

# THE GAMES PEOPLE PLAY: IS IT TIME FOR A NEW LEGAL APPROACH TO PRIZE GAMES?

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"As some wise man doubtless said when Babylon was merely a country town, it is impossible to suppress the gambling instinct. It is not impossible, however, to put more sense into the laws affecting gambling . . . ."<sup>1</sup>

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<sup>1</sup> 107 CONG. REC. 17,122 (1961) (statement of Sen. Ervin) (discussing gambling issues).

## I. INTRODUCTION

People love games. We buy hamburgers to acquire game pieces for an opportunity to become millionaires. We watch game shows with the thought that some day we will have the opportunity to win a fortune before a nationwide audience. We hold our children's birthdays at pizza arcades where kids play coin-operated games all day to win plastic trinkets. We log on to the growing number of game sites on the Internet to compete in both casual games like solitaire and more intense first-person shooter tournaments. And we love to gamble on everything from large jackpot state lotteries to slot machines and sporting events.

Yet there is no consistency between legal and illegal prize gaming. With regard to illegal gambling, the criminal laws are even inconsistently enforced. Complicating matters further, the notion of "gambling" itself is being tested by the merging of sweepstakes, contests, and lotteries. Specifically, as long as the public has an unfulfilled demand for a gambling experience, entrepreneurs continue to test the boundaries of legal sweepstakes and contests to meet these demands. The variations of sweepstakes and contests are bound only by human imagination and unbound by tremendous leaps in technology.<sup>2</sup>

Anomalies have become the rule, as opposed to the exception. For example, many states have arcade-restaurants that cater primarily to children. These arcades, such as Chuck E. Cheese, Dave & Busters, and Jillian's feature prize-redemption games. Many of the games have some skill elements, but they are also designed to emulate, if not achieve, chance-based gambling.<sup>3</sup> In some states, games unabashedly include "casino" in their names and incorporate spinning reels, typical of traditional slot machines, into their games. Despite this, an owner of a tavern that is restricted to adults may commit a crime by offering an actual slot machine for play in those states.<sup>4</sup>

This Article focuses on the various types of prize gaming. These categories include the following: (1) *gambling games*, including casino-gaming, parimutuel gaming, sports wagers, and lotteries; (2) *promotional gaming*, such as sweepstakes; and (3) the growing field of *skill-based gaming*.

Part II of this Article provides general background and legal definitions. Part III explores the recent history of the various forms of prize gaming. Part IV describes anomalies and inherent contradictions that exist in prize gaming. Part V focuses on some policy concerns that can provide a theoretical foundation for a more harmonious approach. Lastly, in Part VI, we argue that modern gambling requires a new legal approach to prize gaming and we propose a basic structure for such an approach.

## II. WHAT IS PRIZE GAMING?

"In the beginning, there was only chaos . . . ."<sup>5</sup>

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<sup>2</sup> See discussion *infra* Part IV.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> HESIOD, THEOGENY 64 (Stanley Lombardo, trans., 1993).

### A. *Confusion Reigns Despite a Persistent Phenomenon*

Almost all countries of the world afford their citizens some form of legal prize gaming.<sup>6</sup> It could be, for example, betting on a hot stock rumor, buying a ticket in a state-run lottery, wagering on a horse, or checking the bottom of a soda can to see if you won a trip to the World Cup.<sup>7</sup>

There is an old saying that “[i]f you bet on a horse, that’s gambling. If you bet you can make three spades, that’s entertainment. If you bet cotton will go up three points, that’s business. See the difference?”<sup>8</sup> Of course, given the analytical-similarity between the foregoing activities, it is difficult to justify why some activities are spurned, while others are legal.

Prize gaming is any activity where the participant is attempting to win a prize. There are three basic forms of prize gaming: gambling, sweepstakes, and contests.<sup>9</sup> In general, court decisions typically analyze gambling offenses as financial schemes where (1) individuals pay *consideration* (usually money) (2) to participate in a game of *chance* (3) for the opportunity to win a *prize* (usually even more money).<sup>10</sup> A *sweepstake* is similar, but involves activities where the participant *does not pay* consideration.<sup>11</sup> Likewise, a *contest* differs from *gambling* only because the winner is determined primarily by skill as opposed to chance.<sup>12</sup>

Increasingly, prize gaming scenarios appear to defy classification under such simple analytical models. For example, why is it legal to risk your money (consideration) on the chance that cotton stock will go up three points (a chance event) in hopes of making a profit (prize), while risking your money on the finish of a horse at the track may be prohibited?

In many instances, historic reasons, based on politics rather than analytical reasoning, exist for such distinctions.<sup>13</sup> One argument is that those forms of prize gaming activities that were popular with the upper class tended to be legal (i.e., stock trading, horse racing, and golf contests for a prize), while those that were popular with the “lower classes” tended to remain illegal (i.e., numbers [lotteries], general sports wagering, and card games for a prize).<sup>14</sup> For now, however, we merely note that legislation and case law dealing with prize gaming often appears to be intellectually incongruous.

<sup>6</sup> See generally ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION 1 (1996).

<sup>7</sup> ANTHONY N. CABOT, INTERNET GAMING REPORT IV 13 (2001) [hereinafter THE REPORT].

<sup>8</sup> Anonymous, *Gambling Quotes*, available at [http://www.geocities.com/omegaman\\_uk/quotes1.html](http://www.geocities.com/omegaman_uk/quotes1.html) (last visited Feb. 20, 2004).

<sup>9</sup> See discussion *infra* Part II.

<sup>10</sup> FCC v. Am. Broad. Co., 347 U.S. 284, 290 (1954).

<sup>11</sup> See, e.g., Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., 534 So. 2d 295, 296-97 (Ala. 1988).

<sup>12</sup> See generally Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 87 (Nev. 1961).

<sup>13</sup> See generally 38 AM. JUR. 2D *Gambling* §§ 31-60 (1974).

<sup>14</sup> See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1878-79 (Nov. 2000) (stating: “Gambling has long been criminalized, and enforcement (when it existed) has long focused on numbers rackets – illegal lotteries for mostly poor customers – rather than most upscale games. . . . [T]he picture is of differential enforcement breeding contempt for the law, which in turn bred defeat for the norm the law embodied. (With gambling, the defeat has been so total that the state, in the form of government-run lotteries, has entered into the very business it criminalized.)”).

Even courts are sometimes confused as to what activity should be prohibited under criminal gambling laws. For example, a Washington court held that a newspaper's free football contest contained the element of consideration because it required *effort* to pick the teams each week.<sup>15</sup> In another equally perplexing case, the Supreme Court of Nebraska upheld a ruling that chess and checkers are games of chance.<sup>16</sup>

## B. *The Basic Framework*

[Historically,] [a]t common law . . . gambling . . . where practiced innocently and as a recreation, was not unlawful. Such games were unlawful, however, where they became an incitement to a breach of the peace, so as to constitute a nuisance, tended to immorality . . . or for any peculiar reason were against public policy, or were conducted by means of cheating or by fraud. . . . Thus, gambling essentially is a crime only when and to the extent that the legislature has so declared it.<sup>17</sup>

As we prepare to examine the public policy choices and general historical background, a brief overview of the various categories of prize gaming is helpful. "Gambling" itself does not have a single definition; it is made up of three separate categories.<sup>18</sup> In the first category of gambling games are "lotteries" or chance games involving schemes where a person pays valuable consideration for the chance to win a prize based on a game of chance.

"Casino-style gaming" is generally a subset of lotteries or chance gaming. This subset encompasses such well-known chance games as slot machines, roulette tables, craps, and the like. In these games, participants risk something for the chance to win something of greater value than that which was risked.<sup>19</sup>

The second category of gambling games is "bookmaking." Bookmaking occurs when a person risks something of value on the outcome of an uncertain event, in which the bettor does not exercise any control, but has the opportunity to win something of greater value than that which was risked.<sup>20</sup> Whether sports wagering is an activity predominately determined by chance or skill can be the subject of much debate. Most states avoid this debate by enacting separate laws defining bookmaking as a criminal offense. The key difference between bookmaking and lottery laws is that a predominant element of chance, a prerequisite in many states to illegal gambling, is not a specific prerequisite to a bookmaking violation.<sup>21</sup> Bookmaking is typically associated with wagering on sporting events.<sup>22</sup>

Despite this, not all bookmaking is illegal. For instance, "trading commodity options" is a legal form of bookmaking.<sup>23</sup> Prior to federal legislation

<sup>15</sup> See *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the effort required to pick teams is sufficient consideration).

<sup>16</sup> See *Indoor Recreation Enter., Inc. v. Douglas*, 235 N.W.2d 398, 400-01 (Neb. 1975) (holding that checkers and chess are games of chance by implication).

<sup>17</sup> 38 AM. JUR. 2D *Gambling* § 31 (1999) (citations omitted).

<sup>18</sup> See discussion *infra* Part II.

<sup>19</sup> See generally 38 AM. JUR. 2D *Gambling* §§ 48-53, 55 (1999).

<sup>20</sup> See generally *id.* §§ 44-47.

<sup>21</sup> See generally *id.* §§ 44-47, 61-76.

<sup>22</sup> See *id.* § 45.

<sup>23</sup> Commodities trading is regulated by the Securities Act of 1933. See 15 U.S.C. § 77a et seq. (2000). See also RICHARD A. BREALEY, *FUNDAMENTALS OF CORPORATE FINANCE* 257

that specifically authorized such trading, the great majority of courts held that a contract to speculate in the rise and fall of commodities is illegal gambling if there was no intent that the underlying commodities would be delivered.<sup>24</sup> Specifically, this occurs if an actual stock or commodity purchase was never intended to take place.

"Pari-mutuel wagering" is a unique form of sports wagering. Unlike other forms of sports wagering, pari-mutuel horse wagering is legal in most states. Pari-mutuel wagering is important to the success of wagering on horse races.<sup>25</sup> The popularity of pari-mutuel wagering assures that horse track operators have the gross profits necessary to maintain horse track facilities and compensate the horse owners and others involved in the industry. Gross profit is assured because the track or off-track betting ("OTB") operator takes a commission from each wager and places the remaining amounts into pools to be divided among winning bettors. The commission retained by the operator is called the "takeout." Takeouts vary between states and tracks and are often set by law or regulation. Typically the takeout on win, place, and show bets is about fifteen percent and is slightly higher on "exotic" bets, such as exactas and trifectas. Pari-mutuel wagering is most commonly used for events such as horseracing, dog racing, and motor sports.<sup>26</sup>

The final category of "gambling" involves activities that are predominantly skill-based "contests," but because state legislatures want to eradicate

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(1995) ("Commodity futures allow firms to fix the future price that they pay for a wide range of agricultural commodities, metals, and oil. Financial futures help firms to protect themselves against unforeseen movements in interest rates, exchange rates, and stock prices.").

<sup>24</sup> See, e.g., *Pearce v. Rice*, 142 U.S. 28 (1891); see also *Farless v. Morehead*, 201 F. 310 (6th Cir. 1912) (holding that transactions were really "bets" or "wagers" on the fluctuations of the market, because all parties understood that *no* stock was to be in fact purchased and received); *Wade v. United States*, 33 App. D.C. 29 (1909) (holding that contracts tied to the probable rise and fall of market prices, *without* actual equity ownership, constitutes gambling and is prohibited); *Joslyn v. Downing, Hopkins & Co.*, 150 F. 317 (9th Cir. 1906) (holding that the pretend buying and selling of stocks or commodities were merely gambling transactions); *Morris v. Norton*, 75 F. 912 (6th Cir. 1896) (holding similarly and stating that such gambling contracts are void).

<sup>25</sup> As noted above, "pari-mutuel wagering" is a unique form of sports wagering. Specifically, unlike other forms of sports wagering, it tends to be legal, where licensed, in most states. Pari-mutuel wagering involves accepting bets on an event or contest and dividing the pooled entry fees among the winners. Normally, the pool is distributed pro rata to the winning bettors, and the promoter will subtract a commission called a "takeout." Pari-mutuel wagering is most commonly used in racing events such as horseracing, dog racing, and motor sports. Generally, for every dollar bet made at the track or an OTB facility, about 82% is returned to the players. Almost all of the remaining 18% goes to the takeout. Still, the track/OTB facility receives about 2% of each bet from "breakage." Breakage is the difference between the true pari-mutuel odds and the amount actually paid to the winning patrons after their winning totals are rounded down to the next lowest nickel, dime, or other set denomination or level.

<sup>26</sup> See generally 38 AM. JUR. 2D *Gambling* §§ 58-60 (1974). Pari-mutuel wagering activities may also implicate a number of federal laws, including the Interstate Horseracing Act. 15 U.S.C. §§ 3001-07 (2000). Federal exemptions for pari-mutuel wagering are limited to horse racing, however. Recent federal legislation clarified that both account wagering (via telephone and Internet) and pari-mutuel pooling do not violate federal law, if done between states where such pari-mutuel wagering is legal. See *id.*

these types of activities, they have grouped them with illegal gambling. The best example of this type of activity is poker.<sup>27</sup>

Besides poker and some other more traditional casino games, where any of the three elements of a chance game or lottery are missing, the activity is usually not treated as a prohibited lottery.<sup>28</sup> For example, because sweepstakes lack "consideration" (i.e., an entry fee), they are generally deemed to fall outside lottery prohibitions.<sup>29</sup> More specifically, a "sweepstake" is a giveaway based on chance.<sup>30</sup> Among other things, sweepstakes may include sending in a postcard to enter, receiving a game piece, or obtaining a free game card at a business.<sup>31</sup> Examples of this type of promotion include "Publisher's Clearinghouse" sweepstakes or the various McDonald's promotions.<sup>32</sup> While in many states private lotteries are illegal, correctly structured sweepstakes are legal.<sup>33</sup>

Moreover, true "skill games" lacking the lottery element of "chance" are legal in most states.<sup>34</sup> "Skill games" are games where participants' skill, and not chance, predominantly determine the outcome of the game.<sup>35</sup> A traditional slot machine, for example, is a game of chance because winning is determined purely by chance.<sup>36</sup> Another game, such as chess, which contains virtually no chance, is a game of skill.<sup>37</sup> Between the extremes of chess and slots are many games, however, that contain both chance and skill.<sup>38</sup>

To assess the legality of such games, most states have adopted the "predominance test." Under that test, if the winner is determined predominantly by chance, then the activity is gambling.<sup>39</sup> If, however, the winner is determined predominantly by skill, then the activity is a contest.<sup>40</sup> Two more traditional activities within the "grey area" are poker<sup>41</sup> and backgammon,<sup>42</sup> both of which have elements of skill and chance. To date, these two games have been held to

<sup>27</sup> See, e.g., *Charnes v. Cent. City Opera House Ass'n*, 773 P.2d 546, 551 (Colo. 1989) (holding that in Colorado, poker is an illegal gambling game of chance).

<sup>28</sup> See, e.g., *Cudd v. Aschenbrenner*, 377 P.2d 150, 153 (Or. 1962).

<sup>29</sup> See *id.*

<sup>30</sup> Anthony N. Cabot, Gregory R. Gemignani, & Louis V. Csoka, "Net Success": *Interactive Promotions in the Internet Age*, 6 GAMING L. REV. 295 (2002) [hereinafter *Net Success*].

<sup>31</sup> THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>32</sup> THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>33</sup> See generally *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 297 (Ala. 1988).

<sup>34</sup> See generally *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); see generally THE REPORT, *supra* note 7.

<sup>35</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>36</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>37</sup> See *Net Success*, *supra* note 30, at 15.

<sup>38</sup> *Id.*

<sup>39</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>40</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>41</sup> See, e.g., *Charnes v. Cent. City Opera House Ass'n*, 773 P.2d 546, 551 (Colo. 1989) (holding that, in Colorado, poker is an illegal gambling game of chance); see also *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that, in Massachusetts, video poker is a lottery in which chance predominates); but see *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405 (Mass. App. Ct. 1991) (holding that, in Massachusetts, video poker games are games of skill); cf. 1993 Colo. Op. Att'y Gen. No. 93-5 (April 21, 1993) (opining that, in Colorado, poker is a game of skill, but nevertheless illegal under specific statutory language).

be predominantly skill-based by some courts and predominately chance-based by others.

### III. THE RECENT HISTORY OF PRIZE GAMING

"Jacta alea est" ("the die is cast").<sup>43</sup>

#### A. Lotteries and Numbers

Since the founding of our nation, many forms of prize gaming have existed in this country with periods of prohibition following periods of permissiveness.<sup>44</sup> Lotteries are one of the best and earliest examples of a gambling activity that became sanctioned or legalized to help support socially important causes.

[Specifically,] [l]otteries in the United States date to early colonial times. A lottery was conducted in 1612 to support the Jamestown settlement. In the 1740s, Benjamin Franklin organized a lottery to raise money for the strengthening of Philadelphia's defenses. George Washington's Continental Army was the beneficiary of a lottery authorized by the Continental Congress in 1776. [Furthermore,] [s]tate-authorized lotteries funded much of the westward expansion of the nation throughout the first half of the nineteenth century.<sup>45</sup>

Several institutions of higher learning, including Yale and Harvard, were, in part, financed by lotteries.<sup>46</sup> The proliferation of state-run lotteries began in the mid-1960s to address state budget deficits. As one commentator noted:

[More recently,] [g]rowing opposition to tax increases was a leading factor in establishing [legalized] state-run lotteries in the 20th century. In 1964 New Hampshire was the first state to sponsor a lottery, followed by New York in 1967. New Jersey launched the first financially successful modern lottery in 1971. . . . There were also various attempts to legalize a national lottery, but they failed to be passed by Congress.<sup>47</sup>

The illegal "numbers" game was another prominent form of lottery. Often, for as little as a penny, residents of usually the poorest neighborhoods of major United States cities could pick either a three or four digit number with

<sup>42</sup> See, e.g., *Hurvich v. City of Birmingham*, 46 So. 2d 577 (Ala. 1950) (holding that backgammon is a game that is "brought about much more by the skill of the contestants, than by the accidental fall of the dice."); *but see Boardwalk Regency v. New Jersey*, 457 A.2d 847, 851 (N.J. 1982) (holding that despite any skill necessary, many factors in the game, including the doubling technique which results in increasing points, was an "uncontrollable element of chance").

<sup>43</sup> 2 PLUTARCH'S LIVES OF ILLUSTRIOUS MEN 528 (John B. Alden 1983).

<sup>44</sup> See generally I. Nelson Rose, *Gambling and the Law - Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93 (1992).

<sup>45</sup> Kevin D. Doty, *Mailing and Transporting Lottery Materials*, FEDERAL GAMBLING LAWS 39 (Trace Publ'g 1999).

<sup>46</sup> Harvard Medical School - Massachusetts Council on Compulsive Gambling, *Time is on the Lottery's Side*, 6 THE WAGER WKLY. ADDICTION GAMBLING EDUC. REP. 1, 2 (Feb. 21, 2001), available at <http://www.thewager.org/Backindex/vol6pdf/wager68.pdf> (last visited Feb. 20, 2004).

<sup>47</sup> Roger Dunstan, *The History of Gambling in the United States*, in GAMBLING IN CALIFORNIA 7, available at <http://www.library.ca.gov/CRB/97/03/Chapt2.html> (last visited Feb. 20, 2004).

the hopes that it would match the number drawn by the operator. Tens of thousands of low-income individuals have purchased tickets in these underground lotteries.<sup>48</sup>

Numbers was quite popular, even though the game is illegal. One author claimed, "the amount wagered on numbers was \$5 billion in 1960. Another estimate shows that the numbers game was grossing \$20 million annually in Chicago alone during the early 1970s and the total handle was \$1.1 billion."<sup>49</sup>

### B. Sweepstakes

Sweepstakes have been around for a long time. McDonald's and Pepsi, among others, have been operating sweepstakes with great success.<sup>50</sup> Most states permit sweepstakes, provided that several conditions are present.<sup>51</sup> Specifically, the promoter may not require participants in the promotion to stake anything that may be deemed "consideration." Under the majority rule, incidental expenses or inconveniences undertaken to enter a contest promotion are not consideration.<sup>52</sup> For example, the cost of a postage stamp or the need to go to a store to obtain a contest entry form is not consideration under the "any effort or expense" test.<sup>53</sup>

Perhaps the most popular are sweepstakes that are tied to the sale of particular retail products. For example, persons buying a certain brand of soda or hamburger may have the chance to win a prize. These sweepstakes are designed to promote legitimate business objectives: increased sales.<sup>54</sup> There are costs associated with these benefits. These costs are born by the promoter and competitor. For example, when Pepsi holds a sweepstakes promotion, both Coke (in lost product sales) and Pepsi (in the cost of purchasing the prizes), and not the general public (in entry fees paid), pay the costs.<sup>55</sup>

When tying sweepstakes with products, a company promoting the product will typically incorporate into the product's packaging either a game piece or information about whether the patron won the prize. Thus, by virtue of the purchase itself, the patron may obtain a game piece or determine if he or she won the prize.

The cost of the product itself is consideration in most states.<sup>56</sup> To avoid classification as an illegal lottery based on this, promoters must provide a free

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<sup>48</sup> See *id.*

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Stephanie Thompson, *Frito-Lay Reports Doritos On-Line Ad Success*, ADAGE.COM, available at <http://www.adage.com/news.cms?newsId=36574> (last visited Feb. 20, 2004).

<sup>51</sup> See generally THE REPORT, *supra* note 7, at 20-22; see also *Net Success*, *supra* note 30.

<sup>52</sup> See *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962).

<sup>53</sup> See *id.* The minority rule, however, which may be followed in only a few states based on older case law, would find consideration in any activity that requires participants to incur any effort or expense. See, e.g., *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (finding that the effort required to pick teams is sufficient consideration).

<sup>54</sup> See THE REPORT, *supra* note 7, at 20; see also *Net Success*, *supra* note 30.

<sup>55</sup> See generally *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 297 (Ala. 1988).

<sup>56</sup> See 1995 Fla. Op. Att'y Gen. No. 95-21 (Mar. 21, 1995) (stating that consideration may exist where there is a benefit to the promoter); see generally 1996 Va. Op. Att'y Gen. 1 (Apr. 19, 1996) (explaining that promotions involving the sale of products with little or no



alternative method of entry ("AMOE"). Games like this are generally legal because the participant is not required to purchase the product as a prerequisite for entering the sweepstake.<sup>57</sup>

Recently, sweepstakes have come under increased state scrutiny, not because they too closely resemble lotteries, but due to misleading promotions. Specifically, a few years ago, the attorneys general of twenty-six states made a joint announcement in which they explained that Publishers Clearing House ("PCH") was to pay \$34 million – "including immediate restitution to thousands of consumers" – and "make significant and permanent reforms in the way it conducts its future contests."<sup>58</sup> In particular, according to that announcement:

The \$34 million settlement and permanent injunction will resolve state lawsuits that alleged consumers often were misled by PCH mailings into believing they had won contests, or that making purchases would enhance their chances of winning. "No longer will Publishers Clearing House be able to use false statements, fictional characters and deceptive personalized letters to prey upon the elderly citizens of our state," said Wisconsin Attorney General Jim Doyle. Texas Attorney General John Cornyn added, "At last, Texas consumers can rest assured that this settlement will hold PCH accountable in the way the company does business. . . ." In addition to the changes in its future business practices, PCH must pay immediate restitution totaling \$19 million for customers who were deceived by its past practices. PCH also will pay civil penalties totaling \$1 million, as well as \$14 million to cover the costs associated with the states' litigation and the costs of administering the restitution payments. "This injunction requires PCH to make the restitution money available for distribution right away, and not wait two or three years," Missouri Attorney General Jay Nixon said. "This is especially important when our investigation shows that most of the consumers who have been injured by PCH's past practices were elderly, and time is a big factor."<sup>59</sup>

### C. Skill Games, Contests, and Game Shows

Like sweepstakes, most states exempted skill games from criminal gambling prohibitions.<sup>60</sup> Many reasons exist for these exemptions. Historically, such contests were used to motivate the citizenry to increase its combat skills. As experts noted: "The value of martial games was recognized as far back as the days of Sparta and Rome, when youths engaged in mock battle to build skills that would later serve them in their duties as a soldier."<sup>61</sup>

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value are illegal lotteries), available at <http://www.oag.state.va.us/media%20center/Opinions/1996opns/apr964.htm> (last visited Feb. 20, 2004).

<sup>57</sup> See generally THE REPORT, *supra* note 7, at 20; see also *Net Success*, *supra* note 30.

<sup>58</sup> National Association of Attorneys General, *Twenty-Six Attorneys General Win \$34 Million Settlement from Publishers Clearing House as Restitution for Consumers*, available at <http://www.naag.org/features/pubhouserest.php> (last visited Feb. 20, 2004).

<sup>59</sup> *Id.*

<sup>60</sup> See generally *State v. Am. Holiday Ass'n.*, 727 P.2d 807, 812 (Ariz. 1986).

<sup>61</sup> Erik M. Berg & Roger L. Lampe, *Modeling the Joust 7* (Feb. 27, 2002) (unpublished B.S. Interactive Qualifying Project Report, Worcester Polytechnic Institute, on file with the *Nevada Law Journal*) available at [www.wpi.edu/~jforgeng/Modeling\\_the\\_Joust.pdf](http://www.wpi.edu/~jforgeng/Modeling_the_Joust.pdf) (last visited Aug. 29, 2003).

Moreover, contests are historically intertwined in American culture, from the rodeo to bowling, and even golf tournaments. As the Arizona Supreme Court noted:

Paying an entrance fee in order to participate in a game of skill . . . in the hope of winning prize money guaranteed by some sponsor to successful participants, is a traditional part of American social life. [W]e are reluctant to adopt a statutory interpretation which would turn sponsors of golf, tennis or bridge tournaments, rodeos, livestock, poultry, and produce exhibitions, track meets, spelling bees, beauty contests, and the like into class 6 felons . . . [Furthermore, where the legislature specifically created a state-sponsored lottery,] it is difficult . . . to find any moral imperative for a sweeping interpretation of a gambling statute in order to make the sponsor of a crossword puzzle contest a criminal while his next door neighbor, betting a dollar with the state to win a million in the state lottery, is a virtuous citizen.<sup>62</sup>

Perhaps another way to justify the distinction between skill games and games of chance is their relative popularity. For example, slot machines do not require training and anyone can play and potentially win thousands or even millions. As a result, given such broad appeal and "accessibility," the potential audience to be invited to play and to invest its discretionary income is much larger. On the other hand, given the level of skill required, skill-based games do not normally enjoy such mass participation. This distinction normally concerns those in the business of providing traditional forms of gambling, such as casino-style gambling or sports wagering, because of the paternalistic nature of gambling laws, which is normally a bar to these forms of gambling.<sup>63</sup> What is generally overlooked is that there is an element of chance even in skill-based games, and vice versa. For example, only a few hundred chess players have a realistic chance of winning major chess tournaments. Judge Williams perceptively commented on the skill necessary to win pool tournaments: "[b]illiards and pool are not games of chance. If any one [sic] thinks they are, let him go and play them for a stake, and he will promptly discover his error."<sup>64</sup>

Carnival games are an early example of skill games, where, for example, contestants could win a prize by successfully shooting a water pistol at an object six feet away. Later arrivals of skill games include certain radio events and television shows in which contestants were intellectually challenged for prizes.<sup>65</sup>

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<sup>62</sup> *Am. Holiday Ass'n*, 727 P.2d at 812 (citation omitted).

<sup>63</sup> See generally ANTHONY N. CABOT, *CASINO GAMING – POLICY, ECONOMICS AND REGULATION* (1996). At the same time, of course, given such limited public appeal and participation, chess, pool, or bridge clubs – unlike casinos – cannot offer world-class entertainment, luxury accommodations, or armies of cocktail waitresses.

<sup>64</sup> *State v. Stroupe*, 76 S.E.2d 313, 316 (N.C. 1953).

<sup>65</sup> The federal government became involved in regulating such contests in the 1950s when there were a number of game show fraud schemes. The movie *QUIZ SHOW* dealt with this general topic. See *QUIZ SHOW* (1994). For a synopsis, see <http://www.hollywood.com/movies/detail/movie/183457> (last visited Feb. 20, 2004). Today, with respect to wire or radio communications, federal law, among other things, provides: "It shall be unlawful for any person, with intent to deceive the listening or viewing public . . . [t]o supply to any contestant . . . any special and secret assistance . . ." 47 U.S.C. § 509(a)(1) (1982). Federal regulations further provide: "A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and

In the 1980s, promoters began challenging the limited mass appeal of skill games by using pyramid methods to entice persons to enter skill-based contests. The pyramid contest had several rounds, each round requiring both additional consideration and a higher degree of skill.<sup>66</sup> As one commentator noted, "Prospective contestants are solicited through the mail in all fifty states . . . [Specifically,] [w]ord puzzle games, mathematical problems and trivia questions are the forms the contest promoters most commonly use."<sup>67</sup>

Lastly, the Internet has spawned a new era of skill-based gaming, both in the form of "hardcore" gamers and casual gamers. Hardcore gaming includes those games requiring intense graphic and audio capabilities to create virtual worlds where participants compete to achieve objectives against other participants or the computer program. These games include role playing games, first-person shooters, real time strategy games (typically war games), racing and sports games, and the like.<sup>68</sup> Players often compete in a computer world along with other players. This is called a multi-user domain ("MUD"). Casual gaming typically involves simple puzzle or logic games, like checkers or Tetris.<sup>69</sup>

#### D. Sports Wagering

##### 1. Classic Sports Wagers

Sports betting is probably as old as spectator sports themselves. Ancient Romans, for example, enjoyed betting on gladiatorial fights and chariot races.<sup>70</sup> Sports wagering is popular and legal in most international countries; however, the United States does not permit it. Virtually all states except Nevada have statutes prohibiting sports wagers and bookmaking.<sup>71</sup>

Sports wagering has a colorful history in the United States. Most scandals have involved a regrettable relationship between sports personnel and illegal gamblers. The most infamous scandal surfaced in the 1920s, when the Chicago White Sox team was accused of intentionally losing the World Series. A more recent scandal involved Pete Rose, baseball's all-time leader in total career

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shall conduct the contest substantially as announced or advertised." 47 C.F.R. § 73.1216 (1986).

<sup>66</sup> See generally *State v. Dahlk*, 330 N.W.2d 611 (Wis. Ct. App. 1983) (discussing one form of a pyramid scheme).

<sup>67</sup> Scott E. Schutzman, *A Game of Skill: The Need for Reform in the Regulation of Mail Order Contests*, 8 WHITTIER L. REV. 1071, 1071 (1987).

<sup>68</sup> See, e.g., <http://www.hardcoregaming.com/main.htm> (last visited Feb. 20, 2004).

<sup>69</sup> See, e.g., <http://www.palm-games.com/> (last visited Feb. 20, 2004).

<sup>70</sup> See Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAP. L. REV. 87, 88 (2002).

<sup>71</sup> For example, bookmaking is illegal in New York and its definition is broad in scope. See N.Y. PENAL LAW §§ 225.10(1), 225.15, 225.20, 225.00(9) (McKinney 1965). Bookmaking is defined as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events." *Id.* at § 225.00(9).

base-hits, who was suspended for life for allegedly betting on games in which he was involved.<sup>72</sup>

In an attempt to protect the integrity of sports, most professional sports leagues have adopted comprehensive rules against associating with gamblers and gambling. Such rules typically include a ban on sports bets by owners, players, and other personnel. Moreover, dual ownership of sport clubs and gambling operations, as well as advertising and other associations with gambling enterprises, is prohibited.<sup>73</sup>

Despite these rules and state laws, the federal government prohibits sports wagering because it is allegedly in the best interest of the nation. This was a radical departure from the historic policy that gambling laws were a state decision. This is the only time in the history of the United States that the federal government has taken the lead on gambling policy. Specifically, the issue of the integrity of athletics led to the Professional and Amateur Sports Protection Act in 1991, which effectively made sports wagering a federal offense.<sup>74</sup>

The sponsor of the federal legislation was then-United States Senator Dennis DeConcini of Arizona. Those that supported the bill cited sports fixing as justification for the legislation. Other reasons noted were the fan perception of sports integrity and a fanciful assumption that legalization would teach young persons to gamble. However, Senator DeConcini was aware that some thirteen states were considering some form of state-sponsored sports wagering and that no prior incident of sports fixing could be tied to legal sports wagering.<sup>75</sup> Fortunately for Nevada, the state was able to obtain an exemption from the ban on sports wagering; however, that exemption is currently under attack.<sup>76</sup>

Following a decade of the federal ban, law enforcement efforts have not resulted in the eradication of illegal bookmaking. Instead, lax enforcement endeavors, and often the lack thereof, has resulted in the proliferation of illegal sports wagering.<sup>77</sup> For example, in 1960 there were 123,000 gambling arrests.<sup>78</sup> The number of arrests for illegal gambling decreased to 15,000 by 1975.<sup>79</sup> Despite the decrease in illegal gambling, the number of illegally wagered dollars has increased from \$8 billion in 1983 to between \$80 and \$380 billion in 1997.<sup>80</sup> In 1998, only \$2.3 billion was estimated to have been legally bet in Nevada.<sup>81</sup> In 1983, the number of illegally wagered dollars increased

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<sup>72</sup> See generally Tom Farrey, *Is Sports Gambling with Its Integrity?*, ESPN.COM (Feb. 10, 2003), available at <http://espn.go.com/nba/s/2003/0209/1506501.html>. (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>73</sup> See *id.*

<sup>74</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-04 (1994).

<sup>75</sup> See S. 474, 102d Cong. (1992) (enacted).

<sup>76</sup> The 107th Congress, for example, was considering legislation to revoke Nevada's exception for amateur sports wagering. See S. 718, 107th Cong. (2001); see also H.R. 1110, 107th Cong. (2001).

<sup>77</sup> See Dan McGraw, *The National Bet*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50.

<sup>78</sup> *Id.* at 52.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* See also Robert Macy, *Ban on College Sports Betting Could Cost State Books Millions*, LAS VEGAS REV.-J., May 18, 1999, at 4A.

<sup>81</sup> See Dan McGraw, *The National Bet*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50.

dramatically, by a multiple of about 200 (far outstripping inflation), presumably not because of a lack of potential law-enforcement targets.<sup>82</sup>

Despite this immense growth, law enforcement has reallocated its resources so that more is given to deal with serious crimes, rather than illegal gambling. Some of this reallocation may be attributed to the fact that illegal sports gambling is hard to detect and prosecute, in part due to cyber-sportsbooks. The overwhelming reality, however, is that illegal gambling is no longer perceived as a serious crime even though it is still a federal offense. For example, virtually everyone knows of an office sports pool.

Sports wagering is estimated to be a \$380 billion industry.<sup>83</sup> Less than one percent of this amount is bet legally in Nevada sports books; the other ninety-nine percent is controlled by persons who are assuredly criminals because, by the very act of accepting sports wagers, they are breaking the law.<sup>84</sup> To the great detriment of states, substantial profits from illegal gambling go untaxed. In fact, the profits (ninety-nine percent) go to the criminals, some of whom can use it to support more problematic criminal activity. Some profits go to pay police to "look the other way."<sup>85</sup>

## 2. *Pari-Mutuel Wagering*

The United States is inconsistent in the legal treatment of general sports wagers as illegal and wagers on horse races as legal. Most other countries do not treat the two differently. Several reasons exist for this anomaly in the United States. First, the American legal system has borrowed heavily from English jurisprudence, and horseracing had a long and proud tradition in England.<sup>86</sup> Second, the horseracing industry, providing a forum for the "Sport of Kings," was probably also influential on lawmakers. Lastly, as commentators have noted, by legalizing wagering on horse races, states were "encouraging agriculture and the breeding of horses . . . , generating public revenue, . . . [and] providing for maximum expansion of horse racing opportunities . . . ."<sup>87</sup>

Despite this long history, the horse racing industry may not exist today without off-track betting ("OTB") facilities. An OTB is a licensed facility where a person can place wagers on the outcome of horse races held at race-tracks throughout the country. From the 1940s through the early 1980s, horse racing experienced its golden era.<sup>88</sup> In 1972, nearly 72 million persons attended on-track races; this is nearly twice that of baseball, which is known as America's favorite pastime. However, after 1972 the walls began tumbling.

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<sup>82</sup> See *id.* at 53; see generally Farrey, *supra* note 72.

<sup>83</sup> Robert Macy, *Ban on College Sports Betting Could Cost State Books Millions*, LAS VEGAS REV.-J., May 18, 1999, at 4A.

<sup>84</sup> *Id.*

<sup>85</sup> I. Nelson Rose, Note, *Gambling and the Law: Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L.J. 29, 45 (2000).

<sup>86</sup> See Mike Parker, *The History of Horse Racing*, available at <http://www.mrmike.com/explore/hrhist.htm> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>87</sup> T. Taylor & G. Trude, *California Horse Racing Board*, 15 CAL. REG. L. REP. 158, 160 (Winter 1995).

<sup>88</sup> See generally Matt Krantz, *Gambling Drives Passion for Ponies*, USA TODAY, June 6, 2003, available at [http://www.usatoday.com/money/industries/2003-06-05-ponies\\_x.htm](http://www.usatoday.com/money/industries/2003-06-05-ponies_x.htm) (last visited Feb 20, 2004).

This tumble occurred when horse racing became the victim of fickle American consumer preference, as the American gambling dollar flowed from the track window to the slot machine.

Despite the shift in popularity, horse race wagering has actually increased. In 1982, Americans legally wagered about \$11.7 billion on horse races. In the ensuing eighteen years, this total increased a modest 35.5% to about \$15.9 billion.<sup>89</sup> But these figures tell only half of the story. On-track wagering decreased by about 72% during approximately the same period, dropping from about \$9.9 billion to \$2.8 billion.<sup>90</sup>

Today, the tracks acknowledge the importance of OTB facilities. This, however, was not always the case. Racetracks and horse owners initially saw OTB facilities and their potential national growth as a threat. Specifically, the tracks and horse owners were concerned that the consumer appeal of OTBs in major cities would harm the on-track attendance and jeopardize racetrack employment. Proponents of off-track betting, on the other hand, argued that the developing off-track market would increase – not redistribute the market – and that the increased market would benefit the overall health of the industry. Proponents of OTBs claimed that much of this market could come from persons who previously gambled with illegal bookies. Besides cutting the flow of funds to criminals, the government could receive tax revenues from an additional source.

After several years of debate in the late 1970s, these track owner concerns resulted in federal legislation. The Interstate Horseracing Act (“IHRA”) now governs the relationship between the OTB operators, the tracks, horse owners and trainers, and the state racing commissions; this Act applies to wagers placed in one state on the outcome of races held in another state.<sup>91</sup> All other aspects of horse racing, such as licensing and policing, are left to the discretion of the various state racing or gaming commissions.<sup>92</sup>

## *E. Casino Gaming*

### *1. General History*

To understand modern casino-style gaming, it is important to understand the backdrop from which it grew. The following is a brief history of the State of Nevada, and specifically Las Vegas.

The city of Las Vegas was not an overnight sensation.<sup>93</sup> How a tiny desert town that served as a railroad watering stop became the most novel and imaginative city in the world is attributable to perseverance, vision, capitalism, and luck, in equal parts.<sup>94</sup> Gaming law and regulations played a significant

<sup>89</sup> Eugene Martin Christiansen & Sebastian Sinclair, *The Gross Annual Wager of the United States, 2000* “Waiting to Exhale,” (Christiansen Capital Advisors, LLC 2000) available at <http://www.grossannualwager.com/Primary%20Navigation/Online%20Data%20Store/Free%20Research/Gaw%2000%20Analysis.pdf> (last visited Mar. 01, 2004).

<sup>90</sup> *Id.*

<sup>91</sup> See 15 U.S.C. §§ 3001-07 (2000).

<sup>92</sup> See, e.g., *Atl. City Racing Ass’n v. Att’y Gen.*, 461 A.2d 178, 181 (1983) (holding that the IHRA did not preempt state law that prohibited interstate pari-mutuel wagering).

<sup>93</sup> LIONEL SAWYER & COLLINS, *NEVADA GAMING LAW 2* (Trace Publ’g 2000) (1991).

<sup>94</sup> *Id.*

role in the growth of Las Vegas, providing both the substance and the perception of integrity that today allows Nevada casino operators to obtain financing through the sale of stock and to access bank and bond financing.<sup>95</sup> Despite these contributing sources, the Great Depression ultimately launched the modern era of gaming in Nevada.<sup>96</sup> Declining state revenues and the fast diminishing popularity of the "temperance movement" created strong public sentiment to legalize all forms of gaming.<sup>97</sup> The public perceived casino gaming as a vehicle to increase business and provide needed tax revenues.<sup>98</sup>

In 1931, Nevada legalized virtually all forms of gaming, including casino-style gaming, sports betting, and horse wagering, but did so with little concern for regulating the industry. A few years later, air conditioning and the growing popularity of the automobile in the early 1940s caused an explosive growth in Nevada's gaming industry.<sup>99</sup> The potentially lucrative industry caught the attention of legitimate developers and less-than-legitimate organized crime figures.<sup>100</sup> Following the murder of casino-owner and organized crime boss Benjamin "Bugsy" Siegel in June 1947, Nevada Attorney General Alan Bible issued an official opinion that led to state involvement in the regulation of casino gaming.<sup>101</sup>

Before Siegel's murder, no explicit provisions in state law allowed the Tax Commission to consider the character of an applicant when issuing gaming licenses.<sup>102</sup> The Commission could, however, pass regulations necessary to administer the gaming laws.<sup>103</sup> In Bible's opinion, those provisions allowed the Commission to adopt regulations requiring "[i]nquiry into the (antecedents, habits, and characters) of applicants in order to satisfy the Commission that they will not violate the gambling law . . . prohibiting thieving and cheating games. . . ."<sup>104</sup>

Soon afterwards, in 1949, the Nevada Legislature formally set its blueprint to rid the gaming industry of organized crime by shifting the licensing authority

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<sup>95</sup> *Id.* More significantly, Nevada's story is a tale of strong, independent miners who worked the Comstock Lode in the 1860s. It is a tale of thousands of workers who risked their lives in the sweltering, southern Nevada heat to build Hoover Dam, one of the world's greatest feats of modern engineering. And it is a tale of people who had the courage to rid the gaming industry of organized crime and confront powerful forces in Washington, D.C. who were determined to wipe Nevada's casinos off the map. Moreover, Nevada's gaming industry, which generated a casino "win" in 1997 of \$7.8 billion and contributes more than half of the state's budget revenues, could not have evolved without the courage and dedication of Nevada's legislators and regulators. Hard work and dedication molded a regulatory system that balances the need to control the industry with the freedom necessary to allow it to flourish. This balance took more than sixty years to achieve. *See id.*

<sup>96</sup> *Id.* at 9.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 12.

<sup>100</sup> *Id.* at 13.

<sup>101</sup> *Id.* *See also* 1947 Nev. Op. Att'y Gen. No. 1947-528 (Oct. 14, 1947).

<sup>102</sup> LIONEL SAWYER & COLLINS, *supra* note 93, at 15.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* *See also* 1947 Nev. Op. Att'y Gen. No. 1947-528 (Oct. 14, 1947). Bible told the Commission that if it "finds reasonable ground to apprehend that the grant of a license would be against the public interest, you would be within the powers delegated to you to refuse the license." *Id.*

from local to state government and by formally giving the Tax Commission the authority to regulate gaming. These amendments stated that a person could not operate a game without first obtaining a state gaming license.<sup>105</sup> The Tax Commission was to administer the law for the protection of the public interest and enact regulations necessary to carry out that goal.<sup>106</sup> The Commission's charge included, as indicated above, obtaining "information concerning the applicant's antecedents, habits, and character."<sup>107</sup>

The 1949 amendments had a lasting influence on Nevada gaming in two ways.<sup>108</sup> First, the amendments established a system for the regulation of gaming that allows gaming authorities to carry out broad legislative policies through the adoption of regulations.<sup>109</sup> Second, the amendments also placed an emphasis on the application process.<sup>110</sup> Without question, the application process today is the most thorough aspect of Nevada regulatory control.<sup>111</sup> This application process was created to be so rigorous as to keep the industry clean, even if it meant excessive caution.<sup>112</sup>

As modern casino-style gaming began spreading throughout the states and the world in the late 1960s, Nevada became the model and inspiration to a new generation of lawmakers. These lawmakers set out to create their own set of gaming regulations.<sup>113</sup> Under the model, strong and independent regulatory agencies and licensing (which includes exhaustive background investigations) became an absolute must to a modern system of gaming control.<sup>114</sup>

Today, more than half of all United States jurisdictions have some form of legally-sanctioned gaming, whether it be on land or over waterways.<sup>115</sup> For example, as early as 1989, Iowa took significant steps to legalize riverboat casinos and South Dakota opened up a low stakes casino hall.<sup>116</sup>

In general, where states have taken steps to legalize casino-style gaming, they normally had the requisite budget at the outset to create the necessary industry oversight.<sup>117</sup>

Adding to casino-style gaming growth, the Indian Gaming Regulatory Act of 1988 was another major milestone toward the proliferation of casino gaming.<sup>118</sup> As a result of this Act and other developments, gaming activities on Native American reservations now contribute over eleven percent of all gambling winnings in the United States.<sup>119</sup> The Act also further increased casino-

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<sup>105</sup> LIONEL SAWYER & COLLINS, *supra* note 93, at 16.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 23.

<sup>114</sup> *Id.* at 23.

<sup>115</sup> See United States Casinos, available at <http://us.casinocity.com/> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>116</sup> See INTERNATIONAL CASINO LAW 3 (Anthony N. Cabot et al. eds., 1999).

<sup>117</sup> See generally *id.* at 1-8.

<sup>118</sup> See generally Indian Gaming Regulation, 25 U.S.C. §§ 2701-21 (1994).

<sup>119</sup> INTERNATIONAL CASINO LAW 158 (Anthony N. Cabot et al. eds., 1999). By 1999, there were 281 gaming facilities on Native American lands in thirty-two states. Many of these



style gaming because some states recognized the inevitable existence of tribal gaming, and thus justified the legalization of other non-tribal gaming in their states as well.

## 2. *Slot Machines and Table Games*

In the distant days of the male-dominated world of high rollers, high-stake gamblers regarded slot machines merely as a diversion for their wives and girlfriends while they hit the craps, blackjack, or poker tables.<sup>120</sup> But things have changed.<sup>121</sup> With the development of new technology, particularly the microprocessor, slot and video poker machines and other electronic gaming devices are more sophisticated and appealing.<sup>122</sup> The jackpots are bigger and a new generation of gamblers evolved that were less interested in the traditional table games and more intrigued by the machines.<sup>123</sup>

The growing popularity of video poker in the late-1970s and early-1980s accelerated the growth in the gaming machine industry.<sup>124</sup> For example, in the year 2000, devices accounted for nearly sixty-six percent of the casino revenues in Nevada casinos that have yearly revenues of more than \$1 million.<sup>125</sup>

Notably, the slot experience is now capable of replication on home computers, cellular telephones, personal digital assistants ("PDAs"), interactive television, and other digital devices.<sup>126</sup>

## F. *The Age of High Technology*

The age of high technology, specifically the wide distribution of inexpensive yet sophisticated computing devices, is changing the prize gaming industry. This change extends even to sweepstakes and contests. While some branches of the industry have transmuted or reinvented themselves, other branches were pushed to the sidelines or completely disappeared.

The first significant changes were in the lottery industry. "The Oregon State Lottery . . . [for example] has on-line keno and video poker machines in thousands of bars . . ."<sup>127</sup> Arguably, these are essentially slot machines in disguise. Not surprisingly, given such widely available and regulated competing forms of lottery, the numbers racket has almost completely disappeared.

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facilities, Foxwoods for one, could be transplanted to Nevada, and even seasoned Las Vegas customers would be hard-pressed to notice significant differences between the two operations.

<sup>120</sup> LIONEL SAWYER & COLLINS, *supra* note 93, at 197.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* According to Board statistics, slot machine revenue statewide in 1975 was \$370 million, compared to \$805 million from table games. Slot revenues surpassed table games eight years later, accounting for \$1.5 billion of the state's \$2.9 billion in gaming revenues.

<sup>125</sup> *Id.* at 197-98. By 1998, slot machines generated \$5.3 billion in gaming revenues statewide according to the Board's figures.

<sup>126</sup> Sebastian Sinclair, *Let the Chips Fall Where They May: An Industry Begins to Take Wing*, in INTERNET GAMBLING REPORT IV 67, 87 (Anthony N. Cabot ed., 2001).

<sup>127</sup> I. Nelson Rose, *Gambling and the Law - Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 97 (1992).

Second, while sweepstakes are not much different today than two generations ago, the availability of the Internet as a delivery vehicle will change the debate about the nature of "consideration." The Internet allows companies to use sweepstakes to garner information about a participant to an extent never realized before. Such data collection is often a precondition for entry into a sweepstakes site. This data is then used internally for marketing, or sold to third parties.<sup>128</sup> While a person does not have to pay to enter an Internet sweepstake, the information provided to the promoter has tangible resale value and thus may be deemed consideration in some states.

Third, skill games also have undergone a revolution. In particular, the video game craze, which began with "PONG" in the early 1970s, has experienced a revival with the faster microprocessors in today's desktop computers. Such games have become much more complex than the carnival games even a generation ago.

The Entertainment Software Association estimates that the computer and video game market grew to \$5.5 billion in the United States in 1998, which was the third straight year of double-digit growth.<sup>129</sup> The trend appeared to finally level off in 2000, with sales hovering between the \$6 and \$7 billion mark.<sup>130</sup>

As a result of computer and video game popularity, a world of Internet game tournaments and contests has already emerged. The Internet provides not only a method of sale and delivery of entertainment software, but also a platform for multi-player interactive games ("MUDs"). These MUDs allow home users to enter and leave an Internet site at their will. When in the site, a home user can interact in a game environment with other home users. These MUDs have tremendous potential in the interactive game market. One can envision entire simulated games, such as baseball or football, where a different home user controls each participant in the contest.<sup>131</sup>

More importantly, these Internet platforms are the staging grounds for substantial prize games. These contests include competing as players within the game<sup>132</sup> and participating in contests where programmers create characters and modifications to the games themselves.<sup>133</sup>

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<sup>128</sup> Data Mining, available at [http://searchcrm.techtarget.com/gDefinition/0,294236,sid11\\_gci211901,00.html](http://searchcrm.techtarget.com/gDefinition/0,294236,sid11_gci211901,00.html) (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>129</sup> The Entertainment Software Association, *Industry Sales and Economic Data*, available at <http://www.theesa.com/pressroom.html> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>130</sup> *Id.* Nevertheless, 2002 was another record breaking year, with sixty-three percent of parents saying they plan to purchase at least one game this year.

<sup>131</sup> A natural evolution of MUDs is an environment to stage tournaments or contests for prizes. See Associated Press, *Bets Are On for Online Gamers* (Mar. 25, 2003), available at <http://edition.cnn.com/2003/TECH/fun.games/03/25/gamers.betting.ap/> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>132</sup> See Tricia Harris, *Cyberathletes Converge on Dallas* (July 20, 2002), available at [http://www.dallasnews.com/sharedcontent/features/punchbutton/features/stories/072002dnpbcpl\\_preview.b531b86.html](http://www.dallasnews.com/sharedcontent/features/punchbutton/features/stories/072002dnpbcpl_preview.b531b86.html) (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*). One game called "Counterstrike" held a tournament with total cash prizes of \$100,000.

<sup>133</sup> See OGaming, *Epic and nVidia Sponsor Unreal Mod Design Contest* (June 9, 2003), available at <http://www.ogaming.com/content/comments/1055173402,3336,.php> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

Fourth, a significant evolution in the realm of sports betting comes in the form of fantasy sports. The fast-computing capability of computer networks and the free flow of information over the Internet makes such contests more feasible. Fantasy sports “contests require a person to choose several athletes in a given sport to be on his or her ‘fantasy team.’”<sup>134</sup> The person accumulates points based on the chosen athlete’s performance over the course of a season or other defined period.<sup>135</sup> The person can compete for cash and other prizes against other fantasy teams.<sup>136</sup> Major “fantasy” sports include American-style football, basketball, baseball, and soccer.<sup>137</sup>

Fifth, as noted above, without OTB, horse racing may not exist today as an industry. Since the 1980s, horseracing has become the victim of consumer preference as the American gambling dollar flowed from the track window to the slot machine.<sup>138</sup> Fortunately for the industry as a whole, account wagering contributed much to the success of a well-functioning OTB system.<sup>139</sup> “Account wagering” is an advance deposit wagering system, where gamblers place money into an account, and then use these funds to place the actual wagers via a telephone or the Internet.<sup>140</sup> Last year, in California alone, “[m]ore than \$90 million has been bet on horse races over the telephone and on the Internet by more than 30,000 gamblers . . . [using the account wagering method].”<sup>141</sup>

Lastly, technology has also created a whole new industry – the Internet gambling industry.<sup>142</sup> Here, players from anywhere in the world with Internet access can engage in every form of prize gaming. The most popular forms, in terms of gross revenues, are casino gaming and sports wagering. As early as 2000, Internet gaming revenue was estimated at \$1.5 billion.<sup>143</sup> Christian Capital Advisors, a prominent consulting and financial services firm, conservatively projected that the market for gambling on the Internet would easily grow

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<sup>134</sup> See generally THE REPORT, *supra* note 7.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See Addict Fantasy Sports, available at <http://www.addictfantasysports.com> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>138</sup> See Mike Parker, *The History of Horse Racing*, available at <http://www.mrmike.com/explore/hrhist.htm> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>139</sup> See Autotote Systems, Inc., available at <http://www.autotote.com/SGCorp/parimutuel.asp> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal). A totalisator system, also known as a pari-mutuel wagering system, is a “complex, integrated hardware and software configuration that accepts wagers, prints bet tickets, calculates odds, and allows for the redemption of winning tickets. Transactions are processed at a rate of up to a thousand per second in a secure, redundant . . . [computerized] environment.” See Autotote Systems, Inc., *Totalisator Systems*, available at [http://www.autotote.com/SGCorp/parim\\_autotote.asp](http://www.autotote.com/SGCorp/parim_autotote.asp) (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>140</sup> Don Thompson, *Internet Horse Betting Slow but Steady at the Races* (Aug. 26, 2002), available at <http://www.websense.com/company/news/companynews/02/082602c.cfm/> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>141</sup> *Id.*

<sup>142</sup> THE REPORT, *supra* note 7, at 88.

<sup>143</sup> See Jeff Simpson, *MGM Mirage Gets Web Gaming License*, LAS VEGAS REV.-J., Sept. 21, 2001, available at [http://www.reviewjournal.com/lvrj\\_home/2001/Sep-21-Fri-2001/business/17049553.html](http://www.reviewjournal.com/lvrj_home/2001/Sep-21-Fri-2001/business/17049553.html) (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

to more than \$6.3 billion by the end of 2003, despite a relatively cold reception in the United States.<sup>144</sup>

#### IV. THE PARADOX OF THE PRIZE-GAMING UNIVERSE

"It is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be. . . ."<sup>145</sup>

##### A. *Inconsistent Application*

As the foregoing discussion illustrates, the various forms of prize gaming grew in very different physical and legal environments. Complicating matters, states often create distinct rules of law such that an activity is categorized differently between states. For example, a person may sell a pre-paid phone card in one state that also allows the person to enter a sweepstake, but find that this is categorized as an illegal lottery in another state.<sup>146</sup> This section points out some of the existing inconsistencies between states in the application of gaming law principles.

##### 1. *Do Slot Machines Fall Within the Definition of a Lottery?*

As previously noted, in the area of gambling law, "lotteries" generally consist of three classic elements: (1) a prize awarded; (2) in a game of chance; (3) where participants provided consideration.<sup>147</sup> If all three elements are met and the activity is licensed, then it is a legal lottery. If, on the other hand, all three elements are met and the activity is not licensed, then it is generally an illegal lottery.<sup>148</sup>

In the realm of lottery definitions, a certain overlap exists between lotteries and casino games, specifically with regard to slot machines, which also incorporates the three classic elements. In particular, players drop coins into a slot machine, which generates a random outcome, in the hopes of winning a prize. Nevertheless, based on existing case law and political needs, state legal authorities have been successful in both analogizing and distinguishing "lotteries" and "casino-style gaming" depending on the specific economic needs of a particular state.

For example, legal authorities in both Oregon and Wisconsin have analogized lotteries to slot machines for different reasons. In Oregon, the state

<sup>144</sup> THE REPORT, *supra* note 7, at 88. This growth is due in part to the popularity of the Internet. Undoubtedly, the Internet is the fastest growing telecommunications medium in history. While it took only five years for the Internet to reach 50 million users worldwide, the same type of market penetration took thirty-eight years for radio, thirteen years for television, and ten years for cable. Today, the Internet has over 121 million adult users worldwide and all experts predict continued growth and expansion. *See id.*

<sup>145</sup> Isaac Asimov, QuotesHeaven.com, available at <http://www.quotesheaven.com/change/page2.html> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>146</sup> *See generally* Dennis M. LaRochelle, *Sweepstakes Machines and the Duck Offense: Illegality Is in the Eyes of the Beholder*, 5 GAMING L. REV. 467 (2001).

<sup>147</sup> FCC v. Am. Broad. Co., 347 U.S. 284, 290 (1954).

<sup>148</sup> *See generally* LaRochelle, *supra* note 146.

wanted the ability to operate video lottery terminals ("VLTs").<sup>149</sup> In Wisconsin, the courts, pursuant to the general mandates of the Indian Gaming Regulatory Act, wanted to give tribes the ability to operate slot machines on their land.<sup>150</sup>

At the same time, both Nevada and California have distinguished casino-style gaming – specifically slot machines – from lotteries, again for different reasons. In Nevada, the state wanted to permit casino-style gaming, while leaving the constitutional provision against lotteries in place.<sup>151</sup> California courts, on the other hand, wanted to limit gambling activities to the existing state lottery, while maintaining the prohibition against casino-style gaming.<sup>152</sup>

The foregoing dichotomy is a good indicator as to the variety of rules and reasoning that can develop despite essentially similar activities.

## 2. *Is It Legal to Offer a Free-Play Slot Machine?*

Most courts follow the rule that "consideration," like a "prize," must be something of intrinsic value, such as money. Under this majority rule, incidental expenses or inconveniences undertaken to enter a contest promotion are not consideration. For example, the cost of a postage stamp or the need to go to a store to obtain a contest entry form is not consideration under the "any effort or expense" test. The minority rule, however, which is followed in only a few states, finds consideration in any activity that requires participants to incur any effort or expense.<sup>153</sup>

Nevertheless, in this area, Nevada decided to come up with its own test. The Nevada Attorney General has opined that, where completely-free play credits are risked "upon the chance or uncertain occurrence of a winning outcome . . . , a wager would exist."<sup>154</sup> Stated differently, a sweepstake or unlicensed game of chance may be illegal if its participants may lose play credits for the opportunity to win a prize.<sup>155</sup>

<sup>149</sup> See generally *Ecumenical Ministries v. State Lottery Comm'n*, 871 P.2d 106 (Or. 1994).

<sup>150</sup> See generally *Wis. Winnebago Nation v. Thomson*, 22 F.3d 719 (7th Cir. 1994).

<sup>151</sup> See generally *Ex parte Pierotti*, 184 P. 209 (Nev. 1919).

<sup>152</sup> See, e.g., *W. Telcon, Inc. v. Cal. State Lottery*, 917 P.2d 651 (Cal. 1996); see also *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994).

<sup>153</sup> See, e.g., *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week). See also *Blackburn v. Ippolito*, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963) (contest requiring weekly visits to store to play was consideration under state lottery law); *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962) (consideration for a lottery requires giving something that can impoverish the individual who parts with it); *Albertson's Inc. v. Hansen*, 600 P.2d 982 (Utah 1979) (holding similarly); *State v. Bussierre*, 154 A.2d 702 (Me. 1959) (holding similarly); *State v. Cox*, 349 P.2d 104 (Mont. 1960) (holding similarly).

<sup>154</sup> See 2000 Nev. Op. Att'y Gen No. 2000-38 (Dec. 29, 2000).

<sup>155</sup> See generally *LaRochelle*, *supra* note 146. See, e.g., *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week); *Blackburn v. Ippolito*, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963) (contest requiring weekly visits to store to play was consideration under state lottery law); *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962) (consideration for a lottery requires giving something that can impoverish the individual who parts with it); *Albertson's Inc. v. Hansen*, 600 P.2d 982 (Utah 1979) (holding

A recent case from Idaho applied similar reasoning.<sup>156</sup> The court explained: "the video machines were gambling devices because a player could play additional games . . . [for a prize] by wagering any credits won. It was the ability to risk those credits . . . that constituted the consideration required for gambling."<sup>157</sup>

This reasoning is significant and surprising. First, it is surprising because it is unsupported by the usual policy rationale for gambling prohibitions. Specifically, if the individual does not part with his or her hard-earned resources, it is more difficult to justify such an approach. Second, it is significant because it further stretches certain features of the minority approach to its unparalleled extremes. As between the Idaho case and the Nevada opinion, however, the Idaho case can be justified, to a great extent, because the players initially parted with consideration.

### 3. *How is Betting in a Fantasy Sports League Not Gambling?*

Sport gambling also has its own unique anomalies. First, sports gambling is generally illegal except in Nevada. Nevertheless, ninety-nine percent of sports gambling takes place outside Nevada, albeit illegally.<sup>158</sup>

Whether fantasy sports contests are gambling is a matter of debate that revolves around whether skill or chance predominates the contest. Fantasy sports require skill to assess players and decide their worth in relation to their expected performance over the course of a season.<sup>159</sup> Strategy is also involved in drafting players and making trades. There is, however, a significant element of chance. While a participant can draft or trade for the most talented players, the chance of injury to those players may eliminate his opportunity to win. Until a prosecutor decides to arrest some fantasy league operators under anti-gambling laws, the issue of its legality will remain unresolved and will be left as a close question.

### 4. *How Is Poker a Gambling Game as Opposed to a Contest?*

Poker represents an interesting peculiarity. The analysis of poker as a gambling game is by no means uniform, even within the same jurisdiction.<sup>160</sup> While some courts have opined that video poker is a gambling game, some of

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similarly); *State v. Bussiere*, 154 A.2d 702 (Me. 1959) (holding similarly); *State v. Cox*, 349 P.2d 104 (Mont. 1960) (holding similarly).

<sup>156</sup> See generally *MDS Invs., LLC v. State*, 65 P.3d 197 (Idaho 2003) (holding that video machines were illegal gambling devices, even though players received sports cards that were approximately worth the money paid by players and, arguably, had an alternative method of entry since players could risk play credits for a chance of winning prizes).

<sup>157</sup> *Id.* at 204.

<sup>158</sup> See Robert Macy, *Ban on College Sports Betting Could Cost State Books Millions*, LAS VEGAS REV.-J., May 18, 1999, at 4A.

<sup>159</sup> See generally *Addict Fantasy Sports*, available at <http://www.addictfantasysports.com> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>160</sup> See, e.g., *Charnes v. Cent. City Opera House Ass'n.*, 773 P.2d 546, 551 (Colo. 1989) (holding that, in Colorado, poker is an illegal gambling game of chance); see also *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that, in Massachusetts, video poker is a lottery in which chance predominates); but see *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406-07 (Mass. App. Ct. 1991) (holding that, in Massachusetts, video poker games are games of skill); see 1993 Colo. Op. Att'y Gen. No. 93-5 (April 21, 1993)

these same legal authorities would support an argument that a live poker tournament, given the strategic components involved, should not be considered a gambling game. For example, in *Commonwealth v. Club Caravan*, the court explained that even in video poker there is some element of skill because "it rewarded prudent calculations."<sup>161</sup>

Lastly, not all forms of poker appear to be "created equal" for purposes of a skill-chance analysis. For example, many of the top players consider "Texas Hold'em" to be the most challenging and sublime of all the poker games. Thus, in the opinion of some experts, Texas Hold'em would add an additional layer of strategy (or skill) to the ordinary poker game.<sup>162</sup>

In summary, because various forms of prize gaming "grew up" around a separate set of regulations and laws, such separate development resulted in various anomalies. Moreover, federal intervention and multi-jurisdictional development lead to disparate treatment of certain activities.<sup>163</sup>

## B. The Paradox

### 1. The Split-Evolutionary Paradox – Blurring of the Lines

As noted, the various forms of prize gaming "grew up" around a separate set of regulations and laws. Such split-evolutionary development has lead to anomalies that are difficult to explain using pure logic. In many cases, accidents of history have more to do with legality than rational public policy. As one court observed with respect to one such anomaly:

At nearly every corner grocery store, there is a crane game where children drop in quarter after quarter trying to win a stuffed animal of some sort. [Under the majority's interpretation,] the Gaming Commission should be seizing and destroying these machines as well. In fact, every arcade and children's pizzeria where games are played for tickets that can be exchanged for merchandise is, according to the . . . majority, operating an illegal casino.<sup>164</sup>

#### a. Data Mining – Sweepstakes or Lotteries?

Data mining is sorting through data to identify patterns and establish relationships. . . . Data mining techniques are used in . . . [many areas, including] in customer relationship management . . . [where an operator] takes *advantage of* the huge amount of information gathered by a Web site to look for patterns in user behavior.<sup>165</sup>

A "sweepstake," as noted above, is a free giveaway based on chance. Why do operators offer sweepstakes? They offer sweepstakes to raise aware-

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(opining that, in Colorado, poker is a game of skill, but, nevertheless, illegal under specific statutory language).

<sup>161</sup> *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406 (Mass. App. Ct. 1991).

<sup>162</sup> World Poker Exchange, *Game Info.*, available at [http://www.wsxpoker.com/game\\_rules.asp?game=1](http://www.wsxpoker.com/game_rules.asp?game=1) (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>163</sup> See discussion *supra* Part III.

<sup>164</sup> *Miss. Gaming Comm'n v. Henson*, 800 So. 2d 110, 117 (Miss. 2001) (Diaz, J., dissenting).

<sup>165</sup> [http://searchcrm.techtarget.com/gDefinition/0,294236,sid11\\_gci211901,00.html](http://searchcrm.techtarget.com/gDefinition/0,294236,sid11_gci211901,00.html) (last visited Feb. 20, 2004) (emphasis added) (on file with the *Nevada Law Journal*).

ness about themselves and their products or service.<sup>166</sup> Why do sweepstake operators offer sweepstakes online? Partly because, when sweepstakes participants answer questions about themselves, this provides the operator with tremendous data mining opportunities.<sup>167</sup> Such raw data can be the source of extremely valuable marketing information to operators.<sup>168</sup>

As noted above, however, existing case law allows for a debate on the issue of consideration. Specifically, a minority of states have held as recently as thirty years ago that consideration establishing a simple contract is all that is necessary in the context of a lottery.<sup>169</sup>

Under this theory, consideration need not consist of money, but can be a substantial effort expended by participants.<sup>170</sup> For example, a Washington court held that a newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week.<sup>171</sup> In states adopting this theory of consideration, requiring participants to visit the sponsor's store or simply participating in a sponsor's scheme may constitute consideration.<sup>172</sup> Thus, if the on-line contest requires valuable personal information, then the participant's effort in filling out a survey may constitute consideration.

At the same time, if there are other financial benefits received by the promoter of the "website" (even in the form of valuable marketing data), then state prosecutors could also argue, on that basis alone, that consideration exists.<sup>173</sup>

Here, in the data mining context, there is a clear benefit to the operator in the form of marketing information. Answering an extensive survey online could also be deemed consideration because it requires the effort of participants. Thus, the question remains, at least theoretically: Is an online sweepstake that provides the promoter with data mining opportunities a legal "sweepstake" or an illegal "lottery"?

#### *b. Cellular Telephone Promotions – Sweepstakes or Lotteries?*

[Cellular telephone technology now allows residents of several countries to] satisfy their gambling urges on the spot with their cell phones. . . . [Specifically,] [i]n the Netherlands, Sweden, Germany, Britain and Austria, regular mobile phones can now

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<sup>166</sup> See *Net Success*, *supra* note 30.

<sup>167</sup> See *id.* See also [http://www.searchcrm.techtarget.com/gDefinition/0,294236,sid11\\_gci211901,00.html](http://www.searchcrm.techtarget.com/gDefinition/0,294236,sid11_gci211901,00.html) (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>168</sup> See [http://www.searchcrm.techtarget.com/gDefinition/0,294236,sid11\\_gci211901,00.html](http://www.searchcrm.techtarget.com/gDefinition/0,294236,sid11_gci211901,00.html).

<sup>169</sup> See *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1368-69 (Wash. 1972).

<sup>170</sup> See *id.* at 1369.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* See, e.g., *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week); *Blackburn v. Ippolito*, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963) (contest requiring weekly visits to store to play was consideration under state lottery law); *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962) (consideration for a lottery requires giving something that can impoverish the individual who parts with it); *Albertson's Inc. v. Hansen*, 600 P.2d 982 (Utah 1979) (holding similarly); *State v. Bussiere*, 154 A.2d 702 (Me. 1959) (holding similarly); *State v. Cox*, 349 P.2d 104 (Mont. 1960) (holding similarly).

<sup>173</sup> See generally *THE REPORT*, *supra* note 7, at 18-22; see also *Net Success*, *supra* note 30.



be used to buy lottery tickets, bet on sporting events or enter sweepstakes for prizes. . . . [For example,] Wayne Flohil, a 21-year-old office manager in Amsterdam, recently won an Apple iPod in a mobile sweepstakes. To play that game, entrants simply send a text message to a certain phone number (at about \$1.25 a pop). They get an instant reply revealing their numerical ranking, and the 2,400th message wins. Flohil, who sent a few dozen to win the iPod, plays a hundred or more such games a month.<sup>174</sup>

Forty years ago, in a major landmark case for the sweepstakes industry, the United States Supreme Court held that, contrary to the position of the Federal Communication Commission, radio-based “give-away” contests were not lotteries because the contestants did not have to purchase anything or pay an admission price.<sup>175</sup> In finding no consideration, the Supreme Court rejected the notion that consideration is present if the promotion results in a financial benefit to the promoter.<sup>176</sup>

Nevertheless, assuming that the above-described scheme was sponsored by the cellular telephone company, a very strong argument exists that the cost of the telephone call, “at about \$1.25 a pop,” should be deemed “consideration.” Moreover, even assuming that the phone call was free, should the end user’s cost of owning and maintaining the cellular telephone be deemed “consideration”?

Thus, the question remains, at least theoretically: Is the cellular telephone sweepstake a legal “sweepstake” or an illegal “lottery”?

### c. Kids’ Arcade with Prizes – Gambling or Entertainment?

A visit to a carnival or a neighborhood kids’ arcade will reveal a number of games for a prize that are games of mixed skill and chance and, as some would argue, come extremely close to being games of chance. For example, there is the coin-pusher game. The goal of this game is to make the player’s coin, which acts as a catalyst (the “Play Coin”), fall on a display tray inside the coin-pusher machine that appears to be overflowing with coins (the “Coin Pile”). This action thereby knocks some of the coins from the Coin Pile into a coin tray at the bottom (the “Coin Tray”) where the player can retrieve them.<sup>177</sup> The player can choose from several slots at the front of the machine (collec-

<sup>174</sup> Douglas Heingartner, *Place Your Bets, Via Cell Phone*, MERCURY NEWS, Apr. 16, 2003, available at <http://www.bayarea.com/mld/mercurynews/20032/04/16/business/5644894.htm> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>175</sup> See FCC v. Am. Broad. Co., 347 U.S. 284 (1954).

<sup>176</sup> See *id.* See also, e.g., *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the newspaper’s free football contest contained the element of consideration because it required effort to pick the teams each week); *Blackburn v. Ippolito*, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963) (contest requiring weekly visits to store to play was consideration under state lottery law); *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962) (consideration for a lottery requires giving something that can impoverish the individual who parts with it); *Albertson’s Inc. v. Hansen*, 600 P.2d 982 (Utah 1979) (holding similarly); *State v. Bussiere*, 154 A.2d 702 (Me. 1959) (holding similarly); *State v. Cox*, 349 P.2d 104 (Mont. 1960) (holding similarly).

<sup>177</sup> See, e.g., *McGregor Enterprises, Inc., Coin & Token Pusher*, available at <http://www.videogaming.com/coinpushers.html> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

tively, the "Coin Drop Slot") into which he or she can "strategically" drop the Play Coin.<sup>178</sup>

Specifically, as the player is dropping the Play Coin, he or she is hoping that it will end up near the Coin Pile, so that he or she will pick the Coin Drop Slot that appears to be the most full with coins.<sup>179</sup> Unseen, and usually unbeknownst to the player, inside the Coin Drop Slot there are a series of bristles that revolve at a very high speed per minute (the "Bristles") and ultimately, it is the speed and condition of the Bristles that will determine the velocity, and to a large extent the placement, of the Play Coin as it is hurled in the general direction of the Coin Pile.<sup>180</sup> If all goes well, and the Play Coin and the Bristles meet up at a fortuitous time, the Coin Pile is dislodged, and the player will end up with a few coins in the Coin Tray.<sup>181</sup>

Another popular arcade game for a prize is the crane game.<sup>182</sup> The object of the crane game is to control a mechanical or electro-mechanical claw (the "Claw"), typically through the use of a joystick, to pick up a valuable prize (the "Toy"), and place the Toy into a drop slot (the "Drop Zone") from which the player can retrieve it.<sup>183</sup> The Toys are located inside the crane game machine and are visible through Plexiglass.<sup>184</sup> The player normally has a limited amount of time within which he or she can make full use of the Claw.<sup>185</sup>

Often unbeknownst to the player, however, the arms of the Claw may not be at the proper angle (or even condition) to carry the shape or weight of the Toy to the Drop Zone.<sup>186</sup> If all goes well, however, and the Claw and the Toy meet up at a fortuitous angle, the Toy is picked up from the inside of the machine and dropped in the Drop Zone.<sup>187</sup>

To assess whether an activity is a game of skill, "one needs to envision a continuum with pure skill on one end and pure chance on the other."<sup>188</sup> As noted above, the prevailing rule under federal law, as well as under the majority of state laws, is that an activity is a game of chance if chance predominates, even if the activity requires some skill.<sup>189</sup> Depending on the condition of the Bristles and the Claw, for example, one may argue that significant chance exists in these two games.

Thus, the question remains, at least theoretically: Are arcade games-for-prizes legal skill contests or illegal gambling?

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<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See *id.*

<sup>182</sup> See, e.g., <http://www.moneymachines.com/crane.html> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>183</sup> See *id.*

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> See THE REPORT, *supra* note 7, at 15.

<sup>189</sup> See, e.g., *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); see also THE REPORT, *supra* note 7, at 15; *Net Success*, *supra* note 30.

d. *Trading Cards and Chase Cards – A Pastime or Gambling?*

Not all trading cards are created equal. Most card companies recognize that if they randomly insert special cards in their packs of trading cards, consumers are more likely to purchase the cards. These special cards are known in the trade as “chase cards.”<sup>190</sup> The desirability of these cards could be because they depict popular players or game pieces or because they are made from special materials like metallic surfaces or pieces of player’s uniforms. Their value is enhanced because they are printed in limited quantities.

In some instances, the sale of these cards is directed exclusively at children; particularly the sale of cards based on animated television shows and video games. The similarities to traditional gambling cannot be ignored.<sup>191</sup> The purchaser pays consideration in the form of cash to buy a sealed pack of trading cards. They take the chance that the pack they purchased will have a chase card in it. If they are lucky, they will have a chase card worth many times the price they paid for the pack of cards. If not, the value of the exposed cards is almost certain to be worth less than what they paid for the cards.

Thus, the question remains, at least theoretically: Are the trading cards with chase cards a pastime or illegal gambling?

e. *Online Skill Games – Entertainment, Skill Game, or Lottery?*

Jurisdictions use two tests in determining whether the gambling element of chance is present in any scheme: the Predominance Test and the Gambling Instinct Test.<sup>192</sup> In some states, however, like Florida, skill or chance is irrelevant and merely wagering on any event or contest is sufficient to be illegal gambling.<sup>193</sup>

The Predominance Test is the prevailing test in the United States.<sup>194</sup> Most states and the federal government have adopted this test to assess the existence of the gambling element of chance. Under this test, if chance predominates over skill, even if the activity requires some skill, the game satisfies the chance element. This test is also referred to as the “Dominant Factor Test.”<sup>195</sup>

In a minority of states, courts have adopted a test that looks at the nature of an activity to determine whether it appeals to one’s “gambling instinct,” regardless of whether skill or chance dominates. This test is sometimes referred to as the “Any Chance Test.” Because this test is at least as subjective, and arguably more so, than the Predominance Test, decisions vary widely when courts apply such tests to particular games.<sup>196</sup>

Internet skill games begin to raise issues as they approach chance gaming. Here the promoters may recognize that chance games have greater mass appeal than skill-based games. Therefore, they begin to design games that resemble

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<sup>190</sup> See, e.g., <http://rainbowcardco.com/index.cfm> (last visited Feb. 20, 2004) (on file with the Nevada Law Journal).

<sup>191</sup> See, e.g., *Schwartz v. Upper Deck Co.*, 967 F. Supp. 405 (S.D. Cal. 1997).

<sup>192</sup> See generally THE REPORT, *supra* note 7, at 15-16; see also *Net Success*, *supra* note 30.

<sup>193</sup> See generally THE REPORT, *supra* note 7, at 17; see also *Net Success*, *supra* note 30.

<sup>194</sup> See generally THE REPORT, *supra* note 7, at 15-16; see also *Net Success*, *supra* note 30.

<sup>195</sup> See generally THE REPORT, *supra* note 7, at 16; see also *Net Success*, *supra* note 30.

<sup>196</sup> See generally THE REPORT, *supra* note 7, at 16; see also *Net Success*, *supra* note 30.

casino-style games with skill components. A historical example is the Pachislo machine from Japan.

The Pachislo – the name being a combination of pachinko and slot – is like a slot machine in that it takes up to three tokens to spin the reels and hope for a jackpot. Unlike a slot, the Pachislo offers the player control over the stopping of the reels through ‘skill stops’ located on the front panel of the machine.<sup>197</sup>

While the ability to stop the reels is supposed to be based on the dexterity of the player, the inability of players to achieve these skills has created an entire industry in Japan. In the United States, children’s arcades have many examples of similar devices where the player must stop something, such as a spinning wheel, on a particular symbol to win.

Another interesting anomaly is developing in the gray area between legal and illegal games of chance. Increasingly, slot machines are being themed after popular skill-based game shows. To better replicate the game show, the slot machines are introducing some skill elements. A slot machine that pays based on 49% skill and 51% chance is considered a gambling device and is typically prohibited or highly regulated. In contrast, a skill game that is 51% skill and 49% chance is typically legal and unregulated.

The existence of “bots” raises additional issues for skill-based online contests. A bot – short for a robot – is an automated computer program that can play even the most complicated skill-games with optimum strategy.<sup>198</sup> Therefore, suppose that a game is 90% skill and 10% chance if played by human opponents. If two players both have bots that play with optimum strategy and, therefore, chance determines the outcome, is it still a skill-based game or simply gambling?

#### *f. MUD Tournaments – Skill Game or Lottery?*

The Internet provides not only a method of sale and delivery of entertainment software, but also a platform for multi-player interactive games. These MUDs allow home users to enter and leave an Internet site at their will. When in the site, a home user can interact in a game environment with other home users.

As noted above, a natural evolution of MUDs is as an environment to stage tournaments or contests for prizes. CNN recently reported that online virtual gamers “will soon be able to bet against foes while competing online in the World War II action game ‘Return to Castle Wolfenstein.’”<sup>199</sup> After registering on the proposed site, participants “can place wagers ranging from a few cents to a few dollars.”<sup>200</sup> When a participant “kills or injures” a virtual oppo-

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<sup>197</sup> See, e.g., [http://www.leisureliving.com/Category\\_PAGES/NewPages/Pachislo\\_Machines.html](http://www.leisureliving.com/Category_PAGES/NewPages/Pachislo_Machines.html) (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>198</sup> Webopedia, available at <http://www.webopedia.com/TERM/b/bot.html> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>199</sup> Associated Press, *Bets Are On for Online Gamers*, Mar. 25, 2003, available at <http://edition.cnn.com/2003/TECH/fun.games/03/25/gamers.betting.ap/> (last visited Feb. 20, 2004).

<sup>200</sup> *Id.*

nent, he or she wins the opponent's bet.<sup>201</sup> On the other hand, "[g]et killed or hurt and lose the cash."<sup>202</sup> Gamers also can play Half-Life tournaments, where prizes of up to half a million dollars are available. Undoubtedly, many fans of first-person shooter games will flock to such online sites.<sup>203</sup>

In order for a game to be a "skill game," the following elements must be present: first, the participant must have an opportunity to affect the outcome by virtue of his or her skill. This requirement applies to all portions of a multi-phase contest. For example, a random drawing cannot break a tie in a skill contest. Second, while the contest may involve some chance, skill must predominate. Third, the participant must have sufficient knowledge to exercise his or her skill. This includes being informed by the promoter of the standards or criteria on which the contest will be decided.<sup>204</sup>

Nevertheless, given the complexity of registration requirements of any tournament, the question remains, at least theoretically: Are MUDs for prizes legal skill games or illegal lotteries?

#### *g. Decision Markets – Futures Trading or Gambling?*

A relatively new concept is "decision markets." Decision markets, which are essentially "prediction markets," involve two individuals betting on a future event. Such events could be as diverse as election results, weather patterns, ocean temperatures, or oil prices. One example of decision markets is the Iowa Markets ("IM"), futures markets in which contract payoffs are tied to fluctuations in measurable events, such as economic indicators, financial events, or political elections. The Business College at the University of Iowa (the "University") operates the IM.<sup>205</sup>

According to the IM website, using real money, "[a]ll interested participants world-wide can trade in . . . [the] political markets. Other markets – such as the earnings and returns markets – are open only to academic traders."<sup>206</sup> The University runs its future markets pursuant to a no action letter from the Commodity Futures Trading Commission ("CFTC").<sup>207</sup> Nevertheless, irrespective of the federal CFTC's no action letter, a separate question arises under state law: Is this activity gambling?

As a preliminary matter, from the late 1880s, "bucket shops," where stock market information was used as a basis for a "bet," became increasingly popular until courts began to put them out of business.<sup>208</sup> More specifically, the great majority of courts have held that a contract to speculate on the rise and fall of commodities is illegal gambling if the contracting parties have an

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> ANTHONY N. CABOT, INTERNET GAMING REPORT V 18 (2002).

<sup>205</sup> Iowa Electronic Markets, available at <http://www.biz.uiowa.edu/iem/about/> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>206</sup> Iowa Electronic Markets, *Frequently Asked Questions*, available at <http://www.biz.uiowa.edu/iem/faq.html#who> (last visited Feb. 20, 2004) (on file with the *Nevada Law Journal*).

<sup>207</sup> *See id.*

<sup>208</sup> *See generally* Bd. of Trade v. O'Dell Comm'n Co., 115 F. 574 (S.D. Ohio 1902) (stating that bets taken at bucket shops are illegal contracts).

explicit understanding that, regardless of whether the commodities go up or down in value, there is never an expectation that the underlying commodities will be delivered.<sup>209</sup>

From the foregoing, one may reasonably assume that speculating in the rise and fall of popularity of a single political candidate, for example, may also be deemed gambling. There is case law to support this assumption.<sup>210</sup>

Skill games, however, have normally been deemed exempt from criminal prohibitions. Thus, pursuant to that general principle, could one operate "decision markets" without running into criminal prohibitions? We believe the answer may be "yes" in the majority of jurisdictions, if the decision market is set up so that a strong argument can be made it is genuinely skill-based.

Nevertheless, uncertainties under state laws (for a variety of reasons already noted above) linger. Thus, the question remains, at least theoretically: Is the IM futures trading or gambling?

*h. Video Lottery Terminals – Lotteries or Slot Machines in Disguise?*

In the area of gambling law, as noted above, "lotteries" generally consist of the three classic elements: (1) a prize awarded; (2) in a game of chance; (3) where participants provide consideration. If all three elements are met and the activity is licensed, then it is a legal lottery. If, on the other hand, all three elements are met and the activity is not licensed, then it is generally an illegal lottery.<sup>211</sup>

As noted above, it is not difficult to recognize that, in the realm of lottery definitions, a certain overlap exists between lotteries and casino games, specifically slot machines, which also incorporate the three classic elements. Nevertheless, based on existing case law and political needs, state legal authorities have been successful in both analogizing and distinguishing "lotteries" and "casino-style gaming," depending on the specific economic and political needs of a particular state.

For example, as noted above, both Oregon and Wisconsin legal authorities have analogized lotteries to slot machines for different reasons. In Oregon, the state wanted to have the ability to operate Video Lottery Terminals ("VLTs").<sup>212</sup> In Wisconsin, the courts, pursuant to the general mandates of the

<sup>209</sup> See, e.g., *Pearce v. Rice*, 142 U.S. 28 (1891); see also *Farless v. Morehead*, 201 F. 310 (6th Cir. 1912) (holding that transactions were really "bets" or "wagers" on the fluctuations of the market, because all parties understood that *no* stock was, in fact, to be purchased and received); *Wade v. United States*, 33 App. D.C. 29 (D.C. Cir. 1909) (finding that contracts tied to the probable rise and fall of market prices, *without* actual equity ownership, constitutes gambling and it is prohibited); *Joslyn v. Downing, Hopkins & Co.*, 150 F. 317 (9th Cir. 1906) (holding that pretend buying and selling of stocks or commodities were merely gambling transactions); *Morris v. Norton*, 75 F. 912 (6th Cir. 1896) (holding similarly; stating that such gambling contracts are void).

<sup>210</sup> See generally *Wagner v. State*, 63 Ind. 250 (Ind. 1878) (holding that a transaction is not gambling only because consideration has already exchanged hands).

<sup>211</sup> See generally *FCC v. Am. Broad. Co., Inc.*, 347 U.S. 284 (1954); see also *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 297 (Ala. 1988).

<sup>212</sup> See *Ecumenical Ministries v. State Lottery Comm'n*, 871 P.2d 106 (Or. 1994).

Indian Gaming Regulatory Act, wanted to give the tribes the ability to operate slot machines on their land.<sup>213</sup>

[For example, in Oregon] [i]n 1991, it was estimated that up to 10,000 video slot and video poker machines (known as "grey machines") were being used for illegal gambling in Oregon. That year, the Oregon Legislative Assembly outlawed the "grey machines" but, recognizing their well-established presence in the marketplace, placed the operation of similar devices under the authority of the Oregon State Lottery Commission. Video Lottery gaming is now regulated by the State, and accounts for approximately 78% of all Oregon Lottery earnings for public education, economic development and natural resource programs.<sup>214</sup>

At the same time, as noted above, both Nevada and California have distinguished casino-style gaming, specifically slot machines, from lotteries, again for different reasons. In Nevada, the state wanted to permit casino-style gaming, while leaving the constitutional provision against lotteries in place.<sup>215</sup> California courts, on the other hand, wanted to limit gambling activities to the existing state lottery, while maintaining the prohibition against casino-style gaming.<sup>216</sup>

In Nevada, as in other states, the elements of a prohibited lottery (prize, consideration, and chance) would appear to be common to that of a wager under most criminal gambling laws.<sup>217</sup> Thus, without constitutional authorization of gaming, there appears to be a direct conflict between Nevada's lottery prohibition and Nevada's Gaming Control Act that permits licensed gaming, including VLTs.<sup>218</sup>

The answer to all of these questions, regarding the legalizing and classification of data mining, cellular telephone promotions, kids' arcades, trading cards with chase cards, online skill games and tournaments, the Iowa Markets, and VLTs, will ultimately depend on which state you are standing in and the general mood of the respective state courts, legislature, or agencies.

### C. *Implications of the Paradox*

It is useful to pause here and reexamine the implications of the foregoing discussion. First, when it comes to prize gaming laws and regulations, a myriad of arbitrary lines exist<sup>219</sup> and, as noted above, justifying certain approaches is difficult based on logic alone.

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<sup>213</sup> See generally *Wis. Winnebago Nation v. Thomson*, 22 F.3d 719 (7th Cir. 1994); see also *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State*, 770 F. Supp. 480 (W.D. Wis. 1991).

<sup>214</sup> Oregon Lottery Web Center, *Frequently Asked Questions*, available at <http://www.oregonlottery.org/general/faq/index.shtml#16> (last visited Feb. 20, 2004).

<sup>215</sup> See *Ex parte Pierotti*, 184 P. 209 (Nev. 1919).

<sup>216</sup> See, e.g., *W. Telcon, Inc. v. State Lottery*, 917 P.2d 651 (Cal. 1996); see also *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994).

<sup>217</sup> See, e.g., *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961).

<sup>218</sup> NEV. CONST. art. IV, § 24 (amended 1990). The 1990 amendment of the Nevada Constitution to permit charitable lotteries did not include an exemption for authorized casino gaming.

<sup>219</sup> See discussion *supra* Part IV.B.

One may accept, however, that such lines exist due to different historical developments. As technology and public policy evolves, however, re-examining these lines is necessary to see if the rationale still persists.

As stated by one of our nation's most distinguished jurists, Justice Oliver Wendell Holmes of the United States Supreme Court: "It is revolting to have no better reason for a . . . [construction] of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and . . . [that construction] simply persist[s] from blind imitation of the past."<sup>220</sup> One may, for example, wonder at the wisdom of finding a winner of a puzzle contest a criminal, while his neighbor, betting with the state lottery, is deemed to be an upstanding citizen.<sup>221</sup>

Second, after reexamining the value judgments underlying these prize gaming laws, adjusting such laws with the realities of changing technology becomes a less challenging matter.

## V. BASIC POLICY CONCERNS

"Change your opinions, keep to your principles . . . ."<sup>222</sup>

The prize gaming universe – containing sweepstakes, skill-games, lotteries, pari-mutuel wagering, casino gaming, bookmaking, equity trading, and many other forms of gaming – is very complex. It is full of anomalies and inherent contradictions. In this Article, we have merely scratched the surface. To propose a solution to the troubling paradox of the prize gaming universe, we will first turn to science for inspiration.

In the last century, scientists, using a revolutionary new concept known as the Chaos Theory, have observed that all natural systems are chaotic, in the sense that such systems dynamically change and adapt through instability.<sup>223</sup> In particular, dynamic change comes about through irregularities or paradoxes that crop up throughout a natural system.<sup>224</sup> The end result, however, may be some self-organizing order or partial equilibrium (which is again interrupted by new change and further disorder).<sup>225</sup>

The Chaos Theory is susceptible to some metaphorical applications in the realm of prize gaming laws. In particular, it teaches us to anticipate the contradictions, irregularities, and disorder in our legal system. Nevertheless, because the legal system, unlike the natural world, is a man-made system, we can hope to achieve greater order and predictability than in the natural world. The goal of this Article is to pave the way toward a new such approach.

Specifically, interesting parallels exist today with those events that ultimately led to the daring and visionary efforts of Professor Llewellyn, who took

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<sup>220</sup> Oliver Wendell Holmes, *The Path of the Law*, Address at the Dedication of Boston University School of Law (1897).

<sup>221</sup> *State v. Am. Holiday Ass'n, Inc.*, 727 P.2d 807, 812 (Ariz. 1986).

<sup>222</sup> Victor Hugo, *SearchQuotations*, 1802–1885, available at <http://www.quotablequotes.net/search.asp?type=author&searchdb=hugo,%20Victor> (last visited Feb. 20, 2004).

<sup>223</sup> See Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 348 (1993).

<sup>224</sup> See *id.* at 350.

<sup>225</sup> See generally *id.*



the leading role in the creation of the Uniform Commercial Code. As one commentator noted:

The Constitution gives Congress jurisdiction over interstate and international commerce, but the pattern was established that most commercial law rules were predominantly part of state law, although the role of national law vastly expanded in other aspects of economic affairs during the Roosevelt New Deal. When the need to harmonize the law of sales and other commercial subjects was recognized late in the 19th Century, therefore, the effort was to reform and coordinate state law on these subjects.

One major vehicle for this effort was an organization known as the National Commissioners on Uniform State Laws, a group dominated by lawyers who represented banks and other commercial interests, and representatives of state governments. During the first several decades of the Twentieth Century, with strong support from the legal profession and the help of such outstanding scholars as Professor Samuel Williston, the Commissioners adopted and urged on the states a number of uniform laws on sales, documents of title, negotiable instruments, and the like. These uniform statutes were very influential in reducing the differences between the laws of the states. Legal and commercial interests saw their aims as parallel and mutually supportive. Many state legislatures were willing to . . . adopt this legislation. A similar organization, the American Law Institute, was created at about the same time as the National Commissioners on Uniform State Laws with the aim of reconciling and improving the body of judge-made common law on such topics as contract.

By the period immediately before the Second World War, it was becoming clear that some of the older uniform laws needed to be brought up to date and that the connections among the uniform acts needed to be more coherent. The National Commissioners joined forces with the American Law Institute and with foundation and bank financial support . . . to draft a revised Sales Act that soon was described as a Commercial Code.<sup>226</sup>

Similarly, today there is a need for greater harmonization of existing baroque, and sometimes outdated, prize gaming laws and regulations. Every year, game promoters design a multifarious variety of new game concepts that they offer to the public. Many of these concepts are of such hybrid nature that it is often difficult to tell whether such concepts should be deemed lotteries, contests, or sweepstakes.

Designing a new approach to gambling, sweepstakes, and contests is a two-part process. First, state officials should evaluate the public policy concerns associated with prize gaming and create a uniform set of criteria for their jurisdiction. Second, state officials should design the appropriate control mechanisms to make certain that such criteria are applied consistently.

To assist such efforts, one approach may be to draft a uniform code of gaming laws at the national level. Such laws could emulate the federal carve-out that exists for speculative trading or the prohibition against sports wagering. For the "remaining territory," the states could choose from several basic models, based on the policy concerns outlined below.

The difficult question of whether prize gaming policy should be determined on a state or federal level, however, is beyond the scope of this Article.

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<sup>226</sup> Arthur Rosett, *Improving the Uniform Commercial Code*, available at <http://www.crdcs.org/rosett2.htm> (last visited Mar. 01, 2004) (on file with *Nevada Law Journal*).

Gambling policy has historically been left to the states. For a myriad of reasons, this approach is preferable.

Our goal here is to argue for consistency; it is not, however, to dictate any specific result to a state government in deciding how to handle the various aspects of sweepstakes, contests, and gambling. The criteria that would be used to assess, for example, whether a child is exposed to a forty-nine percent chance game (patterned after casino-style games) should be substantively the same as whether adults are allowed to buy lottery tickets. Moreover, the level of scrutiny accorded the activity by government regulators should also be equalized and consistent.

State governments have never taken a comprehensive approach to creating prize gaming policy. More often, the underlying public policy has taken an inferior position to historical, political, or economic realities that drove a particular piece of legislation. For example, economics normally dictate when a deficit in school funding drives support for creating a state lottery.

As a result, the general subcategories of horse racing, lotteries, sports wagering, and casino-style gambling each have their unique anomalies, without any overarching, carefully-reasoned policy rationale. Moreover, laws regarding gambling, contests, and sweepstakes have evolved from different historical bases, which appear to have led to another layer of contradictions.

To avoid the anomalies described in this Article and to better achieve the state's public policy goals, the state must utilize consistent criteria to determine whether to permit the different forms of gambling, sweepstakes, and contests in their community. In other words, those that enact laws should have rational answers as to why one activity is allowed and another activity is prohibited; or why one activity is heavily regulated, while another is left unregulated.

Any reasoned debate on prize gaming policy must start with a clear articulation of the government's underlying prize gaming public policy goals. There are three distinct approaches to this issue: (1) prize gaming should be prohibited because it is immoral, (2) prize gaming should be permitted as a fundamental aspect of individual freedom, or (3) prize gaming should be permitted only to the extent that government can achieve a positive economic benefit, while minimizing negative economic or social consequences.

There are two bases for justifying government intervention: the first is moralism and the second is pluralism.<sup>227</sup> Moralists maintain their positions based on subjective, personal feelings dictated either by theology or personal notions of social order. Patrick Devlin's teaching typifies the moralist position. He notes that societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed, and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.<sup>228</sup>

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<sup>227</sup> *Id.* Between the two poles is the pragmatic moral pluralism. While taking a particular moral stand against an activity, the pragmatic moral pluralist may argue for legalization only because of the harm caused by making the activity illegal.

<sup>228</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 13 (Oxford Univ. Press 1968) (1965).

Moralists claim that gambling influences the values and priorities of the general public.<sup>229</sup> In essence, people may interact differently in a community with gambling as opposed to in a community where it is banned. The argument is that the emphasis on hedonism, luck, and wealth created by gambling may affect the nature of these societal interactions. Undesirable attributes in the community at large may emerge, including that persons are better off trying their luck gambling than working hard. This line of reasoning extends even further; wealth is the most important social attribute in this culture, therefore everyone must have a price.

When the government adopts a policy view that prize gaming is immoral, the typical approach to implementation of that policy is eradication. Under the second approach, where the government adopts a policy view which states that prize gaming should be allowed as an aspect of individual freedom, the correct approach to implementation of that policy is regulation. Under either approach, however, there is no need to undertake a pragmatic review of the costs and benefits associated with prize gaming.

Where state policy is based on morals, a re-examination of the application of those morals to the various forms of prize gaming is appropriate. For example, does logic dictate that casino gambling should be morally prohibited while allowing minors access to prize arcades and trading cards with chase cards? Likewise, if the prohibition on gambling is based on promoting the notion that persons are better off working hard than taking their chance at luck, a million dollar sweepstakes is difficult to justify. Here, again, consistency alone in the application of a public policy will begin to eliminate the anomalies found in prize gaming.

States that go beyond moralism and attempt to assess prize gaming based on pragmatic considerations face a more daunting task. Regarding legalized casinos, some state governments have undertaken, at least on the surface, a pragmatic consideration of the economic and social costs and benefits associated with legalized gambling. Under this approach, state officials must consider the benefits, negative externalities, and feasibility of implementation before deciding on a policy approach. If the benefits exceed the externalities, the activity should be permitted, but regulated, to further maximize the benefits.

Even if negative externalities exceed the benefits, the state may decide not to end legalized prize gaming in the state. Instead, policy makers may look toward alternatives to reduce or avoid those externalities. Only if the reduced negative externalities exceed the benefits would a government normally prohibit the activity, unless the activity is inevitable. Specifically, where the externalities caused by illegal gambling are worse than the externalities caused by regulated gambling, regulating the activity with the goal of minimizing the externalities is the preferred approach.

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<sup>229</sup> See WILLIAM R. EADINGTON, *THE POLITICAL ECONOMY OF THE LEGAL CASINO GAMING INDUSTRY IN THE UNITED STATES* 18 (1984).

## A. *Evaluating Policy Concerns*

### 1. *Economic and Social Benefits*

#### a. *Economic Benefits*

Assessing the economic benefits of prize gaming is most often associated with commercial gaming as opposed to promotional gaming and contests. This is because most forms of commercial gaming have a much larger impact on a state than other forms of prize gaming.

A government can view gambling as a savior in many areas. It may view new construction and tourist influx as a way to rehabilitate a decaying urban resort, or legalized gambling may serve as general economic stimulation.<sup>230</sup> Legal casinos and ancillary businesses may increase tourism, employment, and accommodations that were previously deficient or nonexistent. These increases may lead to creating new, or retaining existing, residents. In other situations, the tax revenues alone may suffice as the reason. Other politically palatable benefits of legal gaming include increasing investment, creating jobs, and regional development or redevelopment.<sup>231</sup> This is equally applicable to other forms of prize gaming, particularly those associated with the high-tech industry. The ability to attract skilled computer technologists to create computer games would be a welcomed addition to most local economies.

Tourism is a primary industry because it introduces new cash into the community from nonresidents. Certain prize gaming can help promote tourism. Beyond commercial casinos, contests of various sorts are used by many communities to attract tourists, ranging from holding a pro-golf or bowling tournament, a world championship game of bridge or monopoly, to hosting a beauty pageant.

#### b. *Social Benefits*

Most people enjoy "controlled risk" in some form. Different people are willing to assume various degrees of risk. While a person may not be willing to jump off a twelve-story building into an air bag, that same person might be willing to risk a roller coaster ride at the regional amusement park. Casinos market to people who are willing to undertake various levels of "controlled risk" from middle-income tourists with a \$500 gambling budget to those who put millions at risk on a typical weekend. What is the common link between these persons?

As Reverend Moody points out, gambling within a "controlled risk" environment is just another way in which people experience enjoyment. In effect, it is a form of adult play, and play is the antithesis of work because it creates no direct economic benefit. Play may, however, be essential to a healthy society and life in industrialized societies because people can use it to express themselves in ways not available in traditional settings such as the workplace or home. It is a diversion from ordinary life and from societal and personal pressures. It may offer rewards through excitement, gratification, and, with gam-

<sup>230</sup> Jerome Skolnick, *A Zoning Merit Model for Casino Gambling*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 48 (1984).

<sup>231</sup> See WILLIAM R. EADINGTON, *THE EMERGENCE OF CASINO GAMING AS A MAJOR FACTOR IN TOURISM MARKETS: POLICY ISSUES AND CONSIDERATIONS* (Nov. 1993).

ing, the possibility of financial reward. Persons who regularly include play in their lives may be better adjusted and greater contributors to society.

Gambling and certain prize gaming – particularly video games – are opportunities for workers to experience risk in a controlled setting. Seminal work on this theory by Edward Devereux also noted that “gambling can revitalize orientations to certain economic goals . . . which play a vital role in our capitalist economy.”<sup>232</sup> This can include risk taking, conflict and adventure, and is perhaps no more evident than in some hard-core video games.

### c. Improved Skill Sets

Beyond controlled play, certain types of prize gaming may actually improve skill sets. Even the United States Army has developed its own video games based on its training and discipline for both prospective recruits and its squad leaders.<sup>233</sup> Some studies have shown that video games sharpen visual skills, including the ability to better process visual information.<sup>234</sup>

Because a basic tenet of contests is that persons pay to enter, they are subject to abuse in many ways. First, contests can be used to create what is substantially chance-based gaming. The idea of a predominately skill-based contest is nebulous. Simple games may distinguish between neophytes and experienced players, but are there skill games where the skill necessary to compete equally is easily acquired? This question illustrates that the level and type of skill required in a contest may be a relevant factor in determining public policy. In general, we propose that the lower the level of skill in a prize game, the greater level of concern the activity warrants.

As noted above, the prevailing test used by most state and federal courts, when assessing the existence of the gambling element of chance, is sometimes referred to as the “American Test” or the “Dominant Factor Test.”<sup>235</sup> Under this test the element of chance is met if chance predominates over skill in determining the outcome of the contest, even if the activity requires some skill.<sup>236</sup>

One example of the use of this test is seen in *Las Vegas Hacienda, Inc. v. Gibson*.<sup>237</sup> In that case, the Nevada Supreme Court held that a hole-in-one contest – where participants paid an entry fee and were awarded a cash prize if they made a hole-in-one – was not illegal gambling.<sup>238</sup> The court found that

<sup>232</sup> James H. Frey, *Gambling: A Sociological Review*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 107, 110 (1984) (citing Edward C. Devereux, *Gambling and the Social Structure: A Sociological Study of Lotteries and Horseracing in Contemporary America* (1949) (Ph.D. dissertation, Harvard University)).

<sup>233</sup> See Reuters, *U.S. Army Creates Video Game to Train Soldiers*, May 19, 2003, available at [http://www.intelligentx.com/newsletters/technology/articles2/story\\_tech6\\_051903.cfm](http://www.intelligentx.com/newsletters/technology/articles2/story_tech6_051903.cfm) (last visited Feb. 20, 2004).

<sup>234</sup> The Associated Press, *Video Games Sharpen Visual Skills, Study Finds*, May 30, 2003, available at <http://www.wausaudailyherald.com/wdhlocal/277825684968414.shtml> (last visited Feb. 20, 2004).

<sup>235</sup> See *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961); see THE REPORT, *supra* note 7, at 15.

<sup>236</sup> See THE REPORT, *supra* note 7, at 15; see also *Net Success*, *supra* note 30.

<sup>237</sup> 359 P.2d at 85.

<sup>238</sup> See *id.* at 87.

there was sufficient evidence to sustain a finding that the shooting of a hole-in-one was a feat of skill.<sup>239</sup>

A more interesting issue arises, however, with respect to tournaments and games in which experts would prevail over novice players only 51-75% of the time. In one New Jersey case, based on expert testimony, the court found that because experts only prevailed over novice players 68-72% of the time, the game should be deemed a game of chance.<sup>240</sup>

What if the game was offered in a tournament mode, where at each stage of the tournament unsuccessful contestants were eliminated? As we will show, in those games where "skill" is a more significant component than "chance," utilizing the tournament model ensures that the skill element becomes not only the predominant, but virtually the determinative factor.

As an example, imagine a three-tiered tournament based on a 75% skill game with eight participants. At tier one, four contestants would be eliminated based on their performance. Here, a "novice player" would have a 25% chance of successful survival. At tier two, two contestants would be eliminated. To make it this far, however, the novice player would only have a 6% chance of successful survival. This 6% chance of successful survival is calculated by multiplying 25%, the chance of successful survival from tier one with 25%, the chance of successful survival from tier two.

The novice player would only have about a 2% chance of successful survival to make it to tier three (the final round of elimination in our hypothetical). This chance is the product of multiplying 25% three times, which is the novice player's chance of surviving at all three stages of the tournament. By comparison, if the eight players had drawn lots at the outset, the novice player's chances of survival would have been 12.5%! And in a typical, permissible head-to-head skill game, his or her chances of survival (or winning) would have been about 10%! This comparison demonstrates that the tournament model magnifies the skill element in a contest.

What level of scrutiny would such an activity deserve? Again, it is up to the jurisdiction to decide. We are merely attempting to demonstrate that, based on existing case law, there is a sliding scale; the lower the level of skill required, the greater the concern. Additionally, tournaments appear to further magnify the skill component in a contest.

With respect to the horseracing form of sports wagering, similar observations can be made. By legalizing wagering on horse races, states were "[not only] encouraging agriculture and the breeding of horses . . . , generating public revenue . . . [but were also] providing for maximum expansion of horse racing opportunities . . . ."<sup>241</sup> Such perceived benefits appeared to make it possible for legislators to keep horseracing legal.

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<sup>239</sup> See *id.*

<sup>240</sup> See *Ruben v. Kenper*, 127 A.2d 906 (N.J. Super. Ct. Ch. Div. 1956); cf. *O'Brien v. Scott*, 89 A.2d 280 (N.J. Super. Ct. Ch. Div. 1952) (holding that, where an expert prevails seventy-seven to eighty percent of the time over a novice player, such game should be deemed a game of skill).

<sup>241</sup> T. Taylor & G. Trude, *California Horse Racing Board*, 15 CAL. REG. L. REP. 158, 160 (Winter 1995).

d. *Establishing the Beneficiaries*

Governments often distinguish their gaming public policy choices based on the beneficiary of the offered activity. Prize gaming can benefit four principal groups: government, charities, disadvantaged groups, and private interests. Where the gambling activity was designed to help charities or, generally, a socially important cause, then it has often been deemed acceptable because of its targeted nature.

Specifically, in those instances where state officials wish to decide who should be the beneficiaries of gambling, three distinct models are available. Under the first model, only the state may benefit. One example of this approach is the state-run lotteries. Under the second model, charities may also benefit. One example of this model is charitable bingo. Under the least restrictive model, any properly licensed business may benefit. One example of this model is publicly-held corporate casinos.

Lotteries, for instance, are probably one of the best and earliest examples of a gambling activity that became sanctioned or legalized to help support socially important causes.<sup>242</sup> Thus, lotteries, a form of gambling, have been sanctioned to benefit or advance socially important causes.

With respect to certain forms of casino-style gaming, similar observations can again be made.<sup>243</sup> As the United States Congress explained, the purpose of the Indian Gaming Regulatory Act of 1988 was to establish a "statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, tribal self-sufficiency, and strong tribal governments."<sup>244</sup> Accordingly, it is a fair inference that in a case where an ethnic minority experiences desperate economic conditions, a legislature may see fit to improve upon such situation by legalizing certain forms of gambling for the benefit of the minority.

Legislatures, regulators, and sometimes the courts have always, at least implicitly, asked the question: Who will this activity benefit? When the proposed activity was for a socially important cause, many have found it difficult to deny the legitimacy of gambling.

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<sup>242</sup> Specifically:

[l]otteries in the United States date to early colonial times. A lottery was conducted in 1612 to support the Jamestown settlement. In the 1740s, Benjamin Franklin organized a lottery to raise money for the strengthening of Philadelphia's defenses. George Washington's Continental Army was the beneficiary of a lottery authorized by the Continental Congress in 1776. [Furthermore,] [s]tate-authorized lotteries funded much of the infrastructure needed to accommodate the westward expansion of the nation throughout the first half of the nineteenth century.

Kevin D. Doty, *Mailing and Transporting Lottery Materials*, in *FEDERAL GAMBLING LAW* 39 (Anthony N. Cabot et al. eds., 1999).

<sup>243</sup> As a preliminary matter, for example, while certain forms of Native American gaming activities have been around for decades, commercial gaming operations on reservations are a more recent phenomena. More specifically, the inception of Native American commercial gaming can be traced most directly to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 (1988), that enabled tribes to enter into gaming compacts with states.

<sup>244</sup> 25 U.S.C. § 2701 (1988).

## 2. *Negative Externalities*

### *a. Externalities in General*

Externalities are the negative consequences or costs of an industry. With most other industries, externalities are tangible by-products of an industry. Air pollution, for example, can be an externality of the steel industry. As early as 1920, economists recognized that externalities created economic considerations.

From this perspective, externalities can be addressed through economic solutions. Some economists suggest the use of taxes and subsidies on the inflicting industry to deal with the externalities. One approach is for a government to tax a firm for creating an externality at a rate equal to or greater than the damage caused. For example, a steel company might have to pay a tax for releasing pollutants at a rate equal to or greater than the state's cost to clean the water. If the tax is higher than it would cost to abate the problem, the firm would abate the problem.

Another approach is through regulation designed to reduce or eliminate the externality. In the air pollution example, maximum limits may be set on the amount of pollution that an industry can release into the atmosphere.

Unlike most other industries, gambling produces few tangible externalities, except air pollution from increased traffic and, perhaps, litter. Instead, the externalities generally concern psychological or economic consequences. Social and economic externalities proffered for a ban on gambling include dysfunctional behavior like problem gambling, crime, adverse economic consequences, corruption, and environmental impact.

Externalities play a significantly large role in shaping public policy toward casino gaming, but are virtually ignored when considering other forms of prize gaming. These externalities include the role that gambling plays in: community street and organized crime; increasing dysfunctional gambling and its effect on family life; and increasing stress on the community infrastructure (e.g., traffic congestion and police services).

Opponents of legalized casino gambling often argue that government should prohibit legal gaming expansion. They claim the availability of convenient gambling increases the incidence of dysfunctional gamblers whose costs to third parties (i.e., other than the gamblers and the casinos) are not compensated by the casino industry. Opponents argue that not all externalities can be attenuated by regulation, and the cost will exceed the benefits that can be derived from legal gaming.

Proponents counter that effective regulation eliminates most externalities, and those remaining are minor and the government can address them using a small portion of the total tax revenues from gaming. A method of dealing with externalities that are not attenuated by regulation is not to prohibit the activity, but to shift the economic burden from third parties to the industry that causes the problem. This could be in the nature of a "community benefit levy." This approach requires the government to decide the costs of the externalities and then impose those costs on the industry through taxes.



Besides casino gaming, the issues of externalities are virtually ignored in the debate concerning other forms of prize gaming. The case of prize gaming and minors is illustrative.

No state that allows casino-style gaming permits minors (typically those under the age of 21) to gamble at licensed casinos. Presumably, this policy is based on several factors, including that minors do not have the mental capacity to make decisions regarding whether to risk money on games of chance. Nevada even goes so far as to prohibit games that may attract minors, presumably to avoid providing them with attractive gambling options. Yet, in these same states and other states that prohibit gambling altogether, children's arcades featuring prize gaming (questionably close to games of chance) and trading cards with chase cards are offered without public policy challenges.

Not all prize gaming activities need be treated equally, however. Different gaming activities may have different externalities, which may lead to a public policy where some activities are permitted but regulated, while others are prohibited altogether. For example, as the Florida Supreme Court explained in *Greater Loretta Improvement*:

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community . . . [by entering and plundering] every dwelling. . . .<sup>245</sup>

Externalities, however, can be based on more than just geographic distribution. Obvious examples include a number of factors, such as the age of participants, the amount of consideration required, and the like. These concerns will be explored further below.

#### *b. Source of Consideration*

Problem gambling is a concern for one principal reason: the problem gambler loses more money than he or she can afford to lose and, therefore, may neglect other obligations. A central concern is that the individual may neglect their responsibility to support their families or resort to criminal means to continue gambling. If the person did not have to pay consideration to gamble, then most of the perceived externality associated with the activity would be absent. Therefore, in assessing all prize gaming, a critical question is the source of consideration used to participate in the activity. In the case of gambling games and skill contests, there is a simple answer: the participant. Therefore, these activities are more susceptible to externalities than true sweepstakes. Other factors, however, may justify a distinction between gambling games and skill contests, including whether the incidence of problem behavior is more associated with gambling as opposed to skill contests in general or to specific types of skill contests.

On the one hand, the issue surrounding the source of consideration for sweepstakes is not as simple as it may first appear. Sweepstakes have a broad range. A sweepstake can be a simple and free drawing for products for the grand opening of a new store. However, pushed to its absolute limit, promoters have gone as far as installing vending machines that resemble slot machines

<sup>245</sup> *Greater Loretta Improvement Ass'n v. State*, 234 So. 2d 665, 668 (Fla. 1970).

that dispense virtually worthless prepaid telephone cards. The special feature of these machines is that each purchase allows the person the chance to win a greater prize through a game of pure chance. The activity is ostensibly a "sweepstake" because the promoters allow non-paying persons an opportunity to participate by a mail-in entry. This is simply casino gaming disguised as a sweepstake.

Determining a public policy toward sweepstakes, therefore, requires consideration of several factors, including whether participants must purchase a product to play. Where no one can enter the sweepstake except by purchasing a product, then the promotional aspect of the sweepstake is almost assured. Where participants can enter by purchasing a product and others can enter for free, characterization of the activity depends on several factors: does the product being purchased have a retail value equal to the price for which it is being sold? In other words, a can of soda has a fairly standard price. Is the price of purchasing this product with a sweepstake entry the same as it would be without the entry? What is the intended economic benefit to the promoter? Is it from increased sales of products or services or from conducting the sweepstakes itself? Does the method of free entry meet the statutory or administrative test for equal dignity?

The first major policy concern is the source of consideration. What we mean here is that sweepstakes and, from time to time, certain contests, do not require an entry fee or participation buy-in from their participants. What level of review should such activities warrant? Specifically, should such activities receive the same scrutiny as other forms of prize gaming? What if there is an alternative method of entry ("AMOE"), but most participants still pay to participate? To better understand this phenomenon, we will first look at case law with respect to AMOEs. Second, we will also take a look at value-added services, where they are coupled with a contest buy-in. Lastly, we will conclude with a mathematical analysis of these scenarios.

In the past, most courts have exempted prize-gaming activities that have an optional free method of entry (i.e., an AMOE) from criminal prohibitions, because no reason exists to be excessively protectionist if players do not have to part with their money to participate in the promoter's game.<sup>246</sup> As the court

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<sup>246</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30. Besides such policy reasons, specific statutory language has also allowed courts to exempt AMOE sweepstakes from criminal prohibitions. New Jersey provides one important example. As in several other states, New Jersey law defines gambling as "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." N.J. STAT. ANN. § 2C:37-1(b) (West 1995). Although such prohibition appears to be broad on its face, a recent federal case, decided by a New York court that applied New Jersey law, suggests that an AMOE may be an effective defense in New Jersey and in other states with similar statutory language, unless legal authority exists to the contrary. See *Glick v. MTV Networks*, 796 F. Supp. 743 (S.D.N.Y. 1992). In particular, in *MTV Networks*, an individual sued MTV alleging that MTV Networks had violated New Jersey gambling laws. More specifically, the plaintiff alleged that, by collecting entry information for a "sweepstake" through a "900 number" for which there was a \$2 charge, MTV was running an illegal lottery. See *id.* at 745. Nevertheless, the federal court found that, because cost-free means of entering the sweepstakes were also available (i.e., an AMOE), no gambling violation had occurred. See *id.* at 748. More

explained in *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co.*, where a promoter expects to gain some benefit from increased sales due to a contest, this benefit is not "consideration."<sup>247</sup>

Allowing people to enter either by paying or by AMOE, however, is not enough to classify a contest as a legal sweepstake instead of illegal gaming.<sup>248</sup> A second requirement is that those who pay and those who enter free must have a substantially equal chance of winning the prize.<sup>249</sup> Accordingly, at a minimum, the promoter's AMOE must meet the following criteria: (1) it must be readily available; (2) it must be free; and (3) non-paying participants must have a substantially equal opportunity to win as paying participants. These criteria are often referred to as the "Equal Dignity Rule."<sup>250</sup>

Promoters also face other requirements, however. First, the effectiveness of an AMOE varies greatly from state to state.<sup>251</sup> Second, contests that are not used to sell a so-called "legitimate product" are also subject to greater scrutiny.<sup>252</sup> Third, even where a product is sold, if it has little or no value, a state attorney general may be persuaded to prosecute the promoter.<sup>253</sup>

Having gained a basic understanding of AMOE principles, we now turn to value-added products or services, where they are coupled with a contest buy-in. A modern example of the value-added concept is the trading card industry with chase cards. A basic industry argument is that the consumer pays for a pack of cards that are worth what he or she paid for them, and the ability to win a chase card is simply an added value to the participant. As a preliminary matter, there has always been what, at best, may be called a conflict of opinion among state courts on this issue.

Based on dated case law, in some jurisdictions an argument can be made that where a promoter provides services or products for a fee at a fair price, there is no "bet" and the award of a contest prize is merely incidental to the underlying basic transaction. This argument would be predicated on case law explaining that a "bet" or "wager" is an agreement between individuals that some item of value will become the property of one of them depending on the happening of some future event, which is presently uncertain.<sup>254</sup>

Specifically, where something is sold for its real value, such transaction is not a wager because the central item to the transaction has already exchanged

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significantly, the court rested part of its conclusion on the finding that contestants were not required to "stake or risk" something of value as prescribed by the statute. *See id.*

<sup>247</sup> *See Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia*, 534 So. 2d 295, 297 (Ala. 1988) (holding that expecting to gain some benefit by way of increased sales due to a contest does not constitute consideration); *see also* 253 Ala. Op. Att'y Gen. No. 1999-028 (Oct. 29, 1998) (stating that consideration is not present where free participants are merely required to pay postage or other expenses not flowing directly to the contest promoter) (on file with the *Nevada Law Journal*).

<sup>248</sup> *See THE REPORT*, *supra* note 7 at 21-23.

<sup>249</sup> *See id.*

<sup>250</sup> *See, e.g.*, 1991 Va. Op. Att'y Gen. 122 (August 29, 1991); *see also* *G.A. Carney Ltd. v. Brzeczek*, 453 N.E.2d 756 (Ill. App. Ct. 1983).

<sup>251</sup> *See THE REPORT*, *supra* note 7.

<sup>252</sup> *See id.*

<sup>253</sup> *See id.*

<sup>254</sup> *See People v. Oreck*, 168 P.2d 186 (Cal. Ct. App. 1946).

hands.<sup>255</sup> For example, in *People v. Oreck*, an Indiana court held that an individual could not be convicted where he bought an item at fair value, even though subsequently he may have received additional consideration as the result of an incidental bet.<sup>256</sup> In short, because the participant received a service or product at fair value, the incidental award of a contest grand prize, under such rationale, did not create an illegal gambling transaction.

Contrary authority also exists. For example, in an older Georgia case, the court held that a suit club, whose members pay a tailor a dollar a week to win a free suit in the weekly drawings, is a lottery even though all "unlucky" members are also entitled to their suits at a "fair price."<sup>257</sup>

A major concern with "value-added" services from a public policy perspective is that the services are rarely "value added." The trading card industry is a good example. The chase cards often have tremendous value. For example, in one promotion, Wal-Mart included an opportunity to win the most valuable trading card in the world, a pristine 1910 Honus Wagner card, which recently sold for over a million dollars.<sup>258</sup> The promotion was associated with the clearance of sports cards and grossed in excess of \$22.5 million for Wal-Mart.<sup>259</sup> Perhaps this is an extreme case, but the emphasis on high-value chase cards cannot be ignored.<sup>260</sup> In many cases the chase cards become the products.<sup>261</sup> From the perspective of the trading card companies, the chase cards are not merely additional promotions, but necessarily must be considered a substantial expense in the production of the trading card series. When taken in this light, distinguishing value-added products and services from actual gambling becomes difficult because the cost of the value-added product is very relevant in the expected return from trading card sales.

Take a look at a pure gambling transaction using a mathematical formula: casinos make money because they have a house advantage over the player. Here, "expected value" represents the amount of money a player can expect to lose over the long run playing a specific game.<sup>262</sup> "Long run" means the amount of time sufficient to reasonably negate any significant fluctuations in individual trials.<sup>263</sup> Expected value is a function of both the probabilities of

<sup>255</sup> See *Wagner v. State*, 63 Ind. 250, 251 (1878).

<sup>256</sup> See *People v. Oreck*, 168 P.2d 186 (Cal. Ct. App. 1946).

<sup>257</sup> See *De Florin v. State*, 49 S.E. 699 (Ga. 1905); see also *State v. Lipkin*, 84 S.E. 340, 343 (N.C. 1915) (stating, in dicta, that a court "will strip . . . a transaction of all . . . [irrelevant elements] and consider it in its very nakedness"); *Paterson Publ'g Co. v. N.J. Bell Tel. Co.*, 122 A.2d 599, 467 (N.J. 1956) (stating similarly that service that tells the results of a game is real value to the bookmaker, not participants).

<sup>258</sup> Dorothy S. Gelatt, *Honus Wagner Raffle Gross: \$22.5 Million at Wal-Mart*, Apr. 1996, available at <http://www.maineantiquedigest.com/articles/walmart.htm> (last visited Feb. 20, 2004); Shawnee News-Star, *\$1.265 Million Paid for Wagner Card*, May 2, 2000, available at [http://www.news-star.com/stories/071800/spo\\_wagner.shtml](http://www.news-star.com/stories/071800/spo_wagner.shtml) (last visited Feb. 20, 2004).

<sup>259</sup> Dorothy S. Gelatt, *Honus Wagner Raffle Gross: \$22.5 Million at Wal-Mart*, Apr. 1996, available at <http://www.maineantiquedigest.com/articles/walmart.htm> (last visited Feb. 20, 2004).

<sup>260</sup> Brett Warnebold, *For the Love or Money?*, available at [http://www.hobbyinsider.com/articles/article\\_10\\_love\\_money.asp](http://www.hobbyinsider.com/articles/article_10_love_money.asp) (last visited Feb. 20, 2004).

<sup>261</sup> *Id.*

<sup>262</sup> See ROBERT C. HANNUM & ANTHONY N. CABOT, *PRACTICAL CASINO MATH* 8-9 (2001).

<sup>263</sup> See *id.*

winning and losing and the amount of money, or other commercially valuable item, won or lost.<sup>264</sup> We may assume that an activity becomes highly scrutinized betting or wagering because people stake their money in games themselves to provide, over the long run, a financial benefit to the game operator. In short, the odds slightly favor the house.<sup>265</sup> People gamble in casinos only because, in short run, fluctuations allow some to win.

Why, from a public policy prospective, should value-added promotions differ from gambling? As businesses that seek to make a profit, trading card companies must understand the expected return on the sale of each pack of trading cards based on the cost of the "regular cards" and the "chase cards." They must know that the value of a pack of all regular cards must necessarily be less than the face value for them to make a profit. They must understand that a significant number of persons hope to be the person that pulls the chase card, and that the statistical fluctuation occurs because the value of the pack is greater than the purchase price.

Should such transactions be permitted? In other words, should a value-added service or product eliminate high scrutiny? As some of the foregoing older cases illustrate, courts were not always opposed to such transactions. While there is no direct language on this point, the strongest justification for the above-stated scenario is that even those players who do not have large bank-rolls did not have to wait for their luck to change because they could still walk away with a "prize" every time they placed a bet.

Nevertheless, concerns remain. What about those individuals who continued to buy "trading cards" (or anything else) for the chance to win a prize? While the value-added scheme appeared to cancel out the potentially large fluctuation in a player's luck, a small minority of players could still suffer economic loss. For example, Cracker Jacks can legally offer a different prize in every package.<sup>266</sup> This is permissible because a company can offer unknown objects for sale if the objects are of reasonably equal value.<sup>267</sup> A company, however, may face liability if the unknown objects have widely divergent values.<sup>268</sup> Courts are concerned and do not want Cracker Jacks to be "flying off" the store shelves because some are anxious to win a BMW, for example.

Here, by offering a true AMOE, a promoter further minimizes concerns that may be created under the previous examples. In other words, even a player

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<sup>264</sup> In short, one may use the following formula:  $EV = (\text{Net Pay} \times P)$  (where Net Pay equals the net payoff and P equals the probability of the Net Pay or, in greater detail,  $EV = [(\text{payoff per winning play}) \times (\text{probability of winning})] + [(\text{average bet per play}) \times (\text{probability of losing})]$  (the "Expected-Value Formula" or the "Formula")). In casino games, players can generally expect to lose some money over an extended time period. *See id.*

<sup>265</sup> *See id.* Given the scale of gambling operations in places like Nevada, New Jersey, or Connecticut, for example, a casino operator can make up for his or her house advantage by having a long list of complimentary services, as well as steeply discounted rooms, shows, and other accommodations. This is not the case, however, with an independent "underground operator." Moreover, at a licensed casino any player could potentially walk away with a large jackpot that again, however, may not be the practical reality with an underground operation.

<sup>266</sup> *See generally* THE REPORT, *supra* note 7; *see also* Net Success, *supra* note 30.

<sup>267</sup> *See generally* THE REPORT, *supra* note 7; *see also* Net Success, *supra* note 30.

<sup>268</sup> *See generally* THE REPORT, *supra* note 7; *see also* Net Success, *supra* note 30.

who may be tempted to continuously keep purchasing the same product is not "forced" to do so because now there is a non-paying alternative through, for example, sending in a postcard. In short, an AMOE coupled with value-added services appears to further limit any lingering player-protectionist concerns, so long as, of course, the AMOE truly meets the requirements of the Equal Dignity Rule.

For example, in a significant number of states, Pepsi or McDonald's can offer an entry into their sweepstakes with the purchase of a six-pack of soda or a Happy Meal respectively, because they also offer an alternative, no-purchase-required method of entry.<sup>269</sup> Furthermore, most people would likely agree that the price for such consumer goods is reasonable (even if the products were purchased in conjunction with a promotion).

What level of scrutiny would such an activity deserve, particularly where the value-added promotion is directed at minors? Again, this is up to each jurisdiction to decide. We are merely attempting to demonstrate that there is a sliding scale: the greater the pressure on the consumer to part with consideration, the greater the priority should be in both criminal enforcement and administrative oversight.

### *c. Size of Consideration*

Assuming the consumer is the source of consideration, the next concern in deciding public policy is the size of consideration. Specifically, what is the amount that has to be staked?

This is not just a function of the size of any specific bet in terms of dollars, but also a function of time. Here is what we mean: let us assume that "A" is running a contest that allows a buy-in once a week per household at \$5.00. Let us further assume that "B" is operating a Black Jack table where the maximum bet is \$5.00. Naturally, given the frequency of betting at B's Black Jack table, B's scheme warrants a higher level of scrutiny than A's contest.

In sum, the greater the opportunity for a consumer to part with sizeable consideration, the greater the potential for externalities.

### *d. Access by Minors*

In establishing public policy towards prize games, access by minors is the final but, nonetheless, not the least important consideration. In general, we propose that the greater the likelihood minors will participate in a specific prize game, the greater scrutiny such game should receive. And, for most prize games, public policy may dictate that minors should be altogether excluded. Despite this, skill-based arcade games and trading cards that cater to children go unregulated in most jurisdictions.

This position does not require much empirical support. There is ample scholarship on this issue. As one author argues: "Modern teenagers . . . are already confronted with various challenges, misconceptions, and confusions regarding the realities of life . . . [G]ambling may further contribute to the

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<sup>269</sup> See generally Linda A. Goldstein, *Sweepstakes Contests and Games from Off-Line to On-Line*, Promotion Marketing Association ("PMA") Seminar (2001) (on file with the Nevada Law Journal); see also THE REPORT, *supra* note 7; *Net Success*, *supra* note 30.

complexities of growing up.”<sup>270</sup> Thus, we believe that the greater the likelihood and actual participation in a prize game by minors, the greater the associated public policy concerns.

### 3. *Plausibility of Control Mechanism*

Under the approach where state officials consider the benefits and negative externalities associated with prize gaming, deciding on the feasibility of implementation is the final concern. The feasibility of the control mechanism raises three basic questions: (1) does the government have the resources to implement a control mechanism? (2) does the government want to dedicate those resources to implementing the control mechanism? and (3) if the control mechanism is implemented, will it substantially eradicate the activity?

Control issues are becoming increasingly important in any public policy debate on prize gaming based on three factors. First, the Internet has brought all available types of prize gaming to anyone with Internet access, which is increasingly becoming every American household. The susceptibility of this medium to state and federal control will ultimately determine whether government has lost control over prize gaming. Second, the advent of Native American casinos has stripped many states of the ability to determine gaming policy within their own boundaries. Third, the general proliferation of gambling creates a situation where traditional gambling is available within a short distance of most Americans. For example, persons living in Utah are bordered by Colorado, Nevada, and Arizona, all of which have casinos.

Because of its significant potential impact on control issues, Internet gaming is worthy of lengthy discussion. The position taken by the United States Department of Justice and some members of Congress is that most Internet gambling is, or should be, unlawful.<sup>271</sup> Nevertheless, any actions taken by members of our government may be rendered meaningless by virtue of the Internet’s characteristics. By its very nature, the Internet is global in reach. Therefore, the efforts and policy of the United States must be considered in light of international developments. This is one of the most difficult issues concerning the ways in which United States policy can successfully implement a communications medium that defies national boundaries.

Since the dawn of modern history, mankind has existed under a system whereby the government has physical control over a geographic area and its inhabitants. Indeed, according to one authority, “[u]nder International law, a state is an entity that has a defined territory and a permanent population, under the control of its own government . . . .”<sup>272</sup> Modern technology, however, has gradually eroded government control by facilitating inter-jurisdictional transactions. The creation of a national mail system spurred the development of mail

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<sup>270</sup> WILLIAM R. EADINGTON, *Economic, Social and Policy Observations on Youth Gambling*, in *FUTURES AT STAKE – YOUTH, GAMBLING, AND SOCIETY* 193 (Howard J. Shaffer et al. eds., 2003).

<sup>271</sup> See, e.g., Letter from Jon P. Jennings, Acting Assistant Attorney General, United States Department of Justice, to The Honorable Patrick J. Leahy, Ranking Minority Member, Committee on the Judiciary, Senate (June 9, 1999), available at <http://www.usdoj.gov/criminal/cybercrime/s692ltr.htm> (last visited Feb. 20, 2004).

<sup>272</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987).

fraud, as well as the advent of the first national lottery.<sup>273</sup> More recently, the dawn of electronic bank transfers made the movement of money received from illegal transactions more difficult to track.<sup>274</sup> The Internet also significantly raises the stakes. We now live in a human community that exists without traditional notions of territory. Therefore, the question for each government is whether to extend its monopoly to a boundless territory, or to control the Internet only within its own territorial boundaries.

For many countries, this proposition is easily answered. So long as government controls access to the Internet, it can also control the content that its citizens view. While this approach may be acceptable in some regions of the world, it is unacceptable in most Western cultures, such as the United States, Canada, Western Europe, and Australia. The most daunting option is for a country to maintain traditional governmental controls over its citizens while relinquishing control of the Internet infrastructure.

Without government control over Internet access, citizens can buy virtually anything over the Internet from a business that does not exist anywhere but in "cyberspace." For example, consider the online gaming industry. Where is the sports book located? Is it really in Antigua where it is licensed? Or is it next door, but routed through a surrogate server in Antigua? Moreover, how long does it take to move the Internet sports book between countries? These questions illustrate that the physical location of the Internet business is increasingly irrelevant. These questions also point to a greater issue: without having physical control over the business, the government lacks the ability to control or tax gambling activity.

The basic struggle concerns whether government can control the Internet or whether the Internet will control the government. This issue goes beyond gambling to include issues such as bank fraud, consumer fraud, theft of intellectual property, copyright infringement, and child pornography, and may need to be addressed via international treaty.<sup>275</sup>

In particular, even assuming that operating a gambling site on the Internet is illegal, under national or international law, governments must have a vehicle to enforce the particular law at issue.<sup>276</sup> Prior to creation of the Internet,

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<sup>273</sup> See Kevin D. Doty, *Mailing and Transporting Lottery Materials*, in *FEDERAL GAMBLING LAW* 39, 39-40 (Anthony Cabot et al. ed., 1999).

<sup>274</sup> See generally DAVID MUSSINGTON ET AL., *EXPLORING MONEY LAUNDERING VULNERABILITIES THROUGH EMERGING CYBERSPACE TECHNOLOGIES* (RAND 1998). See also *Cash Transaction Reporting*, in *FEDERAL GAMBLING LAW* 247 (Anthony Cabot et al. eds., 1999).

<sup>275</sup> See generally KENT D. STUCKEY, *INTERNET AND ONLINE LAW* (Law Journal Seminars Press 1996).

<sup>276</sup> When Internet gaming first emerged, it was frequently debated whether § 1084 could be applied to a gambling operator that operates from outside the United States. See 18 U.S.C. § 1084 (2000). Specifically, many of the Internet gaming prosecution cases discussed herein were defended on the theory that United States courts do not have prescriptive jurisdiction over Internet gaming sites operating from an offshore location. See, e.g., *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

Today, in an attempt to circumvent the prohibitions of § 1084, most operators now offer their telephone or Internet gambling services from locations outside of the United States. See Andrew E. Tomback & Anne K. DeSimone, *Every State for Itself? Recent Approaches to Internet Gaming*, 5 *GAMING L. REV.* No. 5 431, 442 (2001). Gambling is unregulated on about 1,400 offshore websites. Tony Batt, *Leach Takes Aim at Web Gambling*, *LAS VEGAS*



REV.-J., Nov. 23, 2001, at 1D, available at [http://www.reviewjournal.com/lvrj\\_home/2001/Nov-23-Fri-2001/business/17498221.html](http://www.reviewjournal.com/lvrj_home/2001/Nov-23-Fri-2001/business/17498221.html) (last visited Feb. 20, 2004); see, e.g., CyberSportsBook.com, available at <http://www.cybersportsbook.com> (last visited Feb. 20, 2004); Golden Fortune Casino, available at <http://www.goldenfortunecasino.com> (last visited Feb. 20, 2004); Luckyland Casino, available at <http://www.luckyland.com> (last visited Feb. 20, 2004); Planetluck Online Casino, available at <http://www.planetluck.com> (last visited Feb. 20, 2004); Starluck Casino, available at <http://www.starluckcasino.com> (last visited Feb. 20, 2004).

The issue then becomes whether § 1084 applies to non-United States operators that accept wagers from United States residents. It now appears that the Wire Act probably applies to the offshore operators accepting United States sports wagers. In particular, § 1084 prohibits the transmission of wagers by wire communications in foreign commerce. 18 U.S.C. § 1084 (2000). Thus, the Wire Act appears to apply to non-United States-based operators that knowingly accept sports wagers from United States citizens.

At least one offshore Internet gambling operator has learned of the applicability of the Wire Act to his operations the hard way. Interactive casino operator Jay Cohen ran an offshore gambling site from Antigua, where his operations were legally licensed. The United States Court of Appeals for the Second Circuit was not persuaded by Cohen's argument that § 1084 should not apply to interactive gaming activities operating from a jurisdiction where such activities are legal. As a result, his conviction by a New York federal district court was affirmed. Yet the Cohen case was anomalous, as Cohen made the mistake of coming to the United States where authorities had personal jurisdiction over him and charged him with Wire Act violations. While attempts to force American law on offshore operators are, in large part, futile, the United States government has brought charges against at least twenty-two offshore operators for violations of § 1084. *Cohen*, 260 F.3d at 70, 73-74, 78; see also Kelly B. Kramer, *The Jay Cohen Affair: Lessons in the Legality of Internet Betting*, 5 GAMING L. REV. No. 6 551 (2001); Gary Dretzka, *Rolling the Dice on Internet Gambling Casinos, Nevada Look to Create a Web of Wagering at Home*, CHI. TRIB., June 15, 2001, at C1, available at 2001 WL 4083854 or <http://pqasb.pqarchiver.com/chicagotribune/> (last visited Feb. 20, 2004). Yet, even in the aftermath of the Cohen case, uncertainty remains about the scope of the Wire Act's prohibition of Internet gambling. Until 2001, there were no reported cases applying the Wire Act to non-sports related gaming. Prior to *In re Mastercard International Inc., Internet Gambling Litigation*, 132 F. Supp. 2d 468 (E.D. La. 2001), the only cases addressing § 1084, as it applies to non-sports related gambling, were dismissed on other grounds. See, e.g., *United States v. Giovanelli*, 747 F. Supp. 897 (S.D.N.Y. 1989); see also *United States v. Chase*, 372 F.2d 453 (4th Cir. 1967); *United States v. Manetti*, 323 F. Supp. 683 (D. Del. 1971). In cases where conviction occurred, sports betting was the only contested activity. See, e.g., *United States v. Segal*, 867 F.2d 1173 (8th Cir. 1989) (betting related to football games); *United States v. Campagnuolo*, 556 F.2d 1209 (5th Cir. 1977) (betting related to various sports events); *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971) (betting related to sporting events); *Tel. News Sys., Inc. v. Ill. Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1963) (betting related to horse racing).

Several months before the Cohen opinion, the United States District Court for the Eastern District of Louisiana issued an opinion in *In re Mastercard*, 132 F. Supp. 2d 468 (E.D. La. 2001). *In re Mastercard* dealt with a number of plaintiff Internet gamblers who attempted to sue their credit card companies for illegal involvement with Internet gaming operators. *Id.* at 473. Their claims were based on alleged Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (2000), violations, which required an analysis of underlying violations of state laws and the federal Wire Act. *In re Mastercard*, 132 F. Supp. 2d at 473. Upon examination of the Wire Act's applicability to the types of wagering engaged in by the plaintiffs, the court interpreted the Wire Act as inapplicable to non-sports gaming. *Id.* at 480.

The court held that "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." *Id.* Although the court held that the plain language of the statute was clear, rendering a look at legislative history unnecessary, it

enforcement was accomplished more easily. For example, the sheriff could simply locate the alleged perpetrator within his jurisdiction, arrest him, and bring him before the magistrate. The Internet world is much different. Mobility allows the alleged perpetrator to be in another state or halfway around the world. Jurisdictional battles often overshadow questions of guilt or innocence.

Under general principles of international law, the United States' ability to enforce its laws extra-territorially is based on three different principles of jurisdiction: "Jurisdiction to Prescribe," "Jurisdiction to Adjudicate," and "Jurisdiction to Enforce."<sup>277</sup> These principles limit the United States' ability to "export" its laws overseas.

More specifically, jurisdiction to prescribe means the authority of the United States, or a political subdivision thereof (hereinafter sometimes collectively referred to as the "Sovereign"), to make its laws applicable to certain persons or activities.<sup>278</sup> Jurisdiction to adjudicate means the authority of the Sovereign to subject those persons to its judicial process.<sup>279</sup> Jurisdiction to enforce means the authority of the Sovereign to "use . . . [its] resources . . . to induce or compel compliance with its law."<sup>280</sup>

The United States government may exercise extra-territorial jurisdiction ("ETJ") in very limited circumstances. In particular, such exercise must be permissible under international law as well as United States law.<sup>281</sup> International law recognizes five bases for ETJ: (1) territorial, where the place of the offense committed serves as the basis for jurisdiction; (2) national, where the nationality of the offender serves as the basis for jurisdiction; (3) protective, where an injury to national interest serves as the basis for jurisdiction; (4) universal, where physical custody by any forum of the perpetrator of certain offenses, considered particularly heinous and harmful to humanity, serves as the basis for jurisdiction; and (5) passive personal, where the nationality of the victim serves as the basis for jurisdiction.<sup>282</sup>

The third and fourth bases for ETJ (protective and universal jurisdiction) probably do not apply to Internet gambling. Despite some negative commentaries on gambling, the potential injury caused by Internet gambling is unlikely to rise to the level of injuring "national interest" or "considered particularly heinous and harmful to humanity." The fifth basis of ETJ (passive personal juris-

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nevertheless stated that the legislative history of recent Internet gambling legislation supports the idea that the statute applies only to sporting contests. *Id.* Because the plaintiffs failed to allege they had engaged in sports betting, the court held the Wire Act did not apply to their claims. *Id.* at 481. The court concluded: "Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act." *Id.* As it now stands, this is the only case law on point with respect to the Wire Act's application to non-sports betting on the Internet.

<sup>277</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 236-37 (1987).

<sup>278</sup> See *id.* §§ 231-32.

<sup>279</sup> See *id.*

<sup>280</sup> *Id.*

<sup>281</sup> See, e.g., *United States v. Yunis*, 681 F. Supp. 896, 899-903 (D.D.C. 1988).

<sup>282</sup> See *id.* at 899.

diction) is also more likely to apply to "serious and universally condemned crimes."<sup>283</sup>

The first and second bases for ETJ (territorial and national jurisdiction) are the most likely to apply to Internet gambling. First, the United States can exert jurisdiction over its citizens for conducting gambling anywhere in the world, despite the legality of the activity in the place where it is being conducted. For example, under federal law, a United States owned and operated aircraft cannot offer in-flight gambling even between two foreign cities. Second, where the Internet operator "intended" to produce a detrimental effect within the territory of a Sovereign, such action arguably may justify the Sovereign in punishing the operator as if he or she had been personally present in the territory of the Sovereign.

A key aspect of the jurisdiction to adjudicate, however, is the presence of the accused. Moreover, under United States law, except in very rare circumstances, a person cannot be tried for a criminal offense in absentia. Simply put, "no court in the United States may bring a person to trial without his or her presence."<sup>284</sup>

Finally, while the United States generally has the ability to enforce its laws within its own territory, in criminal cases the United States does not have the ability to take enforcement measures outside the United States without the consent of the affected foreign nation.<sup>285</sup> Therefore, while the United States likely has the requisite ETJ to prescribe those activities of the offshore operator that take effect in the United States, absent clear authority under a treaty agreement or other principle of international law, the United States would have a difficult time exercising its adjudicative and enforcement powers over an offending corporation's offshore assets and personnel.

Thus, the end result of a blanket prohibition by the United States is a great benefit to offshore operators, who are, as noted above, often safely beyond the reach of United States authorities. In particular, in the early part of this century the alcohol prohibition eliminated the mob's competition and was thus instrumental in the mob's ability to build a strong financial foundation. Such a blanket prohibition on gaming may help to eliminate the legitimate United States competition for the vast majority of illegitimate offshore operators.<sup>286</sup>

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<sup>283</sup> *Id.* § 902.

<sup>284</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 314 (1987).

<sup>285</sup> *See id.* at 432.

<sup>286</sup> Regulation is a rule or set of rules from a competent authority dictating certain action or conduct. If the rule is "don't do it," the regulation is prohibitory. If the rule is that "you can do it, but under these circumstances" then the regulation is prescriptive. Both entail the government attempting to define acceptable behavior of those under its authority and enforcing such behavior through the threat of sanctions.

A government, however, can no more dictate prescriptive regulation than prohibitory regulation because both require the threat of sanctions for disobedience. For example, if the Internet takes the ability to sanction non-resident offenders from governments, neither prohibition nor regulation can be forced on these unwilling operators.

Certainly some operators must submit to regulation because they fall within the jurisdiction of a competent authority. Foremost in this group are land-based gaming operators. They have privileged licenses to operate traditional gambling operations, such as casinos or racetracks. These operators need a legal and regulated environment to maintain their privileged licenses and the confidence of the public markets. For these reasons, many Internet

## B. *Basic Approaches to Implementation*

Once a society formulates a public policy toward gambling, it must implement that policy. Implementation concerns the way in which the government carries out its policy goals. While policy goals are the desired ends, implementation is the means of arriving at those desired ends.<sup>287</sup>

Implementation usually involves both adopting and enforcing laws. While the government can achieve policy goals through the adoption of laws that restrict, mediate, or promote the activities of private parties,<sup>288</sup> regulation is the most common method of implementation. Specifically, regulation is the process by which the government achieves policy goals by restricting the choices of private parties.<sup>289</sup>

Nevertheless, no perfect regulatory system exists or can exist. The best that a jurisdiction can hope for is that it tailors a regulatory system that meets

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gambling operators and potential operators will also agree to pay taxes for the privilege of being regulated by a legitimate government so long as the tax structure and the regulators are reasonable.

For others, however, whether or not to be regulated is in their discretion. If you want to be regulated, then you can operate in Australia. If not, Costa Rica beckons. Here, the idea that prescriptive regulation can be more effective than prohibitory regulation must lie not with the ability to enforce regulations, but ultimately with consumers choosing to play only with the regulated gaming sites.

Some may argue, for example, that not all customers will perceive the value in dealing only with regulated operators. Specifically, as the forthcoming example demonstrates, unregulated operators may offer better odds because they are not burdened with the costs of regulation or taxes. Simply, prescriptive regulation of the willing will result in parallel gambling universes on the Internet. These are two separate but concurrent worlds: one in which a legitimate regulatory body oversees gambling operations, and the second where none exists.

Parallel universes should not conjure visions of a dark world, on the one hand, that is mired in dishonesty, and oppression; and a heavenly bliss, on the other, which espouses life, love, and the pursuit of happiness. Parallel gambling universes on the Internet will not have such fine demarcations. Both universes will offer a similar gambling product. The differences could be that the regulated universe will be able to represent to players that regulation and licenses will assure that the games are legal, honest, fair, and that winnings will be paid. It also may afford technology to deter minors and others from gambling.

Whether players then play with the regulated versus unregulated operators will depend on several factors. The first factor is the degree to which the players perceive the regulating authority as legitimate and effective. If the regulatory authority is a branch of a small corrupt government, then players will necessarily question whether it provides any protection.

A second factor in the success of the regulated universe is the cost associated with regulation. If regulation is extremely costly and these costs are borne by the Internet gambling operators, then the extra cost will likely result in higher prices. In the casino industry, operators raise prices by increasing the house (operator's) advantage in the games offered. If the unregulated casino operator can offer games at considerably lower prices than the regulated operator, because unregulated casino operators are not burdened with costly regulations, unregulated operators may overcome the regulated operator's other advantages.

<sup>287</sup> See generally ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION (1996).

<sup>288</sup> BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS 8-9 (1980).

<sup>289</sup> *Id.* at 20.

its goals efficiently. In some limited cases, effective regulation in one jurisdiction may prove to be unworkable in another.<sup>290</sup>

### 1. Eradication

The most restrictive approach to regulation, of course, is to eradicate gambling. Eradication involves adopting comprehensive laws prohibiting all forms of gambling, involving the criminal justice system in detecting and strictly enforcing those laws.<sup>291</sup>

This goal is not achievable unless the laws provide penalties that are severe enough to act as a deterrent or prevent a violator from engaging in the activity, usually through incarceration.<sup>292</sup> Moreover, to be effective, the police and the prosecutors must have sufficient resources and motivation to enforce the laws.<sup>293</sup> Finally, the public must support making the activity illegal.<sup>294</sup>

### 2. Non-Enforcement

Non-enforcement is another approach by which societies deal with gambling.<sup>295</sup> Non-enforcement occurs when neither the laws nor their enforcement prevent the deterrence of an illegal activity.<sup>296</sup> Non-enforcement results in little or no regulation of an illegal gaming industry.<sup>297</sup> Here, while laws prohibit gambling, the police or prosecutors do not enforce those laws.<sup>298</sup> As one national study concluded: "The meaning of gambling laws and the resulting constraints on gambling behavior are determined less by what legislators write than by how local police and prosecutors carry out their responsibilities."<sup>299</sup> The amount of illegal gambling in many countries, including Holland and the United States, reflects non-enforcement of gambling laws in many places where it is illegal.<sup>300</sup>

Non-enforcement occurs most frequently when the attitudes of the state and society as a whole differ.<sup>301</sup> The attitude of the state refers to public policy as set by the government through the adoption of laws.<sup>302</sup> A society's conscience as to the propriety of a certain activity is based on the popular sentiments of the people.<sup>303</sup> Usually the attitudes of the state and society will be in harmony. For example, most people in society believe that a person who robs

<sup>290</sup> See generally ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION (1996).

<sup>291</sup> See *id.*

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*

<sup>294</sup> See *id.*

<sup>295</sup> See *id.*

<sup>296</sup> See *id.*

<sup>297</sup> See *id.*

<sup>298</sup> See *id.*

<sup>299</sup> NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES (September 1978).

<sup>300</sup> See generally ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION (1996).

<sup>301</sup> See *id.*

<sup>302</sup> See *id.*

<sup>303</sup> See *id.*

another person by force should be punished. If the laws and their enforcement attempt to prohibit and punish armed robbery, then the attitudes of the state and society are harmonious.

Perhaps the greatest difference between the state (laws) and the public conscience occurred during Prohibition when an unsuccessful attempt was made to prohibit the use of alcohol in America.<sup>304</sup> Prohibition, by all accounts, was a complete failure, as it did not keep Americans from drinking.<sup>305</sup> Instead, the public began frequenting speakeasies instead of legal taverns. New York City reportedly had two to five times more speakeasies during Prohibition than it had taverns before Prohibition.<sup>306</sup>

Prohibition carried damaging effects far after its demise. Prohibition created a national network of organized crime that was well-financed by enormous alcohol profits and achieved higher status than simple crime. With the enormous profits generated from the sale of alcohol, Prohibition also resulted in the first organized corruption of law enforcement, the courts, and the political system.

Non-enforcement leads to two other problems. First, the public may lose respect for the police and the courts because persons are freely allowed to break the law. How do you explain to your children that society says it is acceptable to break some laws but not others? Second, non-enforcement might affect police morale.

Today, a form of gambling equivalent to the consummation of liquor during Prohibition is sports betting.<sup>307</sup> Although illegal in its pure form in every state except Nevada, the public has a preoccupation with sports wagering that results in mass illegal markets. To serve these markets, illegal operators attempt to use the illegality to keep out legitimate operators while, simultaneously, protecting themselves from being put out of business through incarceration.<sup>308</sup> The latter can lead to police corruption. Because of the nature of gambling and its appeal to a broad sector of the community, protection requires police conspiracy through a system that prevents non-participatory police officers from exposing the conspiracy, thereby stopping the payoffs. Protection may also extend to politicians, who are supported by illegal operators to secure police cooperation.<sup>309</sup>

An attitude of non-enforcement may result and prosper when the attitudes of the voters do not reflect the public conscience (the laws).<sup>310</sup> Often, because of apathy, certain definable groups are under-represented at the polls. Proponents of a particular position tend to vote and motivate others with a similar leaning to vote. Together they generally have sufficient political power to convince legislators to adopt a particular prohibition. However, after adoption the

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<sup>304</sup> See *id.*

<sup>305</sup> See *id.*

<sup>306</sup> See *id.*

<sup>307</sup> See *id.*

<sup>308</sup> See *id.*

<sup>309</sup> Peter Reuter, *Police Regulation of Illegal Gambling: Frustrations of Symbolic Enforcement*, 36 ANNALS AM. ACAD. POL. & SOC. SCI. 474 (1984).

<sup>310</sup> See generally ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION (1996).

public may not support the prohibition. This creates discord between the attitudes of the state (the laws) and the public conscience.<sup>311</sup>

This puts the politician in a difficult position: any movement toward the repeal of the prohibition may incur opposition from the original proponents. Attempting to enforce the prohibition, however, accrues no political benefit as it alienates the politician from the public. This alienation may be beyond any corrupting influence exerted by those conducting illegal activities. The result is an illegal activity readily engaged in by the public without substantial police interference.<sup>312</sup>

### 3. *Legalization and Control Through Regulation*

Between the extreme approaches of eradication and non-enforcement lies the middle road of legalization and control through regulation. Three approaches to gaming regulation predominate societies that allow legal gaming: (1) the Player Protection Model; (2) the Government Neutral Model; and (3) the Government Protection Model.<sup>313</sup>

#### a. *Player Protection Model*

The Player Protection Model is a system that protects the player. Under this approach, the government allows the gaming activity, but attempts to regulate the operators to minimize undesirable social consequences.<sup>314</sup> This model is often based on the underlying premise that the activity is not subject to prohibition, therefore legalizing it with the goal toward minimizing externalities is the preferred public policy.<sup>315</sup>

Under the Player Protection Model – applicable to all forms of prize gaming – are three basic principles. First, the game should be fair.<sup>316</sup> Second, the game should be honest.<sup>317</sup> Fairness and honesty are two different concepts. An operator of a prize game can be honest, but not fair. Honesty refers to whether the chance element in the games is truly random or whether the skill of the player truly determines the outcome. For example, a “flat game at a fair’s midway is a dishonest game where no matter what the dexterity of the player, the game cannot be beaten.”<sup>318</sup> Fairness refers to the games being designed so that they do not take unreasonable advantage of the player.<sup>319</sup> For example, many slot machines in traditional casinos are designed to pay back an average of ninety-five percent of all wagers accepted. The five percent retained is the casino’s profit. This is a reasonable amount for the casino to retain to pay for its capital costs, operating expenses, and a fair profit. On the other hand, set-

<sup>311</sup> *See id.*

<sup>312</sup> *See id.*

<sup>313</sup> *See id.*

<sup>314</sup> *See id.*

<sup>315</sup> *See id.*

<sup>316</sup> *See id.*

<sup>317</sup> *See id.*

<sup>318</sup> Mark Pilarski, *Rip-off on the Midway?*, CASINO CITY TIMES, Feb. 11, 2000, available at <http://pilarski.casinocitytimes.com/articles/5851.html> (last visited Feb. 20, 2004).

<sup>319</sup> *See generally* ANTHONY N. CABOT, CASINO GAMING – POLICY, ECONOMICS AND REGULATION (1996).

ting the machines to retain forty percent is not reasonable. The third basic principal is that players who win should be paid.<sup>320</sup>

Another aspect of the Player Protection Model is the philosophy that the operator should not engage in exploitation by encouraging gaming activity, encouraging players to wager more than they can afford to lose, or encouraging players to wager more than they would if not encouraged to do so.<sup>321</sup> These societies often achieve this goal through the adoption of laws that prevent operators from advertising or conducting any other activities that might stimulate interest in gaming.

In Great Britain, where the purest form of this model as applied to casino gaming can be found, an applicant for a casino license must prove that a substantial unstimulated demand exists for a casino. Unlike other businesses, an applicant that is successful in obtaining a license cannot advertise, offer complimentary services, provide entertainment, or use any other methods to promote the casino or gambling.<sup>322</sup>

The late Reverend Gordon Moody, former Secretary of Churches' Council on Gambling (UK), described the model as one that is "legalized and arranged for gamblers. . . ."<sup>323</sup> Moody argued that the government should not take taxes from gambling except as levied on any other transaction, should not legalize forms of gambling that provide the highest return for the operators, and should ensure that the operators do not exploit gamblers to increase the handle. With unstimulated demand, the government can adopt gaming regulations that hinder industry growth and can strictly enforce those regulations even if it decreases government revenue.<sup>324</sup>

#### *b. Government Neutral Model*

The second way that government may approach legal gambling is by adopting a Government Neutral Model. In places where gaming is legal, this is the least common approach. The Government Neutral Model involves little or no regulation of a legal casino industry.<sup>325</sup> Under this model, the casino industry would not be subject to any more licensing or regulatory scrutiny than other businesses, such as automobile dealers.<sup>326</sup> In the rare instances where this approach is taken, government usually requires that proceeds from legal gambling be given to charities.<sup>327</sup> Charitable gaming is common in many American states and in foreign countries where commercial casino gaming is prohibited.<sup>328</sup>

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<sup>320</sup> See *id.*

<sup>321</sup> See *id.*

<sup>322</sup> See *id.*

<sup>323</sup> Reverend Gordon Moody, *Legalized Gambling: For or Against Gamblers*, The Gambling Papers, Paper Presented at the Proceedings of the Fifth National Conference on Gambling and Risk Taking (1981).

<sup>324</sup> J. Skolnick & J. Dombrink, *The Limits of Gaming Control*, 12 CONN. L. REV. 762, 772 (1980).

<sup>325</sup> See generally ANTHONY N. CABOT, *CASINO GAMING – POLICY, ECONOMICS AND REGULATION* (1996).

<sup>326</sup> See *id.*

<sup>327</sup> See *id.*

<sup>328</sup> See *id.*



While the government may approach licensing of charitable gaming with no more intensity than the licensing of other businesses, the revenues generated by charitable gaming are often significant.<sup>329</sup> This model does not reflect a moral or social/economic bias against gambling; nor does it recognize that the government has any special obligation to protect the industry.<sup>330</sup>

This model may distinguish gambling transactions based on total revenues generated. Governments often impose greater restrictions on business activities based not on the activity, but on the monetary amounts involved.<sup>331</sup> For example, the local offering of stock in a company of less than one million dollars may undergo less government scrutiny than a hundred-million-dollar national or international offering. Commercial real estate brokers may undergo more rigorous licensing than residential real estate agents. Similarly, the Government Neutral Model may apply lesser standards to smaller gaming transactions, and more heavily regulate larger ones.<sup>332</sup> For example, a youth group may hold unregulated raffles to raise money to buy sports equipment if the amount raised is less than a thousand dollars. In contrast, a national charity wishing to raise a million dollars may have to meet specified requirements and obtain a license.<sup>333</sup>

The government may also decide that small-stakes gambling is harmless, but that patrons need protection from high-stakes gambling.<sup>334</sup> These governments may apply a Government Neutral Model to some forms of low-stakes gambling and a Government Protection Model to high-stakes gambling, or even ban high-stakes gambling altogether.<sup>335</sup> In Mississippi, for example, licenses to conduct low-stakes bingo games are routinely granted with little regulatory scrutiny, while applicants wishing to operate high-stakes games must undergo more rigorous licensing and follow more stringent regulations.<sup>336</sup>

### *c. Government Protection Model*

Like the Player Protection Model, the Government Protection Model involves strict regulation of a legal industry. While the Player Protection Model provides regulation to protect the patron, the Government Protection Model provides regulation that protects the economic interests of the state.<sup>337</sup> This model is analogous to the restrictions that a bank may put on a business to which it lends money.<sup>338</sup> A bank may only require a simple one-page promissory note for a \$100 loan. In contrast, loan papers for a \$100,000,000 loan will likely be voluminous. The larger the loan, the more likely the bank is to take steps protecting its interests. Although the bank wants to see a business succeed and will help a borrower when it can, its main obligation is to protect its

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<sup>329</sup> See *id.*

<sup>330</sup> See *id.*

<sup>331</sup> See *id.*

<sup>332</sup> See *id.*

<sup>333</sup> See *id.*

<sup>334</sup> See *id.*

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See *id.*

<sup>338</sup> See *id.*

assets.<sup>339</sup> Not surprisingly, the Government Protection Model is often found where the government relies heavily on the industry to meet tax expectations.<sup>340</sup>

The government has four roles in this model. The first and most important role is to act as a vehicle for the industry to gain and maintain credibility.<sup>341</sup> Its existence in many places is tenuous. Public perception of the benefits and burdens of legal gaming may change and influence the legality of the activity.<sup>342</sup>

The second role of the government in the Government Protection Model is to promote and defend the industry.<sup>343</sup> This requires the government to take an active interest in convincing the outside world that the regulatory system has successfully excluded organized crime, and is protecting the honesty of the games. When attacked, the government must defend the industry against its critics.<sup>344</sup>

A third role that the government plays in the Government Protection Model is to provide a vehicle for solving the industry's problems.<sup>345</sup> For example, no single casino may be capable of testing equipment or games sold by distributors to assure that they cannot be manipulated or cheated to the operator's detriment. Equipping and maintaining a lab and employing trained personnel would be too costly for a single casino.

Another governmental role in this model is to assure that it accounts for all government benefits.<sup>346</sup> Because the primary benefit is often tax revenues, the government provides such accounting controls and audit functions as it deems reasonable to assure it receives its fixed share.<sup>347</sup> In other instances, where the benefits are ancillary services, employment, or the like, government checks to assure that the operators comply with all legislative mandates.<sup>348</sup>

Hybrid models also exist, borrowing elements of the Government Protection, Government Neutral, and Player Protection models.<sup>349</sup> Often, underlying these hybrids are the public policy that seeks to tap the economic benefits from gambling and minimize costs.<sup>350</sup> Here, government believes the financial reward from gambling is greater than the potential harm.<sup>351</sup> These hybrid systems often attempt to realize the revenues from gambling while eliminating the harm, particularly to its citizens.<sup>352</sup>

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<sup>339</sup> See *id.*

<sup>340</sup> See *id.*

<sup>341</sup> See *id.* Another goal that often accompanies protection of the industry is the protection of the state's principal interest in tax revenues. This is accomplished by stringent accounting, auditing, and reporting requirements. See *id.*

<sup>342</sup> See *id.*

<sup>343</sup> See *id.*

<sup>344</sup> See *id.*

<sup>345</sup> See *id.*

<sup>346</sup> See *id.*

<sup>347</sup> See *id.*

<sup>348</sup> See *id.*

<sup>349</sup> See *id.*

<sup>350</sup> See *id.*

<sup>351</sup> See *id.*

<sup>352</sup> See *id.*

Two principal hybrid models exist.<sup>353</sup> The first attempts to apply different regulation to different persons based on geographies.<sup>354</sup> Puerto Rico, for example, allows casinos to stimulate demand outside Puerto Rico to attract tourism, but seeks to protect Puerto Rican residents by prohibiting casinos from stimulating demand within the Commonwealth through advertising.<sup>355</sup> Other jurisdictions allow casinos to stimulate demand outside their borders, but prohibit their own population from engaging in gaming. These countries might adopt a Government Neutral or Protection Model as applied to nonresidents, but attempt to eradicate the activity by its residents.<sup>356</sup>

A second, and more prevalent, hybrid model attempts to apply different models to different types of behavior.<sup>357</sup> This is a difficult approach because it involves applying conflicting sets of policies to the same group. This occurs where the government wants the benefits of casino gambling, but feels that gambling may have negative consequences to its citizens.<sup>358</sup> The government, however, is unwilling or unable to apply a different model to citizen participation as it does to tourists.<sup>359</sup>

## VI. ADMINISTERING THE PROGRAM – A NEW APPROACH

“An invasion of armies can be resisted but not an idea whose time has come.”<sup>360</sup>

Once the legislature has decided on a public policy and the basic approaches toward the different prize game activities, the legislature needs to create a mechanism to carry out these goals.

We believe the appropriate control mechanism requires several characteristics to successfully bring order to the prize game arena and accomplish public policy. First, the state needs to create a basic code of conduct that applies to all legal prize gaming. This code of conduct is necessary to assure that minimum standards are met regarding honesty, fairness, and operator responsibility. Second, the state needs to provide more definite statutory guidance as to the meaning of the basic prize game concepts such as consideration, chance, and skill. These definitions should be augmented by administrative procedures for promoters to determine the legality and procedures for proposed prize gaming activities. Third, there should be commonality of control mechanisms. In other words, a single regulatory body, with investigative powers, is preferable to multiple agencies. This regulatory body should be empowered with the tools and discretion to achieve the defined public policies. The regulatory body should have the capability of prioritizing criminal enforcement and regulatory oversight based on considerations of fraud, child access, and game structuring with respect to prize, chance, and consideration.

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<sup>353</sup> See *id.*

<sup>354</sup> See *id.*

<sup>355</sup> See *id.*

<sup>356</sup> See *id.*

<sup>357</sup> See *id.*

<sup>358</sup> See *id.*

<sup>359</sup> See *id.*

<sup>360</sup> Quote by Victor Hugo, available at <http://www.geocities.com/lifeflakes/> (last visited Feb. 20, 2004).

### A. *Creating Basic Statutory Rules for All Prize Gaming*

All prize gaming has some similar characteristics: persons engaging in some game for the opportunity to win a prize. Based on these similarities alone, the government can create a code of conduct that will provide the minimum requirements for all prize games. These requirements can be divided into seven categories: disclosure, truth in advertising, honesty, no conflict of interest, dispute resolution, privacy, and preventing access by minors.

#### 1. *Disclosure Requirements*

In the context of prize games, the purpose of disclosure requirements is twofold: to allow the public to make informed decisions regarding whether to participate in a prize game, and to provide the public with information to register complaints regarding the conduct of a prize game. From these perspectives, disclosure requirements for all prize games should have at a minimum the following attributes:

1. The name/address of the operator should be conspicuous.
2. The name/address of the beneficiary should be conspicuous.
3. Rules should be written in plain, clear language (English) and should include the following:
  - a. Methods of entry and limitations on entry;
  - b. The way in which the game operates and the method of determining the winner should be disclosed, including the skill required to win the game and whether any chance is involved;
  - c. The approximate odds of winning the game and/or particular prizes; and
  - d. Whether all prizes will be awarded.

#### 2. *No False or Misleading Advertising*

Prize game operators should be prohibited from making any false or misleading statements in advertising. Some terms of the legal settlement with Publisher's Clearinghouse give insight into what may constitute false or misleading advertising. The terms prohibited were as follows:

1. making any false, deceptive or misleading representations or omitting or concealing important facts regarding a sweepstakes;
2. making any representation that a recipient of a sweepstakes mailing will win, is likely to win, or that winning is imminent;
3. making any representation that the recipient is receiving individualized attention from PCH or its executives in connection with winning a prize;
4. using simulated checks or legal wording representing the recipient as a winner or as one who is likely to win a prize; and
5. misrepresenting that PCH employees, real or fictitious, have personal feelings or a personal relationship with the recipient.<sup>361</sup>

<sup>361</sup> National Association of Attorneys General, *Twenty-Six Attorneys General Win \$34 Million Settlement from Publishers Clearing House as Restitution for Consumers*, available at <http://www.naag.org/features/pubhouserest.cfm> (last visited Feb. 20, 2004).

### 3. *The Game Must Be Conducted Honestly*

What constitutes “honesty” in prize games may vary by activity, but certain consistent elements are present. In games involving chance, the chance must be random and in no way controlled by the operator. In games of skill, the participant displaying the greatest skill without bias or prejudice by the operator will have the greatest chance of success. Beyond general standards, the government may require an initial review, approval, and periodic testing to assure their honesty.

### 4. *No Conflict of Interest – Employees and Relatives of the Operator and Beneficiary Should Be Prohibited from Play.*

Both for the appearance and the reality of propriety, rules should prohibit participation by those persons (and their families) that have a financial interest in the operation of a prize game.

### 5. *Dispute Resolution Process Must Be Conspicuous*

Dispute resolution procedures for all prize games should be available to players. The procedures for disputing a prize game should be included in the rules for every prize game. Moreover, operators should have an affirmative obligation to inform players of the dispute resolution procedures and to inform state authorities in the event of a dispute over a certain amount.

### 6. *Operator Must Adhere to a Privacy Policy*

A privacy policy should be a mixture of disclosure and restrictions. The disclosures should include the intended use of any personal information acquired by the operator. For example, if the operator of a sweepstakes intends to use names for mailing or telemarketing purposes, this fact should be disclosed. A privacy policy may also extend to prohibiting use of personal information. For example, operators may be required to protect the personal and gaming information of its patrons and prohibit its use to encourage gambling.<sup>362</sup>

### 7. *Prevent Access by Minors*

Where minors are prohibited from engaging in prize gambling, procedures should require operators to take affirmative steps to prohibit their involvement. This should include requiring operators to verify the age of prospective patrons and not allow access to under-aged persons.

## B. *Proving Definitions of the Activities and a Review Process*

Numerous terms in prize gaming are ill-defined. Specifically, no authoritative definition exists in several jurisdictions for a variety of gaming terms. Moreover, gaming terms and definitions change with each jurisdiction and with changing state personnel.

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<sup>362</sup> See *id.*

For example, as previously noted, states have two main approaches regarding consideration: a contract theory of consideration and, like the federal approach, a valuable consideration theory.<sup>363</sup>

The majority of states follow the federal model where consideration for purposes of state gaming laws involves the player giving something valuable.<sup>364</sup> These states hold that mere participation in a contest, such as visiting a store, is not consideration.<sup>365</sup> A court in one state following the majority rule held that consideration for a lottery required giving something which can impoverish the individual who parts with it.<sup>366</sup>

However, as recently as thirty years ago, a minority of the states held that consideration establishing a simple contract is all that is necessary in the context of a lottery.<sup>367</sup> Under this theory, consideration need not consist of money, but can be a substantial effort expended by participants.<sup>368</sup> For example, a court in one state held that a newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week.<sup>369</sup> In states adopting this theory of consideration, requiring participants to visit the sponsor's store or simply participating in a sponsor's scheme may constitute consideration.<sup>370</sup>

Moreover, as noted above, most state courts and the federal courts, when assessing the existence of the gambling element of chance, utilize the "Dominant Factor" or "Predominance Test."<sup>371</sup> Under this test, the element of chance is met if chance predominates over skill in determining the outcome of the contest, even if the activity requires some skill.<sup>372</sup> In theory, an activity crosses from skill to chance precisely in the middle of the continuum.<sup>373</sup>

In a small minority of states, however, the relative predominance of skill versus chance is virtually irrelevant. In these states, courts merely look at the nature of the activity to determine whether it appeals to one's "gambling instinct."<sup>374</sup> If an activity appeals to one's "gambling instinct," or, under a different formulation, has any "chance," it is prohibited.<sup>375</sup> Because this test is highly subjective, it appears to be highly unreliable and, thus, court decisions could vary widely in its application to particular games.

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<sup>363</sup> See, e.g., *Cudd v. Aschenbrenner*, 377 P.2d 150, 153 (Or. 1962) (holding that mere participation in a contest is not consideration); cf. *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972) (holding that the effort required to pick teams is sufficient consideration).

<sup>364</sup> See *Cudd*, 377 P.2d at 153.

<sup>365</sup> See *id.*

<sup>366</sup> See *id.*

<sup>367</sup> See *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972).

<sup>368</sup> See *id.*

<sup>369</sup> See *id.*

<sup>370</sup> See *id.*

<sup>371</sup> See *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (1961) (applying the "Dominant Factor" Test); see generally THE REPORT, *supra* note 7.

<sup>372</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>373</sup> See generally THE REPORT, *supra* note 7; see also *Net Success*, *supra* note 30.

<sup>374</sup> See, e.g., *State v. Gambling Devise*, 859 S.W.2d 519, 523 (Tex. App. 1993) (setting out the any chance test).

<sup>375</sup> See, e.g., *id.*

Creating better definitions will eliminate most, but probably not all, interpretation issues as promoters continue to create new prize games that challenge traditional categorization. Therefore, a state should provide a review mechanism so that promoters can submit prize game schemes for proper characterization under existing laws.

### C. Commonality of Control Mechanism

The lack of commonality in gaming control mechanisms has contributed to the anomalies that plague the gaming industry. In a given state, control over casino gambling may fall under a gaming commission, horse racing under a racing commission, skill games under local police enforcement, and sweepstakes under the state Attorney General. This separation of authority almost assures inconsistent interpretation and enforcement. Consistency can only come to the prize game arena where a single governmental unit assumes responsibility for all prize game activities. This centralized control should probably be exercised by an administrative agency.

Under the American system of government, the government is comprised of a legislative, judicial, and executive branch.<sup>376</sup> The legislative branch makes the law.<sup>377</sup> The judicial branch interprets the law.<sup>378</sup> The executive branch enforces the law.<sup>379</sup> The United States' form of democratic government enforces separation of these powers.<sup>380</sup>

In the administrative agencies, however, these functions sometimes merge.<sup>381</sup> An agency may have the judicial powers to grant or revoke gaming licenses and decide disputes between a casino and a patron.<sup>382</sup> An agency may have legislative powers to adopt regulations.<sup>383</sup> It may also have executive powers to enforce the laws.<sup>384</sup> The rationale is that an administrative agency with multiple powers and expertise is both more efficient and can respond more quickly to industry problems and needs because it is free from political pressure.<sup>385</sup>

Adopting regulations involves establishing the rules that govern the conduct of the gaming industry. Typically, regulations will cover licensing standards and criteria, operational requirements, government inspectors' rights and access authorization, financial requirements, software and other technical specifications, standards for the honesty and fairness of games, patron dispute procedures, audit and accounting requirements including internal controls, and disciplinary procedures. One agency can also provide the review process for new prize games.

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<sup>376</sup> See generally GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW (1996).

<sup>377</sup> See *id.*

<sup>378</sup> See *id.*

<sup>379</sup> See *id.*

<sup>380</sup> See *id.*

<sup>381</sup> See generally RONALD A. CASS, ET AL., ADMINISTRATIVE LAW (1998).

<sup>382</sup> See *id.*

<sup>383</sup> See *id.*

<sup>384</sup> See *id.*

<sup>385</sup> See generally *id.*

Beyond adoption of rules, enforcement, and review processes, the agency can undertake affirmative programs to help educate players about problem gambling and problem gambling programs.<sup>386</sup> The government can also provide programs for problem gamblers and provide information about all licensed operators and describe the regulatory process for lodging complaints and disputes.<sup>387</sup>

The agency should be granted discretion to prioritize its enforcement efforts so that its resources best serve the public interest. An agency's method of prioritization may be based on many factors. An important consideration in prioritizing activities is the games' susceptibility to fraud. In prioritizing criminal enforcement and regulatory oversight, another consideration may be the size of the potential prize. In general, the greater the prize, the greater level of scrutiny the activity should warrant. Other considerations in prioritizing enforcement efforts may include the potential exposure to minors, historical or recurring problem areas, the amount of the entry fees, and prize game activities that generate significant player complaints.

## VII. CONCLUSION

Public policy issues regarding prize gaming are likely to get more complex. Technology substantially complicates the prize game arena because it creates better delivery platforms. For example, while most skill games were limited to carnivals, they are now available to mass audiences over the Internet. Moreover, because skill games are generally legal, the promoters of such activities will attempt to use this platform to create skill games that either resemble casino games or continually introduce a greater element of chance to attract a larger audience.

The historical approach to treating the various types of prize games under different public policy criteria and different enforcement regimes will only exacerbate the anomalies that already exist. Additionally, technology will continually blur the lines between sweepstakes, gambling, and contests.

The government's typical first reaction to new technology is to adopt laws that prohibit gambling on the new medium. Prohibitions against the use of the United States mail to conduct or advertise lotteries, for example, came shortly after the establishment of the federal postal system and its use by those promoting a national lottery.<sup>388</sup> Likewise, prohibitions against advertising lotteries over the radio came shortly after the commercial availability of radios, and their use by lottery operators.<sup>389</sup> These prohibitions were then extended to television shortly after the introduction of that medium. Federal laws addressing the use of telephones to conduct wagering, however, did not appear until well

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<sup>386</sup> See *id.*

<sup>387</sup> See *id.*

<sup>388</sup> 18 U.S.C. §§ 1301-02 (2000); see also Mike Roberts, "The Law of the Land": Tennessee Constitutional Law: The Constitutionality of Gaming in Tennessee, 61 TENN. L. REV. 675, 678 (1994).

<sup>389</sup> 18 U.S.C. § 1304 (2000).



after the discovery and proliferation of Alexander Graham Bell's most-prized invention.<sup>390</sup>

This, however, is exactly the wrong approach. Prohibition is only a sound policy if it can be achieved. Gambling is already the most regulated and unregulated activity in America. The land-based casinos are among the most regulated industries in the world. If a person decides to play online at home, however, they are in an unregulated environment. No substantial evidence suggests that Internet gambling can be prohibited. Moreover, governments do a great disservice by passing laws – like those prohibiting sports wagering – that law enforcement has little intention or ability to enforce.

Moreover, the failure to have a consistent policy for all prize gaming will simply allow the Internet to be a vehicle for similar but substitute prize game opportunities. Entrepreneurs will continue to exploit the inconsistent approaches to prize gaming to provide mass appeal of skill and sweepstakes-based games. To achieve a coherent public policy, the preferred approach is to address both the existing anomalies and the impact of technology on prize gaming.

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<sup>390</sup> Alexander Graham Bell invented the telephone on March 10, 1876. See e.g., WEBSTER'S AMERICAN BIOGRAPHIES 84 (Charles Van Doren & Robert McHenry eds., 1974).