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# **LEVELING (UP) THE PLAYING FIELD: A POLICY-BASED CASE FOR LEGALIZING AND REGULATING ESPORTS GAMBLING**

*Matthew Dobill\**

With the burgeoning growth of esports, industry luminaries and entrepreneurs alike are attempting to create sustainable secondary markets that capitalize on the growth and success of competitive videogaming. One hotly contested issue in the arena of secondary esports markets is the legality of direct gambling on the outcome of esports matches. With recent developments in gambling law revolving around fantasy sports giants DraftKings and FanDuel, gambling on fantasy sports and direct matches has been thrust back into the public light.

While gambling on sports (including esports) is currently extremely regulated and restricted, this Note advocates for the legalization of esports gambling as part of the larger arc of gambling law development in the United States. Esports, due to its nascency, its well-developed internal checks and best practices, receptivity, global scale, and popularity presents an ideal vessel to continue the expansion and regulation of sports gambling in the United States. While extensive discussion is had on traditional sports gambling and the phenomena that is esports, academics rarely bridge the gap between the two. Rather than analyzing esports and sports gambling in separate vacuums, it is important to analyze them together; development of esports gambling would confer benefits both to esports as a whole as well as to the growth and regulation of traditional sports gambling in the United States.

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## I. INTRODUCTION

Center stage at Madison Square Garden, ten players sit on illuminated pedestals, bathed in a hundred spotlights. One by one, each player places in a pair of earbuds, followed by noise canceling headphones, and sits down in front of a computer. In stylish jackets emblazoned with logos advertising energy drinks, headphones, and computer peripherals, the players breathe a collective sigh. Electricity runs through the crowd and what starts as a single fan clapping grows into boisterous cheers that rock the venue. This is neither a concert nor a sporting event. These players are esports competitors. Tonight, Madison Square Garden is their arena and Riot Games's *League of Legends* is their game.

While seemingly fantastic, this vision is not as farfetched as one might think. Riot Games hosted the *League of Legends* North American League Champion Series Playoffs at Madison Square Garden in August of 2015.<sup>1</sup> There, American esports teams competed for a chance to play in the World Championships in Europe in October 2015 for the winner's share of a multi-million dollar prize pool.<sup>2</sup> Today, the video game industry draws in revenues that "rival or exceed the revenues of established music and movie industries."<sup>3</sup> The genesis and explosive growth of esports (competitive organized video gaming) cannot be denied: the 2013 *League of Legends* World Championship video stream drew more viewers than both the 2012 Olympics YouTube video stream and CBS's Super Bowl XLVII stream.<sup>4</sup>

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1. Taylor Cocke, *CLG's Faith Rewarded with Their 2015 NA LCS Summer Split Finals Win over TSM*, LEAGUE OF LEGENDS: ESPORTS (Aug. 23, 2015, 8:48 PM), [http://worlds.lolesports.com/en\\_US/worlds/articles/clgs-faith-rewarded-their-2015-na-lcs-summer-split-finals-win-over-tsm](http://worlds.lolesports.com/en_US/worlds/articles/clgs-faith-rewarded-their-2015-na-lcs-summer-split-finals-win-over-tsm) [<http://perma.cc/75QL-6PLL>] ("Finally, CLG had taken down their bitter rivals Team SoloMid, taking the title of 1st place in the 2015 NA LCS Playoffs in the process. And they did it in style, winning 3-0 on the floor of New York's Madison Square Garden.").

2. See Frank Fields, *Everything You Need to Know about the 2015 World Championship*, LEAGUE OF LEGENDS CHAMPIONSHIP SERIES (Sept. 9, 2015), <http://2015.na.lolesports.com/articles/everything-you-need-know-about-2015-world-championship> [<http://perma.cc/AGA9-ZZL8>].

3. Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1536 (2013) ("The result [of the explosion of growth in computer video games] has been a flourishing new entertainment sector, with revenues that now consistently rival or exceed that of the established music and movie industries.").

4. Rich McCormick, *'League of Legends' eSports Finals Watched by 32 Million People*, THE VERGE (Nov. 19, 2013, 8:50 PM), <http://www.theverge.com/2013/11/19/5123724/league-of-legends-world-championship-32-million-viewers> [<http://perma.cc/28LH-DWU8>] ("The figures show a tremendous leap in League of Legends viewers in the past year: 2012's Season 2 LoL

What started as organized, small-scale competitions in hotel banquet halls<sup>5</sup> has quickly turned into an industry that is constantly compared to traditional sports such as tennis, basketball, or Olympic gymnastics.<sup>6</sup> Like traditional sports, esports teams have received coverage in highly circulated magazines such as ESPN and Playboy.<sup>7</sup> Like traditional sports, players make hundreds of thousands of dollars through marketing sponsorships and goods and by creating personal brands.<sup>8</sup> Like traditional sports, its players attempt to bargain collectively for equitable working conditions.<sup>9</sup> In fact,

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World Championship—the previous record holder for most watched eSports event—was seen by a total of 8.2 million people, with 1.1 million streaming the event at the same time . . . . They eclipse mass market stream figures, too . . . the YouTube stream of the 2012 Olympics reached a peak of 500,000 people at once . . . Riot can make a technical claim that their eSports event is bigger than the Super Bowl: CBS’ Super Bowl XLVII livestream attracted three million unique viewers earlier this year.”).

5. MICHAEL KANE, *GAME BOYS: TRIUMPH, HEARTBREAK, AND THE QUEST FOR CASH IN THE BATTLEGROUND OF COMPETITIVE VIDEOGAMING 3* (2008) (“For these four days in December 2005, the Hyatt Regency is hosting the winder championships of the Cyberathlete Professional League (CPL), the pioneering “e-sports” venture since its inception in 1997 that has drawn kids from all around the world to compete for thousands of dollars in prize money playing videogames.”).

6. Katherine E. Hollist, Note, *Time to be Grown-Ups about Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 826 (2015) (“eSports players compete in events with a variety of styles—some compete directly against other competitors in one-on-one events (like tennis); others play in team events where teammates assume different roles and work cooperatively to score points against other teams (like basketball), and still others compete by allowing each competitor to take a turn and then compare their ultimate times/scores (like Olympic skiing or gymnastics).”).

7. See Mina Kimes, *The Unkillable Demon King*, ESPN (June 6, 2015), [http://espn.go.com/espn/feature/story/\\_/id/13035450/league-legends-prodigy-faker-carries-country-shoulders](http://espn.go.com/espn/feature/story/_/id/13035450/league-legends-prodigy-faker-carries-country-shoulders) [<http://perma.cc/7HDM-UEYC>]; see also Harold Goldberg, *Meet League of Legends: The Video Game Turning E-Sports into Big Business*, PLAYBOY (Oct. 21, 2014), <http://www.playboy.com/articles/winners-losers-and-legends> [<http://perma.cc/R56B-RJCA>].

8. Paul Tassi, *How this 23-Year-Old League of Legends Player Makes Nearly \$1M a Year*, DAILY DOT (Oct. 21, 2013, 2:33 PM), <http://www.dailydot.com/esports/ocelote-esports-salary-league-of-legends-carlos-rodriguez> [<http://perma.cc/X3Z5-DX5Z>] (“‘In total I earn between €600,000 and €700,000 annually.’ . . . That translates to between \$820,000 and \$950,000.”).

9. Bryce Blum, *An Esports Lawyer Explains How the New Team ‘Union’ Will Push Esports Forward*, DAILY DOT (Oct. 4, 2015, 11:54 AM), <http://www.dailydot.com/esports/esports-lawyer-bryce-blum-team-union> [<http://perma.cc/4W4F-7FSA>] (“The long and short is this: you don’t need to collectively bargain (a legal term of art) to bargain collectively. These 10 teams have united to lobby and act in their common interests. They will undoubtedly have more influence as a result.”).

esports have been accepted by American law and society as so analogous to traditional sports that the government of the United States affords international competitors athletic visas.<sup>10</sup> This appropriation of sports culture and law lend many benefits to esports competitors.<sup>11</sup> The publication in magazines, coverage in mainstream media, and access to existing visa framework no doubt contribute to the immense success enjoyed by esports competitors. In addition, secondary markets surrounding the growing esports industry have also played a seminal role in its continued success.<sup>12</sup> In the past two years, key players in the esports industry have attempted to break into a new secondary market previously dominated by traditional sports: gambling.<sup>13</sup>

The intersection of gambling and esports is a logical one. In the past decade, the development of new technology, increased credibility of online gambling to the gambling public, efficient financing mechanisms, and the legalization of certain types of Internet gambling has helped conquer many obstacles to its growth.<sup>14</sup> The growth of Internet gambling in the United States coincides with the growth of the video game industry, which in 2003

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10. Hollist, *supra* note 6, at 842 (“League of Legends made waves in 2013 when it successfully procured athletic visas for its international competitors. Currently, several of the most high-profile League of Legends players are international players, and Riot regularly hosts international tournaments in the United States and overseas.”).

11. See Colin Campbell, *Competitive Gaming Recognized in U.S. as a Pro Sport*, POLYGON (July 12, 2013, 7:15 PM), <http://www.polygon.com/2013/7/12/4518936/competitive-gaming-recognized-in-u-s-as-a-pro-sport> [<http://perma.cc/Z8W4-QCHX>].

12. See generally Paul Lee & Duncan Stewart, *TMT Predictions 2016: eSports: Bigger and Smaller Than You Think*, DELOITTE, <http://www2.deloitte.com/global/en/pages/technology-media-and-telecommunications/articles/tmt-pred16-media-esports-bigger-smaller-than-you-think.html#full-report> [<http://perma.cc/58T9-XWB2>].

13. See generally Keith Wagstaff, *Game On: Gamblers Want Part of Rising E-Sports*, NBC NEWS (Nov. 7, 2014, 11:28 AM), <http://www.nbcnews.com/tech/video-games/game-gamblers-want-part-rising-e-sports-n242086> [<http://perma.cc/5MW4-WPV7>].

14. Charles Doyle, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, CONG. RESEARCH SERV. 1, 2 (2012), [http://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/crs/RS21984\\_120124.pdf](http://ipmall.law.unh.edu/sites/default/files/hosted_resources/crs/RS21984_120124.pdf) [<http://perma.cc/3C24-5M7J>] (“Four obstacles initially stood in the way of Internet gambling becoming a multibillion-dollar endeavor: the limits of available technology; credibility among the gambling public; an efficient financing mechanism; and confirmation of claims that Internet gambling was legal. Many of the technical challenges seem to have been overcome. As for consumer acceptance, although noted earlier reliable statistics can be somewhat elusive, its popularity seems to supply the surest test. Financial complications appear to have slowed but hardly crippled the growth of the Internet gambling.”).

was valued at 7 billion dollars and in 2014 collected over 15 billion dollars in revenue.<sup>15</sup>

The esports gambling industry operates largely on its co-option of sports law. Currently, it is unclear whether gambling on esports is legal since it is illegal in the United States to bet on any sport yet such activity is legal in some capacity in Nevada, Delaware, and Oregon.<sup>16</sup> In the past year, federal gambling law has been subject to scrutiny due to fantasy sports services DraftKings and FanDuel reigniting public debate on the legality of fantasy sports gambling.<sup>17</sup> With major service providers like DraftKings and others doubling down on esports as a new gambling enterprise,<sup>18</sup> esports is caught squarely in the crossfire of this renewed national debate. Clarity is needed to establish esports gambling as an enterprise unique to and different from traditional sports gambling.

This Note explores the evolution of federal policy and statutes governing sports gambling and ultimately argues that supporting gambling in esports not only fits in the current trajectory of federal gambling law, but is an idyllic catalyst for the next wave of federal gambling regulation. While much press and airtime has been given in recent months to the problem of esports “skin gambling,”<sup>19</sup> this Note will not address such

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15. *2015 Sales, Demographic, and Usage Data: Essential Facts about the Computer and Video Game Industry*, ENTERTAINMENT SOFTWARE ASSOCIATION 2, 12 (2015), <http://www.theesa.com/wp-content/uploads/2015/04/ESA-Essential-Facts-2015.pdf> [<http://perma.cc/2THE-3QM8>].

16. *See generally* Wagstaff, *supra* note 13.

17. *See* Fitz Tepper, *New York Governor Signs Daily Fantasy Sports Bill, DraftKings and FanDuel Can Operate Again*, TECHCRUNCH (Aug. 3, 2016), <http://techcrunch.com/2016/08/03/new-york-governor-signs-daily-fantasy-sports-bill-draftkings-and-fanduel-can-operate-again> [<http://perma.cc/V7BY-2DPT>]. *See generally* Bourree Lam, *The New York Attorney General’s Investigation of DraftKings and FanDuel*, ATLANTIC (Oct. 7, 2015), <http://www.theatlantic.com/business/archive/2015/10/draftkings-fanduel-fantasy-sports-insider-trading-advantage/409435> [<http://perma.cc/958X-LT4X>].

18. Jeff Grubb, *DraftKings Brings its Daily-Fantasy Sports Empire to Esports*, VENTUREBEAT (Sept. 23, 2015, 9:47 AM), <http://venturebeat.com/2015/09/23/draftkings-brings-its-daily-fantasy-sports-empire-to-esports> [<http://perma.cc/NM36-F777>] (“DraftKings, one of the top companies in the daily-fantasy market, is expanding to include professional gaming. The site announced this morning that it will take wagers on the League of Legends World Championships starting October 1.”).

19. *See generally* Joshua Brustein & Eben Novy-Williams, *Virtual Weapons are Turning Teen Gamers into Serious Gamblers*, BLOOMBERG (Apr. 20, 2016), <http://www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling>

issues. This Note seeks only to engage issues regarding direct betting on the outcome of esports matches, head-to-head esports matches for a money prize, and fantasy esports. Part II will briefly discuss the current state trajectory of American sports gambling law and show where esports fits in its complicated machination. Part III of this Note will show the unique problems and inconsistencies esports presents in the context of federal gambling law. Lastly, Part IV will reconcile those problems with the current state of the law, thereby showing that esports is the ideal gateway vessel for the legalization of sports gambling because (1) its infancy and receptiveness to scaling and change make it better suited than the traditional sports industry to adopt sports betting; (2) the novelty of esports divorces it from the polarizing history of traditional sports gambling in the United States; (3) esports has no vested economic interest in halting the development of a secondary gambling market; and (4) a budding gambling infrastructure in esports means that American esports is “gambling ready.”

## II. BACKGROUND

To better understand the unique issues surrounding esports betting and gambling law, breaking the issue into digestible chunks makes short work of the law’s complexities. This section will discuss three distinct areas to shed light on the intersection of gambling law and esports. First, section A will give a brief overview of American gambling law, thereby framing the issue of esports gambling. Second, section B will discuss the threshold inquiry of whether an activity or game is considered gambling. Finally, sections C, D, E, and F will address the federal statutes invoked by esports betting.

### *A. An Abridged History of Gambling in America: The Rise of the Third Wave of Legalized Gambling*

The history of American gambling law is one of ebbs and flows. Indeed, Professor I. Nelson Rose<sup>20</sup> contends that the United States is

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[<http://perma.cc/LSP2-RV89>] (explaining the background and separate issue of skins gambling in videogames).

20. I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 361 (2010) (“J.D. Harvard Law School 1979, Distinguished Senior Professor of Law, Whittier Law School, Costa Mesa, California; Visiting Professor, University of Macau. This author is recognized as a leading authority on gambling law and is a consultant to governments and industry.”).

cyclical in its legislation of gambling and betting.<sup>21</sup> He contends that this “boom-bust” cycle is primarily due to societal ambivalence about the legal status of gambling.<sup>22</sup> At the center of this ambivalence lies Professor Rose’s question: “Should the law be used only against the acts that everyone agrees should be illegal . . . or should the law be used as a tool to enforce morality?”<sup>23</sup> This binary approach manifests itself throughout the history of American gambling law.

Professor Rose breaks the history of American gambling law into three waves. Professor Rose’s first wave of gambling fell in colonial America, where the only legal forms of gambling were lotteries.<sup>24</sup> The state and federal governments used these lotteries to raise funds for public works projects and other financial expenditures because there was no national fiscal infrastructure.<sup>25</sup> Over time, public sentiment shifted and the rise of lottery scandals, coupled with heightened public “morality,” led to a near century-long gambling ban.<sup>26</sup> As a result of colonial lottery bans, the statutory definition of lottery is interchangeable with almost any other gambling activity today.<sup>27</sup>

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21. *Id.* at 365 (“Like a prophecy fulfilled, it looks like we are doomed to repeat our history, having failed to learn the lessons of the past. Twice before in American history, players could make legal bets in almost every state, but these waves of gambling came crashing down in scandal, ruin, and ultimately prohibition.”).

22. *Id.* (“Americans are not sure of what role law should have in society . . . anti-gambling prohibitions epitomize the traditional approach taken by American laws. These laws are not only designed to protect people from themselves, but are part of a greater moral framework designed by policy-makers to create an imagined ideal society.”).

23. *Id.*

24. *Id.* at 361 n.2 (“First wave refers to public and private lotteries held during colonial times to finance public operations without national government.”).

25. Rose, *supra* note 20, at 368 (“ . . . the colonies were awash in lotteries, licensed by both states and the newly formed federal government. In part, this was because during the colonial period and even after the American Revolution, America lacked a fiscal infrastructure.”).

26. *Id.* at 369 (“The mix of the two—lottery scandals and a newfound morality—led to a near complete-prohibition of lotteries.”).

27. *FCC v. Am. Broad. Co.*, 347 U.S. 284, 290–91 (1954) (“All the parties agree that there are three essential elements of a ‘lottery, gift enterprise, or similar scheme’: (1) the distribution of prizes; (2) according to chance; (3) for a consideration. They also agree that prizes on the programs under review are distributed according to chance . . . . The Commission contends . . . in its brief . . . that these programs ‘are nothing but age-old lotteries in a slightly new from . . . . The classic lottery looked to advance cash payments by the participants as the source of



Professor Rose's second wave of gambling coincided with western expansion and the Civil War.<sup>28</sup> States turned once again to lotteries and to the legalization of the earliest casinos to raise revenue for the expanding country.<sup>29</sup> Similar to the first wave of gambling, a rise in societal "morality" and scandal led to anti-gambling legislation.<sup>30</sup> Anti-gambling statutes were once again expanded, and the United States was left virtually free of gambling.<sup>31</sup>

With the Great Depression came the third wave of legal gambling, which continues into today.<sup>32</sup> States repealed anti-gambling statutes and reopened their casinos and racetracks.<sup>33</sup> For the past half century, litigation and legislation have come and gone regarding bingo, lotteries, horse racing, dog racing, poker, gaming machines, casinos, and now, Internet gaming.<sup>34</sup>

Professor Rose proposes that the cyclical outlaw and legalization of gambling occurs because "the unthinkable becomes commonplace if taken in small doses."<sup>35</sup> He notes that other contributing factors in this "decriminalization of gambling" are the changed attitudes of morality surrounding gambling, relaxed government restrictions, the easy cash that gambling revenues generate for the government, competition in the

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profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising."").

28. Rose, *supra* note 20, at 370 ("The second wave began with the Civil War and the continuing expansion of the Western frontier.").

29. *Id.*

30. *Id.* at 373 ("[T]he rise of Victorian morality, scandals, and the desire for respectability brought the second wave crashing down in the West . . . . By 1910 only Maryland, Kentucky, and New York were left, and in that year New York closed its [horse] racetracks. The United States was once again virtually free of legalized gambling.").

31. *Id.* at 372-73 ("The United States was once again virtually free of legalized gambling.").

32. *Id.* at 374.

33. Rose, *supra* note 20, at 374 ("[T]he Great Depression gave birth to the third wave of legal gambling. Nevada re-legalized casino gambling in 1931. Twenty-one states opened racetracks . . . in the 1930s, with additional states allowing . . . betting every decade since.").

34. *Id.*

35. *Id.* at 382.

gambling field, and the simple fact that players today want gambling to be faster, modern, and easier.<sup>36</sup>

*B. Threshold Inquiry and the Science of Semantics in American Gambling Law*

At the core of every gambling related inquiry comes a simple yet important question: “Is this gambling or not?” While seemingly perfunctory, this question determines the applicability of federal gambling law to an act or game. Specifically, this threshold inquiry determines whether a game is of skill and thus outside the reach of gambling statutes,<sup>37</sup> or if the game is a game of chance and thus subject to state and federal gambling laws.<sup>38</sup> This inquiry manifests itself in a three-element “checklist” used to determine whether the action in question is indeed gambling<sup>39</sup>: If the activity in question has (1) consideration paid for; (2) a game of chance that; (3) has a payout or prize, then the activity in question is gambling.<sup>40</sup>

In sports and esports betting, there is often little contention concerning the first and third prongs.<sup>41</sup> When one places a bet, he or she is offering consideration in the hope of a payout. The sticking point for threshold inquiry in the context of esports and sports gambling lies in its second element—chance. Chance has been dramatically deemed “the evil principle against which all [gambling] laws are aimed.”<sup>42</sup> The opposite of

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36. *Id.* at 385–87 (“Players want games that are faster and easier, with at least the illusion of player control.”).

37. *See generally id.*

38. *See generally* Rose, *supra* note 20.

39. J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 *DRAKE L. REV.* 41, 45 (2011) (“Although there are statutes specifically defining the word “lottery,” in the general sense it refers to a gambling game of device wherein someone gives up something of value for the chance of obtaining a prize in money or property of value.”).

40. *Id.* (“If all three elements—consideration, prize, and chance—are present, the activity constitutes gambling.”).

41. *Id.* at 50–51.

42. *State v. Shorts*, 32 N.J.L. 398, 401 (N.J. 1868) (“This ingredient of chance is, obviously, the evil principle against which all prohibitory [gambling] laws are aimed. It is by this means that cupidity is solicited, for, if fortune be propitious, in consideration of the trivial price of a ticket, a return of value is to be expected.”).

chance is skill. If an individual's skill or judgment, rather than sheer chance, dictates whether a prize or payout is awarded, the temptation of chance is gone and the activity is deemed "not gambling."<sup>43</sup> A basic illustration of this skill or chance dichotomy is found in the difference between chess and dice. The randomness of throwing dice does not require skill, and skill would not make the outcome of a dice roll more likely. This means that dice is a game of chance. Conversely, in chess, great skill is required in planning the movement of the chessmen across the board: the more skilled the player, the higher the likelihood that the player will win a game of chess. This means that chess is a game of skill.

While the above illustration is apt, esports betting and sports betting do not fit into such clearly delineated boxes as chess or dice. The threshold inquiry is more complex than the difference between chance or skill. The New York Court of Appeals succinctly described the complexity of the skill/chance dichotomy in *People v. Lavin*:

Throwing dice is purely a game of chance; chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times . . . their result is determined by some unforeseen accident, usually called 'luck.' The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?<sup>44</sup>

Accordingly, the current incarnation of the "chance" prong of the threshold inquiry is whether the game is predominantly one involving chance or one involving skill.<sup>45</sup>

Today, the debate over sports and esports betting turns on whether certain types of betting are predominantly games of skill, thereby failing the threshold inquiry and exempting themselves from gambling law, or predominantly games of chance, thus passing threshold inquiry and

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43. Fichtner, *supra* note 39, at 48 ("Conversely, if the participant's skill or judgment dictates whether he or she will take home the prize, the "lure to improvidence" is missing and there is no need to prohibit the activity.").

44. *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904).

45. *See generally id.*

subjecting themselves to state and federal regulation.<sup>46</sup> Perhaps the best testament to this struggle is the evolution of gambling law, gambling's growth, and society's response in recent decades.

Professor Rose postulated that America is currently in gambling's "Golden Age" and the data seems to support his assertion.<sup>47</sup> From 2010–2012, national polls showed marked increases in voter support of sports and Internet gambling, thus showing increased approval of online gambling.<sup>48</sup> Coupled with voter data, the past ten years have witnessed the explosive growth of online gambling enterprises.<sup>49</sup> Full-service online casinos like Bovada boast online poker and casinos, horse books, and sports books based in Antigua and Barbados that exist outside the jurisdiction of current federal gambling statutes.<sup>50</sup> Paid fantasy sports leagues are already dominated by multi-billion dollar United States-based companies and operate in most states under the full protection of the law (though this is changing due to the changing legal status of fantasy sports, as discussed below).<sup>51</sup> In Nevada, sports betting is lawful.<sup>52</sup> To better understand this shifting attitude in gambling law, it is important to understand both contemporary statutory interpretations and case law that have chipped away at the three major laws governing online sports gambling. These laws are the Wire Act,<sup>53</sup> the Unlawful Internet Gambling

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46. *Id.* at 755.

47. Rose, *supra* note 20, at 388 ("History tells us that this is the Golden Age of Legal Gambling.").

48. Keith C. Miller, *The Internet Gambling Genie and the Challenges States Face*, 17 No. 1 J INTERNET L. 1, 21 (2013).

49. *Id.*

50. BOVADA, <http://bovada.lv> [<http://perma.cc/K2AG-6L6S>]; I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 655–56 (2012) ("Opponents have compared online gambling to crack cocaine, but it has also been described as inevitable and unstoppable. Americans have made Internet bets in the hundreds of millions of dollars to the benefit of offshore illegal and gray market operations.").

51. Jeff Grubb, *DraftKings Brings its Daily-Fantasy Sports Empire to Esports*, VENTUREBEAT (Sept. 23, 2015, 9:47 AM), <http://venturebeat.com/2015/09/23/draftkings-brings-its-daily-fantasy-sports-empire-to-esports> [<http://perma.cc/NM36-F777>] ("DraftKings and its main competitor FanDuel are each worth around \$1 billion.").

52. 28 U.S.C. § 3704 (2012).

53. 18 U.S.C. § 1084 (2012).

Enforcement Act (“UIGEA”),<sup>54</sup> and the Professional and Amateur Sports Protection Act (“PASPA”).<sup>55</sup>

### C. *The Wire Act*

Perhaps the most dramatically eroded of federal gambling statutes is the Wire Act. Enacted in 1961, it was part of then-Attorney General Robert F. Kennedy’s war on organized crime.<sup>56</sup> The original purpose of the law was:

[T]o assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.<sup>57</sup>

Early federal prosecutions of Internet gambling generally charged violators with violations of the Wire Act and this phenomenon was primarily attributed to statutory interpretation.<sup>58</sup> To violate the Wire Act, one must: (1) be engaged in the business of betting or wagering; (2) knowingly; (3) use a wire communication facility; (4) for the transmission in interstate or foreign commerce of (a) bets or wagers *or* information assisting in the placing of bets or wagers on any sporting event or contest *or* (b) for the transmission of a wire communication which entitles the

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54. Prohibition on Funding of Unlawful Internet Gambling, 31 U.S.C. §§ 5361–5367 (effective Oct. 13, 2006).

55. 28 U.S.C. §§ 3701–3704.

56. Rose & Bolin, *supra* note 50, at 659.

57. H.R. REP. NO. 87-967, at 1–2 (1961).

58. See *United States v. Ross*, No. 98 CR. 1174–1 (KMV), 1999 WL 782749 (S.D.N.Y. Sept. 16, 1999) (denying a motion to dismiss a four-count indictment charging violations of 18 U.S.C. § 1084 and 18 U.S.C. § 371 (conspiracy) in connection with offshore internet gambling facilities); see also *United States v. D’Ambrosia*, 313 F.3d 987, 987–89 (7th Cir. 2002) (applying Wire Act penalties to operators of an “. . . offshore internet-based sports bookmaking operation.”).

recipient to receive money or credit as a result of bets or wagers *or* (c) for information to assist in placing a bet or a wager.<sup>59</sup>

Functionally, this statute is meant to penalize those engaged in the business of betting or wagering and as such, has not been found to apply to “mere bettors.”<sup>60</sup> In the context of Internet sports betting, the Wire Act has applied to those making interstate or international sports bets.<sup>61</sup> Originally, the Wire Act, the monolithic gambling statute in the United States, was interpreted broadly to apply to all online gambling in the form of poker, lotteries, and sports betting.<sup>62</sup> However, as social mores surrounding gambling have changed, so has the breadth of the application of the Wire Act to Internet gambling. In 2011, the Fifth Circuit read the Wire Act to apply only to online sports betting.<sup>63</sup> This stripped the Wire Act’s coverage to lotteries and poker (poker, however, is yet to be officially declared by a court), thereby broadening the availability of online poker and lotteries to state and federal governments for regulation.<sup>64</sup> This effectively restricted the Wire Act’s application to online sports betting.<sup>65</sup>

#### *D. The Unlawful Internet Gambling Act*

Complementary to the Wire Act is the UIGEA. Hurriedly passed as an addition to the SAFE Port Act in 2006<sup>66</sup> during the presidency of George W. Bush, the statute was intended to add teeth to existing federal

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59. 18 U.S.C. § 1084(a) (2012) (emphasis added).

60. *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983) (“The district court held that the statute did not prohibit the activities of ‘mere bettor[s].’”).

61. *See generally* *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (indicting defendant for violations of the Wire Act in relation to his online, off-shore sports books).

62. *Rose & Bolin*, *supra* note 50, at 670.

63. *In re MasterCard Int’l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 481 (E.D. La. 2001) *aff’d sub nom. In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002) (“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.”).

64. *See* *Rose & Bolin*, *supra* note 50, at 671.

65. *See generally id.*

66. Port Security, 46 U.S.C. §§ 70101–70125 (2012).

gambling statutes.<sup>67</sup> The UIGEA limits the financial transactions related to unlawful Internet gambling and places restrictions on payment systems to prevent money from changing hands from operators to bettors.<sup>68</sup>

The UIGEA provides that:

1) no person; 2) engaged in the business; 3) of betting or wagering; 4) may knowingly accept; 5) in connection with or participation of another person; 6) in unlawful internet gambling; 7) a) credit, the proceeds of credit, extended to or on behalf of such other person; b) an electronic funds transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting services, from or on behalf of such other person; or c) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through a financial institution; or d) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.<sup>69</sup>

The most relevant portion of the statute to esports is its exceptions specifically for fantasy sports betting and intrastate gambling.<sup>70</sup> The Act exempts:

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67. See Rose & Bolin, *supra* note 50, at 667.

68. 31 U.S.C. § 5364(a) (2012).

69. Charles Doyle, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, CONG. RESEARCH SERV. 1, 30 (2012), [http://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/crs/RS21984\\_120124.pdf](http://ipmall.law.unh.edu/sites/default/files/hosted_resources/crs/RS21984_120124.pdf) [<http://perma.cc/3C24-5M7J>].

70. See 31 U.S.C. § 5362(1)(E)(ix) (2012) (“[This statute does not limit] participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization . . .”); see also *id.* § 5362(10)(B) (“The term ‘unlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where: i) the bet or wager is initiated and received or otherwise made exclusively within a single State; ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized and placed in accordance with the laws of such State . . . ; iii) the bet or wager does not [violate existing federal gambling statutes].”).

Participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization.<sup>71</sup>

The UIGEA goes on to qualify several guidelines to ensure that such fantasy sports bets comply with other gambling laws. Moreover, the UIGEA provides guidance to ensure that if someone operates a “fantasy sports” enterprise, that the resulting game is one of predominantly skill and not chance, thereby passing the “chance” prong of the threshold inquiry.<sup>72</sup>

Beyond explicitly permitting fantasy sports betting, the UIGEA also carves out an exception for intrastate gambling.<sup>73</sup> This is in line with the current federal sentiment of leaving gambling largely as a state matter.<sup>74</sup> This also explains how a state like Nevada, which has fully legalized sports gambling, complies with the UIGEA the same way that Arizona, which has banned both sports betting and fantasy sports betting, complies with the UIGEA.<sup>75</sup> While some have challenged the UIGEA in court, it has been upheld against vagueness and due process challenges and remains in full force as binding law.<sup>76</sup>

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71. 31 U.S.C. § 5362(1)(E)(ix).

72. *Id.* § 5362(1)(E)(ix)(I)–(III) (stating that the prize amounts must be made known to the participants in advance and not be based on the number of participants or the amount paid by the participants, stating that all winning outcomes must reflect the respective knowledge and skill of participants and is determined by statistics of the sport in question, and barring the use of point spreads and individual athlete performances as a basis for winning).

73. *Id.* § 5362(10)(B).

74. Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, 27 (2004).

75. Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states) [http://perma.cc/N84H-BDC6].

76. *See Interactive Media Entm't & Gaming Ass'n v. Att'y Gen. of the United States*, 580 F.3d 113, 116–18 (3d Cir. 2009).



### *E. The Professional and Amateur Sports Protection Act*

The final federal statute used to regulate online sports gambling is the Professional and Amateur Sports Protection Act (“PASPA”). The purpose of this Act is to stop the “spread of State-sponsored sports gambling.”<sup>77</sup> At the time of PASPA’s passage, state lotteries in Oregon and Delaware began taking bets on National Football League games and sports organizations stepped in to prevent states from benefitting from these new secondary markets.<sup>78</sup>

Under PASPA, state governments cannot “sponsor, operate, advertise, promote, license or authorize by law or compact” any wagering scheme based on the outcome of professional or amateur sports.<sup>79</sup> Provisions were allowed for the grandfathering of states that already had legalized and organized sports betting prior to PASPA’s passage,<sup>80</sup> but effectively this meant that only Nevada, Delaware, Oregon, and Montana fell within the exception.<sup>81</sup> Without expanding either the Wire Act or the UIGEA, PASPA bars states from creating new sports betting schemes.<sup>82</sup>

### *F. Gambling and Esports*

By and large, the policy factors driving the development of gambling law have come from sports betting and traditional casino games.<sup>83</sup> Every major case involving Internet gambling in the United States has revolved around either offshore sports betting or offshore casinos.<sup>84</sup> The history of

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77. Rose & Bolin, *supra* note 50, at 663.

78. *Id.*

79. 28 U.S.C. § 3702 (2012).

80. *Id.* § 3704.

81. Chris Spatola, *Sports Gambling and Governing with a Moral Compass*, THE HILL (Sept. 17, 2015, 6:00 AM), <http://thehill.com/blogs/pundits-blog/sports-entertainment/253911-sports-gambling-and-governing-with-a-moral-compass> [<http://perma.cc/QMN4-UXCA>].

82. Rose & Bolin, *supra* note 50, at 665.

83. *See generally* Rose, *supra* note 20.

84. *See generally* United States v. Lombardo, 639 F. Supp. 2d 1271 (D. Utah 2007); United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); *In re MasterCard Int’l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468 (E.D. La. 2001), *aff’d sub nom. In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2002).

gambling law is accordingly dominated by regulations and case law that deal explicitly with sports betting or casino games.<sup>85</sup> Competitive esports did not exist until the late 1990's and early 2000's, where sporadic annual and semiannual tournaments like those hosted by the now-defunct Cyberathlete Professional League,<sup>86</sup> Dreamhack,<sup>87</sup> and the World Cyber Games began to gain traction.<sup>88</sup>

In the late 1990's and into the early 2000's, esports tournaments were primarily operated by private companies or individuals and were known for their disorganization and immense delay in paying competitors earned tournament winnings.<sup>89</sup> Prize pots were relatively small compared to today as a single tournament would net an esports team only \$30,000 to \$40,000,<sup>90</sup> which when divided, meant players were only making between \$20,000 to \$30,000 a year.<sup>91</sup> At the outset of esports, sponsorship deals used to supplement tournament winnings were rare, with endemic brands like Intel and NVIDIA giving out monetary support to only a small number of teams.<sup>92</sup> However, times have changed. Companies like Coca-Cola,<sup>93</sup>

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85. See generally Rose, *supra* note 20.

86. MICHAEL KANE, GAME BOYS: TRIUMPH, HEARTBREAK, AND THE QUEST FOR CASH IN THE BATTLEGROUND OF COMPETITIVE VIDEOGAMING 24 (2008) (“Munoz also saw dollar signs, so in 1997 he took the LAN party above ground, launching the Cyberathlete Professional League as the first-ever pro gaming organization with a standardized set of rules. In June 1997, the inaugural CPL Summer event drew roughly three hundred attendees.”).

87. T.L. TAYLOR, RAISING THE STAKES: E-SPORTS AND THE PROFESSIONALIZATION OF COMPUTER GAMING 202 (2012) (“Pretty closely tied into the grassroots model is the LAN-hybrid or the pro-am venue. Events like DreamHack . . . are a good example of this kind of space . . . there will often be a special area dedicated to professional play and matches. These types of events are generally well organized and may have a long history.”).

88. *Id.* at 205 (“The World Cyber Games are a particularly interesting example as one of the oldest tournaments of this sort and one that aspires to create a professional atmosphere . . . . Launched in 2000, the WCG Grand Final marks a key event in the pro [e-sports] circuit.”).

89. KANE, *supra* note 86, at 202 (“Top Prize at Lanwar this season was \$12,500 and first at the Intel Summer Championship paid \$50,000. And similar to the CPL, it would take a half-year for the WSVG to pay out its prize money.”).

90. *Id.* at 56 (“Winning a major LAN is typically worth around \$30,000 to \$40,000 to split . . .”).

91. *Id.* at 57 (“Making \$20,000 to \$30,000 a year is great, as long as you're still mooching off your parents.”).

American Express,<sup>94</sup> Arby's,<sup>95</sup> and Buffalo Wild Wings<sup>96</sup> are sponsoring esports organizations. This change in financial reality coincides with a change in the landscape of esports. What were once small tournaments operating out of hotel banquet halls with niche gaming peripheral sponsors has since evolved<sup>97</sup>—esports are now broadcasted on ESPN, sell out major arenas like Staples Center in Los Angeles, and garner sponsorships from major corporations like Nissan Motors.<sup>98</sup>

As esports have grown, sponsorship deals have not been the only area of financial growth. There has been measureable growth in tournament prizes and recognition of individual players' success.<sup>99</sup> Players can now expect salaries of hundreds of thousands of dollars<sup>100</sup> and sponsorship lists that span multiple industries and contain recognizable names.<sup>101</sup>

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92. *Id.* at 33–34 (“By ‘big boys’, he means that Levine has sponsorship deals with the two major sponsors of e-sports, Intel and NVIDIA . . . . Others work with companies like SteelSeries mousepads or Sennheiser headphones for free, but no cash. It’s only Levine who has struck gold in North America, raking in \$150,000 a year combined from Intel and NVIDIA.”).

93. Journey Staff, *Coca-Cola and Riot Games Renew Partnership for 2015*, COCA-COLA JOURNEY (Apr. 17, 2015), <http://www.coca-colacompany.com/stories/coca-cola-and-riot-games-renew-partnership-for-2015> [<http://perma.cc/8AE7-64BB>].

94. Riotwenceslaus, *Get RP with RP+ from American Express Serve*, LEAGUE OF LEGENDS: SALES, <http://na.leagueoflegends.com/en/news/store/store-update/get-rp-rp-american-express-serve> [<http://perma.cc/3WPE-RURE>].

95. Kate Taylor, *Arby's and Buffalo Wild Wings Have a Promising New Strategy – and it has Nothing to do with Food*, BUS. INSIDER (July 27, 2016, 7:17 PM), <http://www.businessinsider.com/arbys-buffalo-wild-wings-explore-esports-2016-7> [<http://perma.cc/Z9CV-MPJP>].

96. *Id.*

97. *See id.*; *see also* John Gaudiosi, *Big Brands Gravitating towards Esports*, FORTUNE (July 24, 2014, 11:44 AM), <http://fortune.com/2014/07/24/esports-sponsors> [<http://perma.cc/6CFH-73K6>].

98. *See* Gaudiosi, *supra* note 97.

99. Paul Tassi, *How this 23-Year-Old League of Legends Player Makes Nearly \$1M a Year*, DAILY DOT (Oct. 21, 2013, 2:33 PM), <http://www.dailydot.com/esports/ocelote-esports-salary-league-of-legends-carlos-rodriguez> [<http://perma.cc/X3Z5-DX5Z>].

100. *Id.*

101. *See Partners*, CLOUD 9, <http://cloud9.gg/partners> [<http://perma.cc/2PB6-7ZZ2>].

Traditional sports franchises, owners, and athletes are turning to esports as an investment opportunity.<sup>102</sup> Beyond direct sponsorship, the marketing opportunity and reach of esports has grown to include non-endemic brands and industries, including esports gambling.<sup>103</sup>

An example of such expansion into gambling is the birth of the “one-on-one” competitive video game market. In 2006, GamerSaloon started allowing players to put money up for paid one-on-one matches against other players.<sup>104</sup> In early 2007, G Spot Gaming launched its website, allowing players to play one-on-one games of Halo 2 for money.<sup>105</sup> Both of these sites allow individual gamers to find competitors online and bet money on the outcome of one-on-one matches of games like Halo, Call of Duty, Bejeweled Blitz, and more.<sup>106</sup> Although taking “bets” or

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102. See Darren Rovell, *Shaquille O’Neal, Alex Rodriguez among Investors in NRG Esports*, ESPN (Mar. 18, 2016), [http://www.espn.com/esports/story/\\_/id/15000505/shaquille-oneal-alex-rodriguez-jimmy-rollins-invest-nrg-esports-teams](http://www.espn.com/esports/story/_/id/15000505/shaquille-oneal-alex-rodriguez-jimmy-rollins-invest-nrg-esports-teams) [<http://perma.cc/QV6G-VNDV>] (noting Shaquille O’Neal, Alex Rodriguez, and Jimmy Rollins’s stake in esports team NRG); Darren Rovell, *Renegades Revived under Celtics Forward Jonas Jerebko*, ESPN (Sept. 3, 2016), [http://www.espn.com/esports/story/\\_/id/17421412/renegades-revived-celtics-forward-jonas-jerebko](http://www.espn.com/esports/story/_/id/17421412/renegades-revived-celtics-forward-jonas-jerebko) [<http://perma.cc/U9YC-PJNK>] (noting Boston Celtics forward Jonas Jerebko’s purchase of esports team Renegades); Dean Takahashi, *Third NBA Owner in a Week Buys a Stake in Esports Team*, VENTUREBEAT (Sept. 28, 2016, 8:00 AM), <http://venturebeat.com/2016/09/28/another-nba-owner-buys-a-stake-in-esports-team-the-immortals> [<http://perma.cc/VS4F-W7MY>] (noting Memphis Grizzlies co-owner Stephen Kaplan increasing his stake in esports team Immortals); Mike Minotti, *NBA Jams into Esports: Warriors’ Guber, Wizards’ Leonsis, and Magic Johnson Buy Team Liquid*, VENTUREBEAT (Sept. 27, 2016, 8:20 AM), <http://venturebeat.com/2016/09/27/nba-jams-into-esports-warriors-guber-wizards-leonsis-and-magic-johnson-buy-team-liquid> [<http://perma.cc/T9KC-PHJN>] (noting Golden State Warriors and Los Angeles Dodgers co-owner Peter Guber, Washington Wizards co-owner Ted Leonsis, and Magic Johnson’s purchase of esports team Team Liquid); Mike Minotti, *Philadelphia 76ers is First among NBA, NFL, and MLB Franchises to Own an Esports Team*, VENTUREBEAT (Sept. 26, 2016, 8:26 AM), <http://venturebeat.com/2016/09/26/philadelphia-76ers-is-first-among-nba-nfl-and-mlb-franchises-to-own-an-esports-team> [<http://perma.cc/F5GE-APRV>] (noting NBA team Philadelphia 76er’s acquisition and merger of esports teams Dignitas and Apex).

103. GAMERSALOON, <http://www.gamersaloon.com/home> [<http://perma.cc/K5RY-AGVW>].

104. *Id.*

105. *Gspotgaming.com Grand Opening*, GSPOT: THE OFFICIAL GAMING SITE (Aug. 19, 2007, 5:20 PM), <http://www.gspotgaming.com/blog/2007/08/gspotgamingcom-grand-opening.html> [<http://perma.cc/8USN-83R8>] (“The first game available for live money, is Halo 2. Shortly after that we will be releasing other games.”).

106. See GAMERSALOON, *supra* note 103; see also *Gspotgaming.com Grand Opening*, *supra* note 105.

“challenges,” websites like these could exist under federal gambling law. The games themselves, their outcomes, and the winnings associated with them are directly tied to individual player’s skills. Since a player was putting money on his own skill, the game became a game of “skill” rather than “chance,” thus falling outside the scope of federal gambling laws and many state gambling laws.

Treading closer towards more traditional notions of gambling, entrepreneurs began developing platforms for esports players to operate paid fantasy leagues through the UIGEA’s fantasy sport exemption.<sup>107</sup> In 2011, venture capitalists formed Vulcun, the first dedicated fantasy esports website.<sup>108</sup> The website allowed players to draft fantasy esports teams for cash and receive money for fantasy league outcomes, much like traditional fantasy sports sites.<sup>109</sup> In 2015, fantasy juggernaut DraftKings entered the arena, bringing heavyweight experience and publicity to the growing secondary market of esports betting.<sup>110</sup> However, as discussed below, DraftKings’s entry into the arena may cause more apprehension than interest due to a myriad of recent scandals that have rocked the pay-to-play fantasy sports league industry.<sup>111</sup>

While some scrambled for the legal fantasy esports betting market, others began entering the market to bet on the outcome of professional

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107. Eugene Kim, *Billion-Dollar Sports-Gambling Startups Draft Kings and FanDuel are Legal Because of Loophole in the Law*, BUS. INSIDER (Sept. 11, 2015, 8:50 AM), <http://www.businessinsider.com/why-draft-kings-and-fanduel-are-legal-2015-4> [<http://perma.cc/37SB-LQAD>].

108. John Gaudiosi, *Fantasy Esports Company Vulcun Offers \$1 Million in Prizes Out of the Gate*, [A]LIST (Mar. 4, 2015), <http://www.alistdaily.com/strategy/fantasy-esports-company-vulcun-offers-1-million-in-prizes-out-of-the-gate> [<http://perma.cc/Ry8U-5TA2>].

109. *Id.*

110. Grubb, *supra* note 51 (“[T]his movie is likely an attempt by DraftKings to futureproof its revenue stream.”).

111. *See generally* Steve Annear, *Maura Healey Says DraftKings Operation is Legal*, BOSTON GLOBE (Oct. 7, 2015), <http://www.bostonglobe.com/metro/2015/10/07/healey-says-draftkings-operation-legal-but-she-concerned-about-insider-trading/O0gcbQF3c6JuvFz2SCHHfO/story.html> (last visited Jan. 14, 2017); Fitz Tepper, *New York Governor Signs Daily Fantasy Sports Bill, DraftKings and FanDuel Can Operate Again*, TECHCRUNCH (Aug. 3, 2016), <http://techcrunch.com/2016/08/03/new-york-governor-signs-daily-fantasy-sports-bill-draftkings-and-fanduel-can-operate-again> [<http://perma.cc/V7BY-2DPT>]; Rodenberg, *supra* note 75.

esports matches.<sup>112</sup> In 2011, Pinnacle Sports began accepting bets on esports from non-United States-based customers and now claims that the volume of trades placed on video game matches has doubled every year since it entered the industry thereby requiring staff increases.<sup>113</sup> Pinnacle was not alone in its venture.<sup>114</sup> Datbet and E-Sports Bets also take bets from all over the world on professional esports match outcomes; however, like Pinnacle Sports, neither accepts bets from United States-based customers.<sup>115</sup> The restriction of these websites in the United States is no accident. Professional esports leagues may fall within the scope of PASPA as either an amateur sports organization<sup>116</sup> or a professional sports organization<sup>117</sup> and investors would rather avoid international legal conflict with foreign governments than invite it.

In spite of PASPA, professional esports betting operations are beginning to take root in the United States with Unikrn and its founder, Rahul Sood.<sup>118</sup> Agreeing with Professor Rose's sentiments on the inevitability of sports gambling legalization, Sood predicts that professional esports betting will be legalized in as little as two years.<sup>119</sup> Indeed, Sood

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112. See Keith Wagstaff, *Game On: Gamblers Want Part of Rising E-Sports*, NBC NEWS (Nov. 7, 2014, 11:28 AM), <http://www.nbcnews.com/tech/video-games/game-gamblers-want-part-rising-e-sports-n242086> [<http://perma.cc/5MW4-WPV7>].

113. *Id.* (“Since 2011, the year when Pinnacle began accepting bets on e-Sports, the volume of trades has doubled every year, Hudson said. The company has hired a team of eight e-sports traders responsible for setting lines and wagers.”).

114. *Id.*

115. *Id.* (“Pinnacle isn't the only one. Datbet and E-Sport Bets also take bets from all over the world—although none officially from the United States.”).

116. 28 U.S.C. § 3701(1)(A)–(B) (2012) (“The term ‘amateur sports organization’ means: (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate; or (B) a league or association of persons or governmental entities described in subparagraph [A].”).

117. *Id.* § 3701(3)(A)–(B) (“The term ‘professional sports organization’ means: (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate; or (B) a league or association of persons or governmental entities described in subparagraph [A].”).

118. See Mike Brown, *US Will Legalize E-Sports Betting in Two Years, Says Unikrn Founder*, INT'L BUS. TIMES (June 19, 2015, 12:25 PM), <http://www.ibtimes.com/us-will-legalize-e-sports-betting-two-years-says-unikrn-founder-1975274> [<http://perma.cc/PYL9-YB8Z>].

119. *Id.* (“The founder of an e-sports betting startup is preparing to expand into the U.S., claiming that the practice will become legal in the next two or so years.”).

believes that gambling can be a vessel used to heighten the esports experience and further, that by legalizing esports betting in the United States, Unikrn can pull esports betting out of the shadows and into the light where measures can be taken to legitimize the practice.<sup>120</sup>

However, sports gambling is still largely illegal in the United States because of PASPA<sup>121</sup> and the actions of current secondary market juggernauts like DraftKings and FanDuel, coupled with erupting tensions regarding the skins gambling market,<sup>122</sup> may be putting a wrench in the progress of innovators like Sood.

### III. THE PROBLEM

Presently, the problem is that esports is viewed against the backdrop of United States sports gambling law. Current sports gambling law is steeped in the history and tradition of professional and amateur sports like football, basketball, and baseball. Accordingly, all of the history and contention surrounding sports gambling is also projected upon esports. Indeed, professional sports organizations prompted the passage of PASPA because they were angry that state governments had created a gambling market to profit from their respective games.<sup>123</sup>

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120. *Start-up Unikrn Bets on E-Sports Wagering*, PHYS.ORG (June 19, 2015), <http://phys.org/news/2015-06-start-up-unikrn-e-sports-wagering.html#jCp> [<http://perma.cc/Z68V-W8YM>] (“We believe there is no better way to heighten the experience than through betting.’ Betting on e-sports is not legal in the United States, but Sood and his team are eager for wagering to be pulled from the shadows and into the light where measures can be taken to keep it honest. Unikrn is preparing a version of its service for the US market, where Sood predicted e-sports betting would be legal in two years or so.”).

121. 28 U.S.C. §§ 3701–3704.

122. See Joshua Brustein & Eben Novy-Williams, *Virtual Weapons are Turning Teen Gamers into Serious Gamblers*, BLOOMBERG (Apr. 20, 2016), <http://www.bloomberg.com/features/2016-virtual-guns-counterstrike-gambling> [<http://perma.cc/LSP2-RV89>] (explaining the background and separate issue of skins gambling in video games); see also Kyle Orland, *Valve Refuses Government Request to Cut Off Steam Skin Trading*, ARS TECHNICA (Oct. 19, 2016, 8:44 AM), <http://arstechnica.com/gaming/2016/10/valve-pushes-back-against-government-threats-over-steam-skin-gambling> [<http://perma.cc/GF2T-QYN9>].

123. I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 15 CONN. L. REV. 653, 665 (2012).

Another fear that traditional sports fans and organizations share with esports is collusion in organized professional matches.<sup>124</sup> This fear is not unfounded: the legalization of esports betting in South Korea has already led to serious accusations of collusion with organized crime, as well as large scandals that have driven professional players to attempt suicide.<sup>125</sup> Along with this fear of collusion is one of the underlying public policy reasons why fantasy sports and other forms of gambling are discouraged: regardless of regulation, the introduction of gambling runs the risk of tainting the human element of professional sports and esports alike.<sup>126</sup> When players cease to be seen as human beings and competitors and instead are seen as an elaborate commodity upon which to gamble money, conflict becomes inherent. Driving players to succeed under immense pressure is inexorable enough without the constant specter of a financial stake other humans have in the outcome of the game (as is the case with legalized sports betting). Indeed, on a broader scale, this notion of freedom from economic influence or expectation of reparation is a cited part of the seasoned history of amateur sports in the United States.<sup>127</sup>

Harkening back to Professor Rose's history of American gambling, it becomes clear that the precipitous tango of legalization and subsequent outlaw of gambling factors into the fabric of American gaming history. Legislation, in its "waves," mirrors the traditional approach taken by American laws designed not only to protect people from themselves but also to serve as part of a greater moral framework designed by policymakers in the pursuit of the ideal society.<sup>128</sup> The unintended consequence of this legislation is a dichotomy of markets. On the one

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124. See generally Brian Ashcraft, *League of Legends Pro Attempted Suicide after Tournament Scandal*, KOTAKU (Mar. 13, 2014, 5:30 AM), <http://kotaku.com/league-of-legends-pro-attempted-suicide-after-tournamen-1542880793> [<http://perma.cc/BYA5-VMAW>] (exemplifying collusion in esports).

125. *Id.*

126. Keith Wagstaff, *Game On: Gamblers Want Part of Rising E-Sports*, NBC NEWS (Nov. 7, 2014, 11:28 AM), <http://www.nbcnews.com/tech/video-games/game-gamblers-want-part-rising-e-sports-n242086> [<http://perma.cc/5MW4-WPV7>] (discussing gambling and its association with the temptation for esports players to cheat).

127. See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973–74 (N.D. Cal. 2014) (discussing the desire of the NCAA to preserve amateurism in collegiate athletics by imposing restraint on athlete remuneration aside from scholarships).

128. I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 365 (2010).



hand, in jurisdictions where gambling is legal, governments have access to a reliable cash flow from a billion dollar market.<sup>129</sup> On the other hand, lack of regulation and the legal “gray area” surrounding gambling, especially as it applies to video games and esports, create exploitative and fickle markets that operate on little more than legal ambiguity.<sup>130</sup>

For all of the above reasons, it seems that gambling—especially esports gambling—would face at best an uncertain future in the United States. In its current incarnation, esports gambling runs the risk of rampant growth at the expense of developers, consumers, and esports competitors alike. However, legalizing gambling on esports matches could in fact address many of society’s qualms with sports betting and potentially serve as a vessel for the legalization of sports gambling while also neatly fitting into the trajectory of the third wave of American gambling.

#### IV. THE SOLUTION

Simply stated: let the government legalize it, regulate it, and reap the reward. While the current law among the Wire Act, UIGEA, and PASPA restrict or prohibit sports betting,<sup>131</sup> esports is an ideal candidate for the next big advancement in gambling because of its nascent nature and position for growth. While explored further below, it must be conceded that esports betting and sports betting are likely to be considered one and the same by courts. Aside from fitting within PASPA’s definition of sports

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129. Chris Grove, *Esports Betting: Overview of the Market and Frequently Asked Questions*, ESPORTS BETTING REPORT (Apr. 25, 2016, 7:01 AM), <http://www.esportsbettingreport.com/guide> [<http://perma.cc/Y4YY-4VUB>].

130. See generally Evan Lahti, *CS:GO’s Controversial Skin Gambling, Explained*, PC GAMER (July 6, 2016), <http://www.pcgamer.com/csgo-skin-gambling> [<http://perma.cc/6CMH-Y9M3>]; Dustin Gouker, *Vulcun Exiting Fantasy Esports, Eyes Move to Twitch Chat Games*, LEGAL SPORTS REPORT (July 6, 2016, 11:54 AM), <http://www.legalsportsreport.com/10653/vulcun-leaves-fantasy-esports-market> [<http://perma.cc/DB2R-ZNH3>].

131. See *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) (holding the Wire Act not only expressly applied to sports betting but also could apply to other types of gambling); see also 31 U.S.C. § 5362(1)(A) (2012) (defining illicit bets or wagers under the UIGEA to include “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome”) (emphasis added); 28 U.S.C. § 3702 (2012) (stating that PASPA outlaws “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.”).

organizations,<sup>132</sup> esports athletes already enjoy traditional protections of sports law such as athletic visas.<sup>133</sup> Simply because esports is new and presents unique challenges to the law does not mean the law should be scratched out and written anew. On the topic of evolving technology and the law, some scholars have likened keeping up with the pace of new technological developments to “drinking out of a fire hose.”<sup>134</sup> With regards to esports, Professor Jennifer Rothman conceded that the law cannot shift with each new invention or business—in this case, esports.<sup>135</sup> She instead contends that “E-Sports [sic] provides a prime example of how new industries and new technologies can reveal new facets of IP law, as well as flaws in its current articulation.”<sup>136</sup> Further, she states that “new technologies provide an occasion for thinking deeply about broader guiding principles that are not wedded to any particular technology. If we become overly focused on specific technologies and specific industries, we will find ourselves reproducing the failings of [past amendments to the Copyright Act].”<sup>137</sup>

While Professor Rothman’s article dealt with esports in the context of intellectual property law, her assertion can similarly be applied to federal gambling statutes in the context of esports betting. Esports betting, in its varied forms, does present certain challenges to current gambling law. Most obviously, questions surrounding ambiguities in the law as to fantasy leagues and betting in esports have not yet been squarely settled by court or legislature alike.<sup>138</sup> Instead, gambling operators are left with a hodge-podge of federal and state laws that they are forced to reconcile if they wish

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132. 28 U.S.C. § 3701(1)–(2).

133. Tracey Lien, *StarCraft 2 Player Receives the Sport’s First US Athlete Visa*, POLYGON (Dec. 15, 2013, 11:00 AM), <http://www.polygon.com/2013/12/15/5212798/starcraft-2-player-receives-the-sports-first-us-athlete-visa> [<http://perma.cc/99N9-LJYC>].

134. Jennifer E. Rothman, Response, *E-Sports as a Prism for the Role of Evolving Technology in Intellectual Property*, 161 U. PA. L. REV. ONLINE 317, 318 (2013).

135. *Id.*

136. *Id.* at 328.

137. *Id.*

138. See Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 6 n.30 (2002).

to operate in full protection of the law.<sup>139</sup> In addition, secondary markets like skins gambling exist outside of both the scope and context of current gambling law.<sup>140</sup>

While it would be tempting to simply create a new body of law to regulate esports gambling, Professor Rothman's warning against hastily crafting laws to fit specific technologies and industries should be heeded.<sup>141</sup> Adding provisions to existing statutes that include or exclude esports gambling could disrupt secondary esports gambling markets. Currently, since the prevailing assumption is that esports betting is a game of chance like sports betting, esports betting sites have simply played "follow the leader" in rules and regulations affecting its sporting counterparts.<sup>142</sup> For example, when the Illinois Attorney General announced it would be outlawing daily fantasy sports betting in December 2015,<sup>143</sup> fantasy esports site Vulcun ceased operations in the state in synchronization with its sporting counterparts DraftKings and FanDuel.<sup>144</sup> This self-imposed application of the Attorney General's decision was based on the assumption that "daily fantasy sports" betting included esports betting sites like Vulcun. Figuratively upending the table and starting from scratch does a disservice to esports, traditional sports, and sports gambling as it ignores context, history, and comprehensive gambling law reform in favor of hastily drafted "quick fix" pieces of legislation. Repeating the mistakes of PASPA by sneaking amendments onto unrelated bills or sloppily augmenting existing law runs the risk of creating unforeseen problems—

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139. *See id.*

140. *See generally* Evan Lahti, *CS:GO's Controversial Skin Gambling, Explained*, PC GAMER (July 6, 2016), <http://www.pcgamer.com/csgo-skin-gambling> [<http://perma.cc/6CMH-Y9M3>].

141. Rothman, *supra* note 134, at 328 ("If we become overly focused on specific technologies and specific industries, we will find ourselves reproducing the failings of recent amendments to the Copyright Act . . .").

142. *See* Dustin Gouker, *Fantasy eSports Site Vulcun Shutting Down Real Money Play One Year After Launch*, LEGAL SPORTS REPORT (Jan. 4, 2016, 12:39 PM), <http://www.legalsportsreport.com/7133/vulcun-stops-real-money-fantasy-esports> [<http://perma.cc/WF3A-APMB>] [hereinafter Gouker, *Fantasy eSports*]; Brent Schrottenboer, *Illinois Rules Daily Fantasy Sports Illegal*, USA TODAY (Dec. 23, 2015, 11:41 PM), <http://www.usatoday.com/story/sports/2015/12/23/illinois-attorney-general-rules-daily-fantasy-sports-illegal/77852710> [<http://perma.cc/ZJ84-EECH>].

143. *See* Schrottenboer, *supra* note 142.

144. *See* Gouker, *Fantasy eSports*, *supra* note 142.

with an area of law already mired in ambiguity, such a solution is impracticable and unacceptable.

Instead, statutory interpretation favors Professor Rothman's suggestion of retrofitting statutes to esports over promulgating new law.<sup>145</sup> Title 28 of the United States Code provides the definition for sports organizations, defining them as anyone who "sponsors, organizes, schedules, or conducts a competitive game in which one or more athletes participate."<sup>146</sup> There is no reason why esports would not fall under the classification of the statute. Additionally, the United States government has issued P-1 visas to esports competitors for years.<sup>147</sup> The issuance of P-1 athletic visas recognizes esports competitors as athletes and consequently, their games as sports. Finally, esports sites like Vulcun already have taken advantage of PASPA's fantasy league exemption in several states to the tune of seven million dollars in 2015.<sup>148</sup> As such, it would be incredibly difficult to argue that in the eyes of federal law, esports is not legally a sport and thus should be exempt from federal gambling statutes. Permitting esports business owners, franchise operators, and others to reap the benefit of sports and gambling laws when convenient while disclaiming applicability when inconvenient would only add to the legal confusion of where esports currently stands. Clarity is needed both to level the playing field and eliminate the seemingly omnipresent shroud of legal ambiguity surrounding esports.

Industry leaders already believe that the legalization of esports betting on the direct outcome of competitive matches is on the horizon.<sup>149</sup> However, this impending legalization will neither be because of a legal loophole, as with fantasy sports, nor will it come about by disclaiming

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145. Rothman, *supra* note 134, at 329.

146. 8 U.S.C. § 3701 (2012).

147. See generally Michael McTee, *E-Sports: More Than Just a Fad*, 10 OKLA. J. L. & TECH. 70 (2014); Lien, *supra* note 133.

148. Samuel Lingle, *Vulcun Offers \$1 Million in Prizes for Fantasy Esports*, DOT ESPORTS (Feb. 2, 2015, 12:00 PM), <http://dotesports.com/league-of-legends/vulcun-1-million-dollars-fantasy-esports-1484> [<http://perma.cc/W3LK-9EJJ>].

149. Mike Brown, *US Will Legalize E-Sports Betting in Two Years, Says Unikrn Founder*, INT'L BUS. TIMES (June 19, 2015, 12:25 PM), <http://www.ibtimes.com/us-will-legalize-e-sports-betting-two-years-says-unikrn-founder-1975274> [<http://perma.cc/PYL9-YB8Z>] ("The founder of an e-sports betting startup is preparing to expand into the U.S., claiming that the practice will become legal in the next two or so years.").

current sports law. The reason esports gambling should be legalized is that it sits within the current trajectory of American gambling law and is positioned to address many long-held policy concerns about the legalization of gambling. Thus, the correct context in which to consider esports betting is not independent of the current dialogue surrounding sports betting, but as complementary to it. Society already accepts secondary market sports betting through the exceptions explicitly carved out in PASPA and the UIGEA.<sup>150</sup> Despite support for anti-gambling laws at the polls, voters do not seek active enforcement.<sup>151</sup> American citizens do not appear to be terribly concerned with the moral implications of sports gambling today: illegal bets on professional and collegiate football in the United States were projected to reach 95 billion dollars in 2015 and gaming research firms value a prospective legalized sports betting market in the United States at 12.4 billion dollars.<sup>152</sup>

Esports, because of its infancy and infrastructure, would be an ideal candidate for the legalization of sports gambling in the United States for several reasons. First, the gambling stakes are low both from a monetary standpoint and from a business standpoint.<sup>153</sup> Accordingly, professional esports leagues need not worry about such problems encountered in traditional sports gambling, like the alleged 15 billion dollar match-fixing scandal.<sup>154</sup> Such issues, if encountered, would be neither of the scale nor scope encountered in traditional sports. The segmentation of esports titles into numerous games (i.e. *League of Legends*, *Counter Strike: Global*

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150. 28 U.S.C. § 3704 (2012); 31 U.S.C. § 5362(1)(E)(ix) (2012).

151. I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 365–66 (2010) (“Surveys and election results have shown that voters want most of the anti-gambling laws to stay on the books, even if they do not want those laws to be actively enforced (unless they are used against a noisy neighbor).”).

152. David Purdum, *Research Shows U.S. Could Dominate Global Legalized Sports Betting Market*, ESPN (Sept. 9, 2015), [http://www.espn.com/chalk/story/\\_id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market](http://www.espn.com/chalk/story/_id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market) [<http://perma.cc/QL63-J7KY>].

153. Keith Wagstaff, *Game On: Gamblers Want Part of Rising E-Sports*, NBC NEWS (Nov. 7, 2014, 11:28 AM), <http://www.nbcnews.com/tech/video-games/game-gamblers-want-part-rising-e-sports-n242086> [<http://perma.cc/5MW4-WPV7>] (“The stakes are relatively small in e-sports—The five-player team that won the 2014 ‘League of Legends’ championship took home \$1 million in prize money, or less than soccer superstar Cristiano Ronaldo gets paid for a single game.”).

154. *Id.* (“So, while pro e-sports leagues don’t have to worry about \$15 billion international match fixing scandals, it’s still a concern.”).

*Offensive, Overwatch, Call of Duty, Defense of the Ancients, Hearthstone,* and more) make it difficult to collude or match-fix with the ease, scale, or potential return achievable in traditional sports betting.

Further, if statutory advances permitted esports gambling on a conditional basis, while money could prospectively flow to the newly legalized activity, the infancy and rapid expansion of esports would be better equipped to deal with the rapid influx of capital. The rapid growth, burgeoning corporate sponsorship, and financial support of esports means that new and innovative self-policing measures are incentivized as a natural part of the industry's growth and as such, can easily be implemented into existing professional league structures. For example, one of the largest professional esports leagues in the world, the Electronic Sports League,<sup>155</sup> has a policy of prohibiting players from betting on games in which they are the player, thereby mirroring contemporary professional athletic league policies.<sup>156</sup> The Electronic Sports League contracted with sports data provider SportsRadar last year to implement anti-fraud and collusion detection systems, again mirroring the best practices adopted by professional sports leagues.<sup>157</sup> The ease with which esports leagues can adopt new gambling policies and anti-fraud policies combat the policy motivation behind regulating gambling. Indeed, due to its infancy and international reach, policies such as these are born out of necessity because of the inadequacy of current gambling laws.<sup>158</sup> If esports leagues proactively craft policies and best practices that are in tune with the current

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155. ESLGAMING, <http://www.eslgaming.com> [<http://perma.cc/AQ85-52ML>].

156. See Wagstaff, *supra* note 153 (“We do not allow betting on games of a league the betting player is taking part in, and betting against yourself or your own team leads inevitably to disqualification,” Anna Rozwandowicz, head of communications for the ESL, wrote to NBC News.”); see also Chrystina Martel, *ESL Expands to North America with LA Studio*, ESL (Mar. 31, 2014), <http://www.eslgaming.com/news/esl-expands-north-america-la-studio-1799> [<http://perma.cc/L9TE-6HKV>].

157. *Sportradar Taps into Fast Growing eSports Market with ESL Partnership*, GAMING INTELLIGENCE (Oct. 9, 2015), <http://www.gamingintelligence.com/business/34409-sportradar-taps-into-fast-growing-esports-market-with-esl-partnership> [<http://perma.cc/4TK9-CKPF>] (“With an ever increasing volume of betting on esports competitions, expanding our anti-fraud initiative to also include match fixing, collusion and other activities related to illegal, underage and irresponsible betting, was the next logical step in our efforts to preserve and promote integrity across our many competitions.”).

158. See Wagstaff, *supra* note 153 (“‘It’s almost 100% on the leagues,’ Rose said. ‘It’s almost impossible for states, and even hard for the federal government, to enforce gambling laws outside of the United States.’”).

state of federal gambling law and compatible with the trajectory of American gambling law, the arguments against the legalization of esports gambling disappear.

Beyond league self-policing, advocates for esports gambling are stepping up regulation and quality control in esports betting, going beyond current efforts of traditional sports organizations. Last year, esports startup Unikrn announced a Competitive Integrity Certification Program for Esports.<sup>159</sup> The Unikrn program is comprised of a player code of conduct, standards for investigating possible violations of that code, and specific rules tailored to both Local Area Network (LAN) and online-based events.<sup>160</sup> The program encourages dialogue between players, teams, organizers, third parties, and key stakeholders with the goal of developing best practices that competitions can adopt to safeguard the competitive integrity of esports.<sup>161</sup> Such private oversight and ownership of policing measures extend beyond organized league controls to create an environment that is more regulated than current traditional sports models, even considering existing statutory safeguards. This differs from traditional sports organizations' approaches to gambling.<sup>162</sup> PASPA was born out of a professional sports lobby to stunt the growth of state gambling law.<sup>163</sup> Under this program, esports leagues are taking a proactive approach by integrating these policies rather than traditional sports' prohibitive approach.<sup>164</sup> This willingness to work with gambling

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159. *Unikrn Introduces First-Ever Competitive Integrity Certification Program for eSports*, BUS. WIRE (Oct. 21, 2015, 9:00 AM), <http://www.businesswire.com/news/home/20151021005054/en/Unikrn-Introduces-First-Ever-Competitive-Integrity-Certification-Program> [<http://perma.cc/3ZX8-MKWM>].

160. *Id.*

161. *Id.*

162. David Purdum, *Congress Reviewing 'Obsolete' Federal Gambling Laws, to Introduce New Legislation*, ESPN (Oct. 26, 2016), [http://www.espn.com/chalk/story/\\_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation](http://www.espn.com/chalk/story/_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation) [[HTTP://PERMA.CC/8DT4-8JMF](http://perma.cc/8DT4-8JMF)].

163. I. Nelson Rose, *Betting on New Jersey's Sports Betting*, GAMBLING AND THE LAW (Nov. 7, 2011), <http://www.gamblingandthelaw.com/blog/316-betting-on-new-jerseys-sports-betting.html> [<http://perma.cc/ZU5B-8L2W>] (“When the National Football League and other sports organizations were lobbying for PASPA, the lawmakers, at first, looked to Congress’s power to protect trademarks.”).

164. See Chris Spatola, *Sports Gambling and Governing with a Moral Compass*, THE HILL (Sept. 17, 2015, 6:00 AM), <http://thehill.com/blogs/pundits-blog/sports->

organizations sets esports apart from its traditional sports counterparts. Here, it is again important to reiterate that part of this proactive spirit flows from the legality of secondary gambling markets in other countries.<sup>165</sup> Since esports have global viewership<sup>166</sup> and global fan-bases,<sup>167</sup> gambling operators are incentivized to create programs that are both cutting edge and compliant with globalized gambling jurisdictions so that they might vie for their share of the esports gambling market.

Another area that distinguishes esports from traditional sports is the secondary market for gambling. One of the policy reasons that keeps traditional sports from endorsing gambling is the monetization of professional sports markets to the exclusion of professional sports leagues and franchises.<sup>168</sup> Since its passage, there has been animosity directed at PASPA and legislative support for a constitutional attack against it.<sup>169</sup> Aside from this momentum is the reality that secondary markets for video games do not exist in the same magnitude and degree of ownership encountered in traditional sports.<sup>170</sup> A key difference at the outset is that there is no players association or union in esports for the statute to clash with, at least in a traditional sense.<sup>171</sup> Even assuming there were, it is

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entertainment/253911-sports-gambling-and-governing-with-a-moral-compass  
[<http://perma.cc/QMN4-UXCA>]; *Unikrn Introduces First-Ever Competitive Integrity Certification Program for eSports*, *supra* note 159.

165. Wagstaff, *supra* note 153.

166. *Id.*

167. *Id.*

168. I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 40–42 (2d ed. 2009).

169. I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 687 (2012) (“The constitutional arguments against PASPA . . . are many, and there is good reason to believe PASPA will be declared unconstitutional. Even at the bill’s passage, Senator Charles Grassley of Iowa and the DOJ argued PASPA was unconstitutional.”).

170. See Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1535–39 (2013).

171. Bryce Blum, *An Esports Lawyer Explains How the New Team ‘Union’ Will Push Esports Forward*, DAILY DOT (Oct. 4, 2015, 11:54 AM), <http://www.dailydot.com/esports/esports-lawyer-bryce-blum-team-union> [<http://perma.cc/4W4F-7FSA>] (“Before I can dive into some of the pros and cons of this news, I need to make one thing clear: this is not a union . . . [t]hese 10 teams have united to lobby and act in their common



unclear whether such a hypothetical players association would oppose the legalization of esports gambling, as leagues and sponsors alike seem willing to work with self-policing measures and gambling-friendly policies.<sup>172</sup> It is common knowledge that esports is hardly broadcast in the home as a great American pastime.<sup>173</sup> This difference is what makes esports the perfect candidate for the first wave of legalizing sports gambling. Esports leagues, unlike the MLB, the NBA, or the NFL, have large international audiences.<sup>174</sup> It makes little sense for the governing powers of esports leagues to advocate for the outlaw of esports betting in the United States when betting services already operate unimpeded in other international jurisdictions and in some cases, have sponsored teams or players already housed in the United States.<sup>175</sup> It would instead seem more prudent to both legitimize esports and exploit secondary markets such as gambling to maximize esports-derived profits via legalization of direct betting on the outcome of matches. Esports gambling could provide more mainstream exposure to esports and secondary market opportunity while serving a dual purpose as the test case for the legalization of sports gambling as a whole.

Still another consideration to weigh with the legalization of esports gambling is the overall trajectory of sports gambling and video game gambling surrounding esports. There are already many legitimate and legal video game gambling services available to players.<sup>176</sup> Individual betting on

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interests. They will undoubtedly have more influence as a result. But that doesn't make this a union.").

172. *Id.* ("The current crop of owners, by in [sic] large, understand the critical value of their player, treat them well, and compensate them fairly.").

173. See Katherine E. Hollist, Note, *Time to Be Grown-Ups about Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 827–28 (2015).

174. Wagstaff, *supra* note 153.

175. *Id.* ("Pinnacle isn't the only one [accepting bets on esports]. Datbet and e-Sport Bets also take bets from all over the world—although none officially from the United States."); see also Dejan Zalik, *A King Enters the Game: DraftKings Arrives on the Fantasy Esports Scene*, ESPORTS BETS (Sept. 28, 2015), <http://www.esportsbets.com/694/daily-fantasy-sports-giant-draftkings-enters-esports-market> [<http://perma.cc/B4XM-ZEWC>] (noting DraftKings sponsorship of U.S. esports teams compLexity Gaming, CLOUD9, Counter Logic Gaming, and Team SoloMid).

176. See generally *Gspotgaming.com Grand Opening*, G-SPOT: THE OFFICIAL GAMING SITE (Aug. 19, 2007, 5:20 PM), <http://www.gspotgaming.com/blog/2007/08/gspotgamingcom-grand-opening.html> [<http://perma.cc/8USN-83R8>].

video games is currently legal under federal and state gambling laws,<sup>177</sup> as one-on-one competitions for money are based predominantly on skill and not on chance. In a matchup system that verifies through a combination of screenshots and the honor system, players can essentially play monetized “pickup” matches of games for money.<sup>178</sup> Other than sitting at a local basketball court, baseball field, or football arena and hoping for someone to come by to challenge, traditional sports have no such individual betting analog, and certainly not with a worldwide and instantaneous pool of players to pull from. While these actions fall outside the definition of “gambling,”<sup>179</sup> they make up the mosaic of secondary markets that consumers view as acceptable, healthy, and worth spending money on. These markets have flourished in spite of United States law.<sup>180</sup> Expanding the activity to legalized esports betting would realize the bigger picture that all team owners and players want in any sport—broad segments of seamless secondary markets integrated into the esports fan experience and economy that are also symbiotic with team structure, league structure, and the law.

In sum, esports is not a solution for the ailments of the current state of federal gambling law. Drastic change is needed to reconcile constitutional considerations with states’ rights and adapt regulations to meet society’s expectations and moral views on gambling laws. However, with the regulation and legalization of new forms of gambling on the rise, perhaps esports can bring us one step closer to the “inevitable” legalization of sports gambling in the United States.<sup>181</sup> The legalization of esports betting

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177. 31 U.S.C. § 5362 (2012).

178. G-SPOT: THE OFFICIAL GAMING SITE, <http://gspotgaming.com> [<http://perma.cc/6Q3K-2N6U>].

179. *Gambling Law and Legal Definition*, US LEGAL, <http://definitions.uslegal.com/g/gambling> [<http://perma.cc/UCN6-FP88>] (“Gambling is accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or other thing of value.”).

180. See Fitz Tepper, *New York Governor Signs Daily Fantasy Sports Bill, DraftKings and FanDuel Can Operate Again*, TECHCRUNCH (Aug. 3, 2016), <http://techcrunch.com/2016/08/03/new-york-governor-signs-daily-fantasy-sports-bill-draftkings-and-fanduel-can-operate-again> [<http://perma.cc/V7BY-2DPT>]; Gouker, *Fantasy eSports*, *supra* note 142.

181. Rose & Bolin, *supra* note 169, at 686 (“As gambling continues to expand, PASPA probably will not endure. As more and more types of legal gambling are added, some states will likely want to add sports betting, as a natural extension of the Third Wave of legalized gambling. Even states with grandfathered-in permissions under PASPA may wish to expand their sports

is unique because it aligns with voter desire to legalize gambling<sup>182</sup> while still keeping with the underpinnings associated with the ebb, flow, and evolution of gambling law. Since creating new law could potentially run contrary to the standing policy of gambling law,<sup>183</sup> it is important to not treat the legalization of esports gambling as a solution for the problems of existing gambling law, but instead as a way to fix public opinion, policy, and law into a functioning system that can serve gambler, moralist, and state coffers alike.

In the end, the logical conclusion is the extension of sports gambling law, starting with esports. Esports strikes the balance of addressing contemporary societal concerns from moral and structural standpoints with sports gambling. It is more regulated and self-policed than traditional sports gambling in its current form.<sup>184</sup> Esports does not have a history of regulation, reregulation, and deregulation associated with its growth as traditional sports do because it is both new and inherently distinct from traditional sports.

## V. CONCLUSION

Esports promises to be a gateway to progress and change in United States gambling law. It is better situated than traditional sports to herald in a new era of gambling because: (1) its infancy and receptiveness to scaling and change make it better suited than the traditional sports industry to adopt sports betting; (2) the novelty of esports divorces it from the polarizing history of traditional sports gambling in the United States; (3) esports has no vested economic interest in halting the development of a secondary gambling market; and (4) a budding gambling infrastructure in

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betting operations beyond their 1970s and 1980s scope, such as adding internet sports betting or other new kinds of sports betting. Delaware, for example, is unhappy being limited to parlay bets.”).

182. Rose, *supra* note 151 (“Surveys and election results have shown that voters want most of the anti-gambling laws to stay on the books, even if they do not want those laws to be actively enforced [unless they are used against a noisy neighbor].”).

183. See Rothman, *supra* note 134, at 328 (“E-Sports provides [sic] a prime example of how new industries and new technologies can reveal new facets of IP law, as well as flaws in its current articulation . . . . [N]ew technologies provide a [sic] occasion for thinking deeply about broader guiding principles that are not wedded to any particular technology. If we become overly focused on specific technologies and specific industries, we will find ourselves reproducing [past] failings.”).

184. See generally Rose, *supra* note 151.

esports means that American esports is “gambling ready.” Society has seen gambling law cycle through boom and bust. In its third wave, it has been chiseled from blanket illegality to fantasy league betting to one-on-one betting to the current model of regional and state sport betting in parts of the United States.<sup>185</sup> The next step in the third wave of sports gambling is its outright legalization<sup>186</sup>—and that legalization should start with esports.

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185. See generally I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361 (2010).

186. See generally I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 15 CONN. L. REV. 653 (2012).