker Product*, 4FLUSH (Oct. 8, 2013), <http://www.4flush.com/online-poker-news/nevada-casinos-need-extension-to-test-online-poker-product/14969> (noting about 500 players currently play on the internet poker sites Nevada has established, which means liquidity could be a “major issue facing operators in the state”).

²¹⁹ See Miller, *supra* note 190, at 26.

²²⁰ *Id.* at 26–27. This may mean sharing players not only with other states, but even with foreign jurisdictions.

²²¹ See, e.g., *id.* at 27; I. Nelson Rose, *The DOJ Gives States a Gift*, 4 UNLV GAMING L.J. 1, 8 (2013); Sue Zeidler, *MGM CEO Sees Nevada/NJ Online Gambling Compact in 2014*, REUTERS (Aug. 6, 2013, 5:47 PM), <http://www.reuters.com/article/2013/08/06/net-us-mgm->

Nevada Legislature specifically authorized the Governor to investigate the possibility of state cooperation.²²² But, combining regulatory systems would not be a simple task and would require states to adapt their regulatory model to some extent. Given many states' apparent preference to have a poker-only model, the effect of market liquidity on the regulatory regime adopted warrants careful attention.

VII. CONCLUSION

Like the industry itself, the study of online gaming is in its infancy. As often happens, the law lags behind advances in technology, and that is certainly the case for Internet gambling regulation. In ten years, the law will likely still be playing catch up to what technology can deliver. Yet, this book will not be outdated anytime soon. What makes the book so useful is that it addresses the range of issues policy makers are struggling to address now. And in one form or another, many of the same issues will likely be vexing regulators in the future as well. A comprehensive best practices resource like this will be a handy reference for legislators, regulators, and all those who are interested in the development of an evolving form of gambling that soon will be a cornerstone of the gaming industry.

onlinegambling-idUSBRE97515520130806 (identifying potential benefits apart from greater liquidity, like enabling "states to share resources for identifying the location of gamblers, guarding against under-age gambling, stolen identities and credit card fraud").

²²² Assemb. B. 114, 77th Reg. Sess., § 6(1)(a) (Nev. 2013) (instructing the Gaming Commission to "authorize the Governor . . . to [e]nter into agreements with other states, or authorized agencies thereof, to enable patrons in the signatory states to participate in interactive gaming offered by licensees in those signatory states"). Since February 2013, when Assembly Bill 114 was passed, Nevada decided it should perhaps pursue international compacts as well. *See* Assemb. B. 360, 77th Reg. Sess., § 12 (Nev. 2013) (replacing Assembly Bill 114's language with even broader language authorizing the Governor to enter into agreements "with other *governments*" (emphasis added)).

