

Poker vs. The Law:

Should Internet Gambling Be Illegal?

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INTRODUCTION

Americans spend more on gambling than they spend on going to the movies, visiting theme parks, attending sporting events and videogames combined.¹ In 2005, gross revenues of gambling in the United States reached close to \$85 billion.² Poker, whether played brick and mortar (land-based casinos or home games) or on the Internet, is a widely popular game. One cannot watch the television for more than a few hours before he sees an advertisement for Poker Stars Internet poker site, a commercial for the next airing of the World Poker Tour show on the Travel Channel, or ESPN's coverage of the annual World Series of Poker in Las Vegas, Nevada. Poker is not legal in every state, and with the passage of the recent SAFE Port Act, questions remain as to whether it is legal to play poker on the Internet.

Gambling is available in almost every state in the Union in some form or another. From horseracing to state lotteries, the opportunity to participate in some form of gambling is never much more than a short-drive from anywhere. This paper will address the moral and legal issues surrounding gambling, and more specifically issues dealing with internet poker. Gambling will be placed alongside other "victimless crimes" for the reader to consider in light of society's acceptance of government prohibitions for certain activities. The reader will gain a basic understanding of the play of poker and the reasons for its preferred characterization as being a game of skill, as well an understanding of the uncertain present state of the legality of its play on the Internet. The paper begins with a discussion of the Harm Principle as set for in John Stuart Mill's famous essay, *On Liberty*.

¹ Citizen Link: Focus on Social Issues (visited Dec. 13, 2006), <http://www.citizenlink.org/FOSI/gambling/>.

² *Id.*

HARM PRINCIPLE

*That the only principle purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. – John Stuart Mill, On Liberty*³

The above quote encapsulates the argument against punishing members of society for engaging in victimless crimes, or crimes without victims. In addressing this harm principle, Mill asserts that laws are meant to prevent members of society harming others. Members of society should be free to gamble or engage in prostitution if they so desire because “[the] only part of the conduct of anyone, for which [a member of society] is amenable to society, is that which concerns others.”⁴ Government should not be in the business of telling a member of society what to do and what not to do because of the fact that doing or refraining from doing so will make the member happier, because, “in the opinion of others, to do so would be wise, or even right.”⁵ Mill goes further and states that, “[the societal member’s] independence is, of right absolute. Over himself, over his own body and mind, the individual is sovereign.”⁶

Mill recognized the importance of liberty as being free from the arbitrary exercise or coercion of authority.⁷ In absence of restrictions on arbitrary authority is a recipe for tyranny. For Mill, tyranny is not limited solely to a government; rather it can also be exercised by a majority in society, and because a majority of people may feel one way does not necessarily make it right or correct.⁸ Generally the majority’s opinions will direct the conduct of society, and as the general consensus sways, so goes the laws and regulations of a society.

³ J.S. Mill, *On Liberty* 1 (Prentice Hall 1978) (1859).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Liberty (Dec. 9, 2006), <http://en.wikipedia.org/wiki/Liberty>.

Behaviors such as dancing, drinking, drug taking, homosexuality, miscegenation, gambling and prostitution, just to name a few, have all been, from time to time, considered “immoral” by the prevailing attitudes of the majority. Those adhering to the harm principle see this as an encroachment on individual liberties – liberties which should be protected in the face of prevailing opinions to the contrary. The harm principle is generally associated with liberal thought, but different groups have differing ideas of what exactly constitutes harm.⁹

Conflicts often occur when the issues of secondary effects of victimless crimes are considered. Prostitution continues to be illegal in the majority of states, but Nevada, for example, has seen fit to provide counties under a certain population level the option to legalize by referendum.¹⁰ Early Christian writers such as Saint Augustine opined that despite the moral wrongs of prostitution, its prohibition would lead to “capricious [male] lusts [overthrowing society].”¹¹ Several European countries have recognized this individual right and have legalized prostitution. Opponents of prostitution posit that allowing the practice promotes immoral behavior leading to broken homes and the spread of disease. Proponents see the right of engaging in prostitution as a right of the *individual* not to be encroached upon by the “majority” or the government. Proponents also note that it is without question that society, in the event of regulation, will not have to spend so much on enforcement. However, opponents argue that secondary effects such as the cost of medical care for those contracting disease through contact with prostitutes would offset the savings and contribute to broken families.

⁸ J.S. Mill, *On Liberty*.

⁹ *On Liberty* (Nov. 23, 2006), http://en.wikipedia.org/wiki/On_Liberty.

¹⁰ Robert F. Meier & Gilbert Geis, *Victimless Crimes?: Prostitution, Drugs, Homosexuality, Abortion* 38 (Roxbury Publishing Company 1997).

¹¹ *Id.*, at 28.

Abortion, once illegal, is now legal, with certain restrictions, following the *Roe* decision by the United State Supreme Court in 1973.¹² The much-contested debate concerning the exact point of the beginning of life continues to this day and has led some to kill doctors who will perform abortions.¹³ Pro-life advocates insist that life begins at conception, and the victim is the unborn child. Conversely, pro-choice advocates insist that life does not necessarily begin at conception, and women have certain reproductive rights – liberties – that must be upheld. In the 1992 *Casey* decision, the Court recognized that abortions have been and will continue to be the source of endless contention in American society, “due to the profound mental and spiritual implications of terminating a pregnancy,” but the Court also recognized that its “obligation is to define the liberty of all, not to mandate [its] own moral code.”¹⁴

This fascinating concept that the Court should “not mandate [its] own moral code” falls in line with the harm principle laid out by Mill. At the same time the Court makes this assertion, American society finds itself embroiled in the “war on drugs.” The prohibitive cost of this venture increases yearly, yet the Court remains silent on why it allows laws to stand that make the use of certain drugs illegal. The Court does not write the laws, but it does exercise its judicial review as it pleases.

The bases of drug laws continue to be rooted in prevailing societal opinions as society sees some drugs as accepted and others as immoral. The country tried prohibition for alcohol, spent countless dollars enforcing it, put people out of jobs, and at the same time encouraged the rise of organized crime and other problems.¹⁵ The consumption of alcohol is legal now and is seen by many as acceptable. Alcohol is taxed and regulated providing revenue, and its

¹² *Id.*, at 154.

¹³ *Id.*, at 173.

¹⁴ *Id.*, at 177.

¹⁵ *Id.*, at 91.

production provides jobs in the economy. Yet, alcohol abuse and poor choices do land many people in jail or “six feet under” each year. A perfect balance may not be achievable, but that is risk taken in a free society that places a premium on liberty.

The effective prohibition presently in place on certain drugs such as crack, cocaine, and heroin costs the American public countless dollars in enforcement and has contributed to the rise of organized crime as well.¹⁶ Americans involved in illicit drug use find themselves at risk of HIV due to sharing dirty needles, as well as the risk of having to resort to illegal acts in order to support their habits. The jails are overcrowded, and each legislative session, state and federal lawmakers enact harsher penalties and increase funding for anti-drug efforts. Perhaps regulation might be a smarter course. By regulating the production and distribution, the government can save significantly on the cost, to the tune of more than \$75 billion each year.¹⁷ American drug users would be able to exchange needles and not fear that the ingredients of the drug they are using are too strong, or even deadly. Prohibition is prohibitively expensive.

Gambling, once illegal in many states, is now widely accepted in various forms, with many jurisdictions running state-lotteries that often benefit higher education programs. Gambling is very popular and accounts for around 10 percent of American leisure expenditures each year.¹⁸ Proponents of gambling assert that individuals should be able to spend their hard-earned money in any way they see fit. Some proponents of gambling support some types of gambling and not others. Several different forms of gambling exist. The main three types of gambling are lotteries, bookmaking (risking money on uncertain outcomes such as sporting contests or who will win this season of *The Bachelor*) and skill-based contests (poker,

¹⁶ *Id.*

¹⁷ *Id.*, at 108.

¹⁸ Eugen Martin Christiansen, *Gambling and the American Economy* 36 (Annals, AAPSS Vol. 556, *Gambling: Socioeconomic Impacts and Public Policy* March 1998, pp. 36-52).

backgammon, gin rummy, etc). One might support skill-based gambling, such as poker, but might not readily support state lotteries. Many opponents of gambling, due to moral and religious reasons, outright oppose all forms for gambling. They posit that gambling can lead to addiction and broken homes due to this addiction and the inevitable debts which will mount. However, most persons do not oppose trading in stocks, futures or commodities and do not consider them to be gambling, even though there are elements of chance and risk involved with every investment, and the trader is risking something of value in order to “win” something in return – a situation similar to the prohibited actions described in many anti-gaming law statutes.¹⁹

Some opponents of state lotteries recognize the reality that the state is essentially employing a disguised tax on its lower economic strata through the lottery. In an 1850 opinion, the Supreme Court said that, “common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries ... [reaching] every class ... [preying] upon the hard earnings of the poor ... [plundering] the ignorant and simple.”²⁰ While persons from all economic strata undoubtedly play the lottery, one need not go further than a corner market and take a brief visual survey of those playing to find out that the majority buying five, ten or fifteen tickets at a time can barely afford to do so in the hopes of “hitting it big.” One study reports that poor persons spend the same amount of money playing the lottery as do those who are financially better off, which means the poor spend a higher percentage of their income on the lottery.²¹ Better educated persons spend less on the lottery than the poorly educated, and

¹⁹ “Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to *any* degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like.” Tenn. Code Ann. § 39-17-501(1). emphasis supplied.

²⁰ *Phalen v. Virginia*, 49 U.S. 163 (1850).

²¹ Bernard Wasow, Soaking the Poor: The Incidence of State-Sponsored Gambling (The Century Foundation Nov. 14, 2002), <http://www.tcf.org/Publications/EconomicsInequality/lotterybrief.pdf>.

blacks spend more than whites or Hispanics.²² The average person may not have a realistic grasp of the odds of not winning the lottery, but even for those that do, several enjoy playing and paying with *their* money, whether they lose it or not. The question that must be asked is whether individuals have this right or should the majority or the government pass laws that would prevent such seemingly destructive individual behaviors.

Lotteries have been approved and regulated in several jurisdictions, but skill-based games, such as poker are not as widely accepted, at least not by legislatures. Poker, in its various forms, is a game of skill with an element of chance. A person can become very skilled at poker and earn a considerable living, but a person can also enjoy playing poker one night a week at a friend's house without worrying about losing \$5 or \$10 a week to a friend – money they would have spent if they went out to a restaurant with their friends in lieu of playing a poker game. In an article I wrote for *Card Player College*, I stated that “[poker] is becoming more and more accepted by society and is no longer relegated to or associated with shady characters in backrooms and alleys.”²³ Every participant in a poker game is in the game voluntarily and impliedly understands the risk of either winning or losing money. Each participant makes a conscious decision to spend his or her money in this fashion and does not harm others by doing so.

POKER AS A SKILL

Each type of poker that is referred to in this paper, whether played at home, in a casino, or on the internet, is a skill-based game, with elements of chance. These include games such as Five Card Draw, Five Card Stud, Seven Card Stud, Omaha Texas Holdem, Texas Holdem, and

²² *Id.*

²³ Bill Grady, *Card Player College*, Vol. 1/No. 6, Nov. 9, 2005.

No Limit Texas Holdem, just to name some of the most popular. All one needs to play is a deck of cards and chips or cash. Just about any type of poker can be learned in a few minutes, but it may take a lifetime to master just one of the above listed games. These games are called table games, as they are usually played around a table and not at a machine such as a slot-machine or video poker.

Poker is played against other players and not the casino as in blackjack. The casino takes a rake, or percentage, from each pot that is built over the course of each hand – terms which are explained below. However, nowhere else in a casino can a decent player rely on skill, while consciously recognizing the inherent chance in the game, and reasonably expect to win in the long run. Every other game in a casino is stacked in favor of the house – the casino will win at least 51% or more of time in the long run. Luck is not an overwhelming factor affecting one's chances of winning in a poker game; rather skill is the main factor that sets winning players apart from losing players. Amateur players can become professional winning players through hard work and experience, as evidenced by the same great players consistently winning big tournaments every year (with yearly additions to the pro ranks as good players become great players).

Texas Holdem is one of the most popular table games live or on the internet. We will use \$5/\$10 Limit Texas Holdem as an example. In \$5/\$10 Limit Holdem, each person is dealt two cards – hole cards or “hand”. One person is the dealer. The first person to the dealer's left is said to be in the Small Blind and is required to make a forced bet of \$2.50. The second person is forced to make a \$5 bet, which is called the Big Blind. The player to his left may fold, call \$5, or raise to \$10. All bets/raises go to the middle of the table, which is called the “pot.” Subsequent players may fold, call or raise, but there may only be a maximum of a bet and 3 raises each

round. After the action gets back to the Big Blind, a card is dealt face down or “burned” and then three Community Cards are dealt face-up on the table. This is called the Flop. A round of betting occurs, which starts with the Small Blind and ends with the Dealer. The minimum bet is \$5 on the flop. Another card is burned and additional card is dealt face-up, which is called the Turn. A second round of betting occurs, and the minimum bet doubles to \$10. One last card is dealt face-up, which is called the River. A final round of betting occurs. The minimum bet is \$10. The best hand wins, and the player takes the pot, unless more than one player has the same hand, in which case the pot would be split equally among the winners.

The possible hands a player may make to win are listed in descending order starting with the absolute best hand: Royal Flush $A\clubsuit K\clubsuit Q\clubsuit J\clubsuit 10\clubsuit$, Straight Flush $Q\spadesuit J\spadesuit 10\spadesuit 9\spadesuit 8\spadesuit$, 4 of a Kind $9\clubsuit 9\spadesuit 9\heartsuit 9\blackheartsuit J\heartsuit$, Full House $3\clubsuit 3\spadesuit 3\diamondsuit 6\clubsuit 6\heartsuit$, Flush $A\heartsuit Q\heartsuit 10\heartsuit 5\heartsuit 3\heartsuit$, Straight $6\diamondsuit 5\spadesuit 4\diamondsuit 3\heartsuit 2\clubsuit$, 3 of a Kind $8\spadesuit 8\heartsuit 8\diamondsuit 5\spadesuit 3\clubsuit$, 2 Pair $K\heartsuit K\diamondsuit 2\clubsuit 2\diamondsuit J\heartsuit$, 1 Pair $10\heartsuit 10\diamondsuit J\diamondsuit 3\heartsuit 2\clubsuit$, High Card $A\diamondsuit 10\diamondsuit 9\spadesuit 5\clubsuit 4\clubsuit$ (note that the Ace may be used to make an A high flush or straight, as well as a 5 high straight, but it may not be bridged to make a KQA23 straight, for example). The deck contains fifty-two cards – four suits (clubs, hearts, spades, and diamonds) with thirteen cards per suit numbered 2-10, Jack, Queen, King, Ace. Because a player knows exactly how many cards are in the deck from start to finish, he knows what the probability of drawing any one card will be on each round of betting in the above Holdem example.

For example, if a player’s hole cards are the 8 of spades and the 9 of spades and the flop comes 6 of diamonds, 7 of hearts, and A of clubs, he knows that to make a straight, or a five card hand sequential hand, he must draw a 10 or a 5 on either the turn or the river to complete his hand. This is called an open-ended straight draw because the player is “drawing” to 10 or 5 to make his straight. A player must disregard the whether or not another player has any of those

eight cards or “outs” (four 10’s and four 5’s) and can assume that out of 47 unseen cards left in the deck, he has an $8/47$ chance of making his straight on the turn and an $8/46$ chance of making his straight on the river (if not made on the turn). The math works out to be odds of 4.88 to 1 against on the turn and approximately 4.75 to 1 against on the river. This means that for every one time that this player catches the 10 or 5 on the turn, he would not catch either around 4.88 times. Additionally, every time that he does not catch either on the turn and must attempt to make his hand on the river, he will make the hand by catching the 10 or 5, 1 time for every 4.75 times that he does not. Overall, the player will make his straight approximately 31% of the time when seeing both the turn and river.

The blind structure, as outlined above in the Holdem example, ensures that there will always be money in the pot. In order for the player with the 8 and 9 of spades trying to catch his straight on the turn or the river to make his action of calling or making bets/raises profitable in the long run, he must get the correct odds on the money he is contributing the pot each time. If the pot, after subsequent bets and raises before the flop, contains \$40, and the player only has to call \$10 to see the turn, the player is getting 5 to 1 on his money [$\$50$ ($\$40$ pre-flop plus a bet of \$10 which the player must call) / $\$10$ (player’s call) = 5/1]. The skilled player, who understands what his odds are because he made the commitment to memorize them for each situation, must then compare the odds he is getting on his money with the odds against making his hand. Since the player is getting 5 to 1 on his money and needs to make a straight, which is 4.88 to 1 going into the turn, the player is said to be getting favorable odds, which is also referred to as positive expectation. He must make the same analysis on the turn going into the river when there will be \$60 in the pot before any bets/raises. If the player consistently makes the right decisions that have positive expectation, he will be a long-term winning player.

However, if the pot only contained \$30 before the flop and the player must call \$10 to see the turn, he will only be getting 4 to 1 on his money [$\$40$ ($\$30$ pre-flop pot plus $\$10$ bet that player must call) / $\$10$ (player's call) = 4/1]. The skilled player quickly recognizes that 4 to 1 is not sufficient to justify calling when the odds of hitting a 10 or a 5 is 4.88 to 1 going into the turn. Should the player make this call in spite of those odds, he will be taking bad odds or the "worst of it," which is also referred to as negative expectation. If he makes the same mistakes consistently, probability dictates, and essentially guarantees, that he will be a losing player in the long run. Below is a list of odds calculations for Holdem that shows the odds of making hands based on the number out of outs. As one can see, the fewer outs one has, the better the odds one needs to get on one's money to make profitable continuing to call bets to the river in Holdem.

Odds Chart²⁴

Number of outs	After Flop		After Turn	
	Two cards to come		One card to come	
	Percentage	Odds against	Percentage	Odds against
1	4.3	22.4	2.2	44.5
2	8.4	10.9	4.3	22.3
3	12.5	7	6.5	14.4
4	16.5	5.1	8.7	10.5
5	20.3	3.9	10.9	8.2
6	24.1	3.1	13	6.7
7	27.8	2.6	15.2	5.6
8	31.5	2.2	17.4	4.7
9	35	1.9	19.6	4.1
10	38.4	1.6	21.7	3.6
11	41.7	1.4	24	3.2
12	45	1.2	26.1	2.8
13	48.1	1.1	28.3	2.5
14	51.2	0.95	30.4	2.3
15	54.1	0.85	32.6	2.1
16	57	0.75	34.3	1.9
17	59.8	0.67	37	1.7
18	62.4	0.6	39.1	1.6

²⁴ Odds Chart (2006), www.realpokertraining.com.

19	65	0.54	41.3	1.4
20	67.5	0.48	43.5	1.3

Other forms of poker have slightly different odds based on the number of outs, but the idea is the same. A knowledgeable player with a basic grasp of probability can make the appropriate charts for any game that he chooses to play. These odds charts are also available online and in many instructional poker books. Games such as No Limit Holdem, where a player may bet all the chips in front of him at any time, involve even more complex mathematical calculations and considerations. The more skilled and adept at exploiting these mathematical aspects of the game, the better the player will be.

No one hand starting hand (one's hole cards in Holdem, for example) is a 100% favorite over any other hand. The best starting hand in Holdem is AA of any two suits. Any player would love to have this hand dealt to him every time, but even AA vs. KK (the second-best starting hand in Holdem) is only a 4.5 to 1 favorite. This means that AA will win about 81% of the time, but the other 19% of the time, KK will win.²⁵ This also means that if a player were somehow able to know for certain that his opponent has AA when he holds KK, as long as he can get better than 4.5 to 1 on his money throughout the hand's resolution, he will still be making a profitable play in the long-run because of the 19% of the time KK will beat AA. A small pair, such as 55, is only a slight favorite over two unpaired big cards, such as AK, in which case the 55 wins about 51.78% of the time.²⁶ This situation is referred to as a "coin flip" or a "race" because neither player is that much a favorite over the other player.

Additionally, there is a psychological aspect to any poker game, and people-reading skills are tantamount to maximum profits in any game. People-reading skills help players narrow

²⁵ David Sklansky & Ed Miller, *No Limit Hold'em: Theory and Practice* 228 (Two Plus Two Publishing LLC 2006).

²⁶ *Id.*

down opposing players possible hole cards based on actions at the table. These “reads” also help players determine when another player might be bluffing or feigning weakness in order to try to fool his opponents into losing more money than they would if they did not recognize his deception. Reading players includes studying body language, voice inflection, and the manner in which a player places, or tosses, his chips into the pot. Many of these reading abilities are the same ones people use in every day life when determining whether someone is lying to them – much of the ability is subconscious or ingrained, and one must learn to harness it to make it profitable in poker. Often times a player will act weak when he has strong hand and strong when he has a weak hand. A strong hand might be hidden in the player’s hole cards that sits back in his chair and acts like he is not all that interested in the game. Internet poker takes away the ability of players to read others’ body language, voice inflections, etc., but one can focus on the amount and speed of bets in order to determine possible hand holdings of other online players. However, these tells, whether when playing live or on the internet, are never right 100% of the time, but they do further the edge that a skilled and perceiving player has over those who do not take the time to develop such abilities.

Now consider playing the lottery, a game based solely on chance. A \$5 scratch lottery card, or “scratcher,” may have a potential maximum prize pay out of \$5000. The player is getting 1000 to 1 on his money or investment ($\$5000 / \$5 = 1000$ to 1). However, his odds of winning may be a phenomenal 50,000 to 1, meaning that he will win 1 time in 50,001 attempts, on the average. Just as in the poker odds examples, this player has a negative expectation of being a winning scratcher player. In the short run, he might win the maximum prize pool of \$5000, but if he continues to reinvest his winnings on buying more of the same scratchers, the odds dictate that he will lose that \$5000 trying win again. If the odds of winning were less than

1000 to 1, then player could profitably make this investment in a \$5 scratcher because he would have positive expectation to be a winning scratcher over the long run. The lotteries are never going to give those odds because they could not make money if they did. Their advantage, or “edge,” is what loads their coffers – they essentially win, in the above example, five dollars, 50,000 for every one time a player wins the \$5,000 for a net profit of \$245,000 $[(50,000 \times \$5) - \$5,000 = \$245,000]$ – and they have several games going at any time with several having even worse odds of winning than the above example of 50,000 to 1.

This section illustrates that, as opposed to casino and lottery games that are based mostly or solely on chance with odds favoring the house or the lottery commission, poker involves skills which can be acquired through study and practice. A good poker player can consistently make money if he relies on his mathematical and psychological abilities. Some of the best players are well-educated mathematicians, lawyers, or business men who have quit their professions because they found that their poker skills were enhanced and were thus, made more profitable than their former occupations through the training they received in their respective professions. As one can see, poker is predominantly a game of skill with elements of chance not present to a sufficient degree to negate the exercise of skill.

LEGALITY OF POKER

Brick and Mortar

The problem is that poker is illegal in several states and is classified as a game of chance. This is in spite of the fact that poker requires players to have a high-level of skill in order to be successful. Gambling, which includes poker, is a Class C Misdemeanor in Tennessee.²⁷ This

²⁷ Tenn. Code Ann. § 39-17-502(c).

means that countless home poker games conducted each week throughout the state could be broken up at any time with all participants arrested and charged with a crime for spending *their* hard-earned money. However, the question is whether law enforcement has the desire or the resources to combat this *immoral* and illegal behavior. In Nashville, Tennessee, the Metro police have a Gambling and Prostitution Unit in their Specialized Investigations Unit that has busted some illegal card rooms operating in Nashville in recent years.²⁸ But there are poker games played across East Tennessee, which are frequented by lawyers and law enforcement officers alike.

Different jurisdictions within the states have different priorities on which they focus their efforts. Those smaller rural counties in Tennessee under District Attorneys that place a premium on anti-meth efforts do not have the resources to go after gamblers as well. From my internship there, I know that the 4th District in Tennessee, which includes Jefferson, Cocke, Grainger and Sevier Counties, has a strong focus on combating crystal meth production and distribution. Where the state and local governments may normally turn a blind eye to some forms of gambling in lieu of other focuses, the federal government will step in and “assist” local law enforcement with anti-gambling efforts, as evidenced by the recent 2005 “cock-fighting” busts in Cocke Co., Tennessee.²⁹

“Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to *any* degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like.” Tenn. Code Ann. § 39-17-501(1). emphasis supplied.

“The definition of ‘gambling’ includes lotteries, chain or pyramid clubs, numbers, pinball, poker or any as yet unnamed scheme where value is risked for profit. The definition of ‘lawful business transaction’, however, makes it clear that futures and commodities trading is not included in gambling. This is a change from prior code § 39-6-627, which prohibited such trading under certain circumstances as gambling.” Tenn. Code Ann. § 39-17-501.

²⁸ Specialized Investigations: Gambling and Prostitution Unit (visited Dec. 12, 2006), http://www.police.nashville.org/bureaus/investigative/gambling_prostitution.htm.

²⁹ Timeline: Cocke County Confidential (July 31, 2005), http://www.knoxnews.com/kns/local_news/article/0,1406,KNS_347_3967869,00.html.

The cost of enforcing specific gambling prohibitions across the country is uncertain. Most participants in private games are not going to “squeal” on their fellow players, and law enforcement officials may hesitate to break up these home games, although it is certainly not heard of.³⁰ Not every jurisdiction can afford a “Gambling Task Force,” nor do they have plans to establish one. The legislature of Tennessee is certainly not scrambling to pass more stringent anti-gambling enforcement laws. Many of these laws are reminiscent of antiquated laws dealing with gambling such as South Carolina’s 1802 law banning games played with cards and dice.³¹

One might correctly suspect that the origin of these laws stem from conservative points in the nation’s history when the church had a strong voice in society and condemned gambling for religious moral reasons. Religious authorities still have a strong voice when it comes to influencing lawmakers, and because of this and some perceived and actual adverse social consequences of gambling, the majority of legal jurisdictions limit gambling in some form or fashion.³² Amusingly, a 2005 raid on church poker game netted sixty four players who were charged with misdemeanors for public gaming.³³

Each jurisdiction has its own particular problems with gambling and ways of dealing with them. New York is famous for its underground poker rooms located throughout the city. Several of these types of card rooms are pictured in the movie *Rounders*, starring Ed Norton and Matt Damon. *Rounders*, released in 1998, has been said by some to have started the poker craze

³⁰ Twenty-two players were arrested in Mt. Pleasant, South Carolina early in 2006 at a private home poker game, including a 78 year old woman, and were charged with violating an 1802 law that bans games played with cards or dice. Earl Burton, South Carolina Poker Bust to Disappear (Oct 22, 2006), <http://www.pokernews.com/news/2006/10/south-carolina-poker-bust-disappear.htm>.

³¹ *Id.*

³² Gambling, (Dec. 2006), <http://en.wikipedia.org/wiki/Gambling>.

³³ 64 In Court After Poker Raid At Church, Tribune Chronicle (May 10, 2005), <http://www.pokerplayersalliance.org/articles/a051005.html>.

still sweeping the nation.³⁴ New York regularly investigates and cracks down on these “members-only” clubs that frequented by the likes of Yankees all-star baseball player Alex Rodriguez and professional poker player Phil Hellmuth.³⁵ It is not illegal to play poker in New York, but it is illegal to profit from it. When the clubs take a rake from each pot played, they are profiting from it. Because of their clandestine nature and large amounts of cash, these clubs are also easy targets of armed robberies, despite stringent security precautions that are taken by the clubs. New York State Sen. John Sabini recently sponsored a bill that would make low-stakes games legal in sponsoring bars and restaurants, but the bill does not protect the card rooms.³⁶

Lotteries are included in Tennessee’s definition of gambling, but the state constitution excepts the state lottery.³⁷ The proceeds go to funding tuition for students in higher post-secondary education, with the excess going to improvements in primary education programs, or K-12.³⁸ Tennessee has no problem allowing a form of gambling solely based on chance because it benefits an accepted purpose. As referenced in the Harm Principle section above, with the introduction of state lotteries increased gambling results and the poor become the conduit for funding post-secondary tuition – even though poorer children might not be the predominant beneficiaries of such higher education scholarships through the lottery.³⁹ Because playing the

³⁴ Tom Hays, Authorities Crack Down on NYC Poker Clubs (Associated Press Nov. 21, 2005), <http://www.pokerplayersalliance.org/articles/a112105.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ “The legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this state, except that the legislature may authorize a state lottery if the net proceeds of the lottery’s revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state.” Tenn. Const. Art. XI, § 5 (2006).

³⁸ Tenn. Const. Art. XI, § 5 (2006).

³⁹ “Introduction of state lotteries leads to a substantial increase in gambling, matched by a decline in spending on food and housing...the probability that an adult will engage in some kind of gambling during the year increases by fifty percentage points...the poorest households, those in the bottom third of income, reduce consumption spending

lottery is now “pursuant to law,” it is not considered gambling for purposes of criminal liability.⁴⁰

Poker is legal along with several other forms of gambling in several states such as Nevada and California. In general, gambling is legal in some form in 48 of the 50 states, with Utah and Hawaii continuing to prohibit all forms.⁴¹ In each state where gambling is legal, regulations and gaming control boards exist in order to ensure fair gaming standards through regular testing and investigation.⁴² State governments receive revenue from casinos, and the Internal Revenue Service (“IRS”) provides W-2G forms to the casinos for patrons to fill out when they win over a \$1,200 jackpot.⁴³ Winners of state lotteries where the prize is \$600 or more are also required to fill out a W-2G form by the IRS.⁴⁴ However, one is not required to report winnings from table games such as blackjack on W-2G forms, but this does not mean that one does not have to report the winnings on tax returns.⁴⁵ Gambling winnings are also taxed by many states and must be filed with relevant state and federal tax returns.⁴⁶ Any losses can be deducted, but these are limited to the amount of the declared winnings.⁴⁷ The IRS has also

the most, nearly 3 percent.” Bernard Wasow, Soaking the Poor: The Incidence of State-Sponsored Gambling (The Century Foundation Nov. 14, 2002), <http://www.tcf.org/Publications/EconomicsInequality/lotterybrief.pdf>.

⁴⁰ Tenn. Code. Ann. § 8-47-127 (2006).

⁴¹ Citizen Link: Focus on Social Issues (visited Dec. 13, 2006), <http://www.citizenlink.org/FOSI/gambling/>.

⁴² Nevada Gaming Commission and State Gaming Control Board (Dec. 13, 2006), <http://gaming.nv.gov/>.

⁴³ Yolanda Smulick Roche, E.A. and Roger C. Roche, E.A. (visited Dec. 13, 2006), <http://www.casino-gaming.com/features/taxlaws.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

announced plans for four new final regulations in the 2006-2007 Priority Guidance Plan dealing with withholding rules applicable to poker tournaments.⁴⁸

Internet Poker



Internet poker web sites have the same types of poker games that are available to play at home or in a casino. These games can be played for free using “play-money” chips issued by the internet sites. Notable sites include PartyPoker, PokerRoom, Paradise Poker, Bodog, Full Tilt, and Ultimate Bet. One must transfer his money to the sites in order to play the real-money poker games. The most popular way of doing so is through an e-wallet such as Firepay or Neteller. These sites are essentially escrow accounts that serve as a conduit between an individual’s bank account and the poker site. Both Firepay and Neteller are safe and will also take transfers through wire transfers and credit card payments. When withdrawing money from an e-wallet, an individual may receive the funds that are desired through an electronic funds transfer to his bank

⁴⁸ IRS Has a Plan For Your Poker Tournament Winnings: Department of Treasury Introduces Guidance Plan For Poker (Cardplayer Magazine Online Aug 20, 2006), http://www.cardplayer.com/poker_news/news_story/1324?class=PokerNews.

account or through a check issued by the e-wallet. Credit cards used to be the most form of transferring money to poker sites, but many credit card companies, of their own self-initiative, decided to no longer approve such purchases. Undoubtedly many players ran up substantial debts that may have never been recovered by the credit card companies.

The legality of Internet Poker has confused lawmakers and players alike. In states with laws similar to Tennessee, prohibited gambling is most likely illegal even though bets are placed on the Internet, or “cyber-space.” In the case of a Tennessean playing online poker, although, the web site may be located in another state or even off-shore where the type of gambling being participated in is legal, the location of the bet being wagered is at computer located within the state, and is most likely illegal. Tennessee has not enacted any laws dealing specifically with internet gambling to this date.

Recently, in February 2005, the North Dakota House of Representatives passed a bill to legalize and regulate online poker and online poker card room operators in the state.⁴⁹ However, the bill was subsequently overwhelmingly defeated in the state Senate.⁵⁰ The bill would have allowed online internet companies to locate their businesses in North Dakota and “offer their services to a global audience.”⁵¹ In drafting the bill that passed by the North Dakota House, Rep. Jim Kasper was quoted as saying, “[if] the DOJ or the Congress try to stop us, it is my intention that the state...initiate legal proceedings...to have the [federal] courts rule on the constitutional issues.”⁵² Since the state did not enact this legislation after it failed in the senate, the federal courts have not had this opportunity.

⁴⁹ Chuck Humphrey, Licensing Online Poker in North Dakota (Feb. 18, 2005), <http://www.gambling-law-us.com/Articles-Notes/ND-licensed-poker.htm>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² House Passes the Unlawful Internet Gambling Enforcement Act (Cardplayer Magazine Online Aug. 30, 2006), <http://www.cardplayermagazine.com/magazine/article/15608>.

The United States Attorney General has taken the position that the 1961 Wire Act prohibits online gambling.⁵³ However, in a 5th Circuit ruling, the Court held that the Wire Act does not apply to online gambling; rather it applies only to sports betting, and the legislative intent focuses on organized crime.⁵⁴ Additionally, case law literally construes the words of the statute to apply to sports betting.⁵⁵ United States Rep. Bob Goodlatte of Virginia, a strong opponent of online gambling and author of recent online gaming prohibition bills in the Congress has even acknowledged that the Wire Act only applies to sports betting.⁵⁶

When the House passed H.R. 4411 earlier this year, they sought to prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful gambling, and other purposes. Unlawful gambling includes internet poker. Proponents of the bill cite, in addition to the risk of addiction, the risk that even terrorists will use Internet gambling sites for money laundering and money transfers. When I contacted Rep. John Duncan by letter⁵⁷ about my opposition to his support and vote for the bill, he told me that he supported the bill because of the “[several] million people already... addicted to one form of gambling or another.”⁵⁸ It is true that out of the 125 million plus Americans who admit to gambling, approximately 7.5 million are

⁵³ “Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any *sporting event or contest*, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C.A. § 1084. emphasis supplied.

⁵⁴ *In re Mastercard Int. Internet Gaming Litig.*, 313 F.3d 257 (5th Cir. 2002).

⁵⁵ “Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language.” *Salinas v. United States*, 522 U.S. 52 (1997).

⁵⁶ Allyn Jaffrey Shulman, J.D., Legal Landscape of Online Gaming Has Not Changed: Analysis From CardPlayer’s Legal Counsel (visited Dec. 13, 2006), http://www.cardplayer.com/poker_law/article/1446.

⁵⁷ William Grady, letter to Congressman John Duncan, July 12, 2006 (by e-mail).

⁵⁸ Congressman John J. Duncan, Jr., 2nd District, TN, letter to William Grady, July 12, 2006.

problem or pathological gamblers.⁵⁹ Pathological gambling is an impulse control disorder where the pathological gambler engages in destructive behaviors including committing crimes, running up debts, destroying relationships, or committing suicide.⁶⁰ The National Gambling Impact Study Commission (“NGISC”) warns that with the increasing availability of gambling through the internet and other sources, pathological gambling may become more widespread.⁶¹ However, whether it is legal or not, people will find a way to gamble just as they found a way to drink during Prohibition, and they find ways to buy illegal drugs.

Internet poker sites’ self-initiatives to combat problem and pathological gambling are many. For example, a player can set certain responsible gaming settings such as limiting the amount he allows himself to deposit daily, weekly, or monthly. Once these levels are set, they cannot be changed by the player for a specified period of time. Presumably a player will set these limits when he is not actually playing and not under the temptation to set the limits too high. Players may also self-exclude themselves for a week, six months, or, in some cases, even longer. Students who enjoy playing poker may choose to do this during mid-terms or finals just in case they are tempted to play when they should be studying. Poker sites also offer self-assessment tests and provide links to problem gambling organizations. Parents may also block access from their children through the use of added security measures. Poker sites implemented these measures of their own accord and later hoped that these measures would encourage lawmakers to reconsider the perceived inherent and dangerous risk of online gambling.

H.R. 4111 also contained exemptions for horseracing and fantasy sports betting. I received no response from Duncan concerning my questions as to why some forms of betting,

⁵⁹ National Gambling Impact Study Commission, Final Report 4-1 (June 18, 1999), <http://govinfo.library.unt.edu/ngisc/reports/4.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

and not others, were excluded from the act. Betting on either horseracing or fantasy sports betting involves wagering money on uncertain outcomes. Both types of gambling can lead to problem gambling and serious consequences such as getting in trouble with bookmakers, or “bookies,” because one is unable to cover one’s debts within a specified amount of time.

In my letter to Duncan, I suggested that the government should consider regulation of the internet gaming industry and that it could benefit from the revenues. However, he answered that because of the decreasing availability of privately-owned land that the government could tax for revenue, governments are turning to gambling “in a desperate attempt to raise more revenue... [with many] states now [promoting] lotteries or even [allowing] casinos or other forms of gambling,” and he does not see regulation of online gambling as answer to shrinking tax base.⁶² Duncan lives and serves a state that passed lottery legislation and amended the state Constitution as a result, but his concern was that “families will suffer if government keeps promoting gambling, and especially if it can be done by pushing a few buttons in the privacy and comfort of a home.”⁶³ His concerns for families are notable, especially in light of the many negative consequences of introducing lotteries into states as outlined above. However, many believe that it is not the government’s role to legislate morality and inhibit individual freedoms. As stated previously, people will find a way to gamble. With government regulation, as in Nevada, patrons will be ensured that standards are strictly adhered to, while a complete prohibition opens up the “can of worms” for black-market internet and underground gambling.

The first online gambling site opened in 1995, and over the next several years more than one dishonest site opened its virtual doors, took player deposits and then disappeared. These sites were predominantly off-shore, and players had no legal recourse – they were scammed.

⁶² Letter from Duncan, July 12, 2006.

⁶³ *Id.*

Today's players do not have to worry as much about this problem because most play on sites recommended to them by reputable web sites or for which they see commercials on the television. Just like brick and mortar casinos, the Internet poker sites want to keep their patrons happy, because happy patrons come back to "lose money." The incredible revenues that these sites make off their generated rake from countless pots played each day keep them comfortably in business. With the move to prohibit online gambling in the United States, the government, by its actions, may actually encourage these black-market sites to resurge and begin stealing American dollars again.

People will find a way to gamble whether it is legal or not, and they will resort to less-reputable sites in order to fulfill their desires. This may be done through peer-to-peer private games played across the internet, or it may be done by linking one's computer to an off-shore computer that can access an off-shore gaming site. Money transfers may be accomplished by sending money to an overseas contact that subsequently deposits the money into the site and enables the American player who is accessing the remote computer to play at that site. There is no limit to the improvisation many will go through in order to continue to be able to play poker online. For those that have quit regular jobs to take up lucrative careers in online poker, the need may be even greater.

The SAFE Port Act (H.R. 4954) was passed in the U.S. House on May 4th, 2006.⁶⁴ When the vote on the bill came before the Senate on September 29, 2006, Tennessee Senator and Majority Leader Bill Frist, at 9:29 pm and without debate, inserted additional language into the bill that was called the Unlawful Internet Gambling and Enforcement Act ("UIGEA").⁶⁵ The act was passed in the Senate, and President Bush subsequently signed the act into law. The SAFE

⁶⁴ SAFE Port Act (Dec. 11, 2006), http://en.wikipedia.org/wiki/Safe_Port_Act.

⁶⁵ *Id.*

Port Act provides for the implementation of additional types of screening, such as radiation detection, for cargo coming into United States ports. Senators who may not have supported the additions of the UIGEA language were faced with a Hobson's Choice because of the importance of securing our ports – something the government has struggled to do since September 11, 2001. Sen. Frist is known for his avid support of anti-gaming measures, but who would have thought he would slip the UIGEA into the SAFE Port Act without first providing an opportunity for debate? This is especially so since the SAFE Port Act that was passed by the House contained no such language.

As a result of the UIGEA legislation, many prominent sites such as Paradise Poker and PokerRoom made plans to stop accepting wagers from U.S. customers made announcements that they would immediately refund any U.S. poker accounts. The sites voluntarily began phasing out U.S. player's access to the sites. The e-wallet Firepay also quit servicing U.S. individuals but Neteller remains as a viable option. Many of the online gambling sites are publicly traded on the London Stock Exchange, and because of having to comply with the laws of relevant jurisdictions, the publicly traded sites had to stop taking U.S. wagers.⁶⁶ Non-public companies such as Bodog and Ultimate Bet continue to take U.S. customers and their wagers with no intention of stopping any time soon.⁶⁷

The UIGEA requires banks to monitor and block the funding of poker accounts, and within 270 of its passing the Federal Reserve Board and the Attorney General will issue polices and procedures for banks and other financial institutions to use in enforcing the act.⁶⁸ The banks

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Michael Bolcerek, Brief Analysis of Internet Gambling Prohibition Act (Attached to Safe Port Act), (Poker Players Alliance 2006), http://www.pokerplayersalliance.org/alerts/Analysis_of_Internet_Gambling_Prohibition_Act.pdf.

are essentially deputized to monitor financial transactions, further encroaching on Americans shrinking “freedom base,” and they will be responsible for the costs of enforcement.⁶⁹ Banks must satisfy a “reasonableness test” in complying with the forthcoming policies and procedures. Internet Service Providers are required to remove access to links to gaming sites “upon written notice from a State Attorney General, or the Attorney General of the United States.”⁷⁰ Exemptions include horseracing and fantasy sports betting, but no specific exemptions exist for poker. Because of the UIGEA’s language referring to “games subject to chance,” the upcoming legal fights will be over whether poker will be construed to be a game subject to chance or a game of skill with elements of chance, and therefore excepted by virtue of the statutes construction.

However, many authorities do not agree that the act makes the act of playing poker online illegal.⁷¹ Instead, the new bill simply makes it more difficult to money to the site by forcing banks to monitor and block such transactions and is basically just enforcement legislation. Section 5361(b) of the UIGEA states that , “[no] provision of this subchapter shall be construed as altering, limiting or extending any Federal or State law...prohibiting, permitting, or regulating gambling.”⁷² It does not change existing gaming law, nor does it address the legality of online gaming. Sen. Frist admitted that “we can’t monitor every online gambler or regulate offshore

⁶⁹ In regards to the then pending legislation, Sam Vallandingham, vice president of the First State Bank in West Virginia and member of the Independent Community Bankers of America, said that “[our] concern is that the added burden of monitoring all payment transactions for the taint of Internet gambling will drain finite resources currently engaged in complying with anti-terrorism, anti-money laundering regulations, and daily operations of our bank.” House Passes the Unlawful Internet Gambling Enforcement Act (Cardplayer Magazine Online Aug. 30, 2006), <http://www.cardplayermagazine.com/magazine/article/15608>.

⁷⁰ Michael Bolcerek, Brief Analysis...

⁷¹ Allyn Jaffrey Shulman, J.D., Legal Landscape of Online Gaming Has Not Changed: Analysis From CardPlayer’s Legal Counsel (visited Dec. 13, 2006), http://www.cardplayer.com/poker_law/article/1446.

⁷² SAFE Port Act, tit. VIII, § 801, subchpt. IV, § 5361(b) (2006).

gambling, but we can police the financial institutions that disregard our laws.”⁷³ Section 5362(6) of the UIGEA states that Internet gambling is unlawful “where such bet or wager is unlawful under any applicable Federal or State law.”⁷⁴ So under this interpretation, internet gambling is illegal in Tennessee, but not in Nevada. The 5th Circuit ruling referred to above has already shown that the Wire Act does not apply to internet gambling, even though Mr. Gonzalez would like you to think so. The UIGEA only serves to enact regulations that banks and Internet Service Providers must follow, but there is no criminal liability for individual players. Laura Fisher, spokeswoman for the American Bankers Association said that “bill sets up banks to police a social issue... it’s not something that we want to encourage.”⁷⁵

In March 2006, ICR, an independent research firm, released a survey of 964 randomly selected adults asked about various issues dealing with gambling and internet gaming.⁷⁶ First, 90% of those surveyed said that the government should not prevent Americans from playing poker. Second, 74% said the government should not prevent Americans from poker on the Internet. Third, 94.7% said the government should not prevent Americans from playing poker in the privacy of their home. Fourth, 66% said that the government should not be managing American’s gambling behaviors on the Internet.⁷⁷ This study clearly suggests that Americans value their autonomy and liberties when it comes to making choices concerning their and other’s gambling habits. Lobbying groups such as the Poker Players Alliance have shown these figures to Congressmen, but it has made little difference.

⁷³ Allyn Jaffrey Shulman, J.D., Legal Landscape of Online Gaming...

⁷⁴ SAFE Port Act, tit. VIII, § 801, subchpt. IV, § 5362(6) (2006).

⁷⁵ Allyn Jaffrey Shulman, J.D., Legal Landscape of Online Gaming...

⁷⁶ Anne Crago, Poker Players Alliance Renews Objection to Internet Gambling Ban, Points to Survey as Support: Poll Finds Nearly 75% of the Public Opposes Federal Ban (April 4, 2006), http://www.pokerplayersalliance.org/press_releases/pr040406.html.

⁷⁷ *Id.*

CONCLUSION

Internet poker is a \$60 billion per year business and operates outside the United States Tax system.⁷⁸ Four to five million Americans were playing online poker in 2005.⁷⁹ Keeping online poker legal would allow US-based companies to gain a foothold in the industry and would serve to further allow the government to regulate gaming and better protect US consumers. Conservative estimates show that in the case that tax withholdings would apply to all gambling amounts over \$1,000, making Internet poker part of the US Tax and economic system would “increase Federal revenues by approximately \$3.3 billion each year.”⁸⁰ This is at the current rate of play, but in the case of making Internet poker legal, the potential revenues would only be limited by the extensive numbers of new players depositing into online accounts each year. It will be left to speculation as to whether such revenues would change the mind of law makers such as Rep. Duncan who complain about their “shrinking tax base.”

The benefits of regulation far out-weigh the costs of enforcement, and the government would not have to shift such a large burden of enforcement to the banks and Internet Service Providers in that event. History shows that Prohibition does not work and its costs of enforcement are prohibitive. Society should ask why it makes more sense to create more crimes for which there are no victims and spend countless dollars enforcing them when the government could easily regulate them and gain considerable revenues in the process. Throughout this paper I have tried to recognize both the positives and negatives of keeping gambling, especially

⁷⁸ Judy Xanthopoulos, Ph.D., Internet Poker Industry and Revenue Analysis Final Report (Quantria Strategies, LLC 2006), http://www.pokerplayersalliance.org/PDF/Internet_Poker_FINAL_REPORT_7_9.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.*

internet gaming, legal in America. Both sides of the issue have important concerns, but, in the end, one side or the other must win.

The trend over the last fifty years or more seems to be towards a more liberal view on gambling, especially in light of the fact that 48 states allow gambling in some form, which is why the recent efforts to prohibit online gambling have surprised myself and others who believe in individual liberties in line with the thinking of Mill and others such as the right to spend our money in the way that we desire, so long as whatever service or good that is received in return does not *directly* harm another person. A sense that government has created another “Big Brother” aspect by deputizing financial institutions to monitor Americans’ banking transactions might just be right in line with the fears that the PATRIOT Act and other legislation have spurred in the last few years concerning the taking away of previously guaranteed liberties. A government should not be in the business of taking rights; rather a government should be in the business of preserving liberties.