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Is Online Sport Betting Illegal in California?

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I. INTRODUCTION

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA),[1] which barred states, with limited exceptions, from legalizing sports betting within the state. In 2018, however, the Court declared PASPA unconstitutional in *Murphy v. NCAA*[2] as a violation of retained state's rights under the 10th Amendment.[3] Although the Court left

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1. 28 U.S.C. § 3701 (1992).

2. Murphy v. NCAA, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018).

3. The PAPSA provision at issue here— prohibiting state authorization of sports gambling— violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop

open the option for Congress to use its commerce power to ban sports betting directly, Congress has shown no desire to exercise that option.[4] Thus, presently, states have the option of legalizing sports betting within their state largely free of federal restraint.[5]

Since the Court's decision in *Murphy v. NCAA*, over 20 states have legalized sports betting through legislation or acquiescence.[6] In California, Senator Bill Dodd and Assemblyman Adam Gray have introduced measures to the state legislature to legalize sports betting in California, but the measures have failed to advance in the legislature.[7] There are several causes for inaction: (1) general opposition to gambling by some groups;[8] (2) opposition from the Indian Tribes that operate tribal casinos within the state

legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine. *Id*. at 1478.

4. Senators Charles Schumer and Orrin Hatch introduced the "Sports Wagering Market Integrity Act of 2018 (S.3793), available at https://www.congress.gov/bill/115th-congress/senate-bill/3793/text. The bill was referred to committee and no further action was taken. *See* Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill in Senate*, LEGAL SPORTS REP. (Dec. 19, 2018), https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/ (reporting lack of bipartisan support for the measure and opposition from commercial gambling interests).

5. *See infra* Part VI of this paper (clarifying that federal statutes that criminalize sports betting require that the conduct be criminal in at least one relevant jurisdiction).

6. *See* Kendall Baker, *The States that have Legalized Sports Betting*, AXIOS (Aug. 7, 2020), https://www.axios.com/sports-betting-legalized-what-states-4a26bb27-d88f-4adf-a908-6e10441ed855.html (listing states that permit some form of sports betting, other than horse racing).

7. Senator Bill Dodd introduced Senate Constitutional Amendment (SCA) 6 during the California Legislature's 2019-2020 regular session, available at: https://trackbill.com/bill/california-senate-constitutional-amendment-6-gambling-sports-wagering/1761818/. SCA 6 would have specifically addressed many of the gambling issues addressed in this paper. It was pulled from consideration by Senator Dodd in June, 2020. See *infra* note 9 (clarifying that while Senator Dodd blamed the bill's failure on deadlines created by the COVID-19 pandemic, opposition from Native American tribal casino owners may have also played a role). See Jill R. Dorson, *Not This Time: California Sports Betting Deal Dead in Legislature*, SPORTSHANDLE (June 22, 2020), https://sportshandle.com/no-sports-betting-california/ (noting opposition from Native American tribal leaders to SCA 6); Assemb. Const. Amend. 16, 2019 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200ACA16 (adding that Senator Dodd and Assemblyman Adam Gray had previously co-sponsored a bill to legalize sports betting in California, and that bill also failed to move forward).

8. Public opposition to gambling is often led by religious organizations, which see gambling as a corrupting influence. *See, e.g.*, John Stemberger, *Is Gambling Morally Wrong?*, FLORIDA FAMILY COUNCIL, https://flfamily.org/wp-content/uploads/2011/12/Our-Opposition-to-Gambling1.pdf) (last visited Nov. 2, 2021) (noting that John Stemberger is the President and General Counsel for the Florida Family Policy Council, which defines its mission as: "Our mission is to protect and defend life, marriage, family and liberty through education, advocacy, and empowerment so that we live in a nation where God is honored, life is cherished, families thrive, and religious liberty flourishes."); Dallin H. Oaks, *Gambling*, THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS (from an address delivered on Jan. 6, 1987), https://www.churchofjesuschrist.org/study/ensign/1987/06/gambling-morally-wrong-and-politically-unwise?lang=eng (providing the viewpoint of Dallin Oaks, a leader of the Mormon religion, that opposition to gambling is not limited to religious concerns); ANTHONY N. CABOT & KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 28-29 (Carolina Academic Press 2d ed. 2016) (discussing views of Patrick Devlin and William Eaditon, who argued that gambling is undesirable on ethical and utilitarian grounds).

pursuant to compacts with the State of California;[9] and (3) opposition from operators of other legal gambling operations in California, such as Cardrooms and Racetracks.[10] The general opposition to gambling is based on moral or religious grounds. The specific opposition by existing gambling interests is based on economics: Legalizing sports betting, particularly mobile sports betting, may discourage patronage at existing stationary gambling sites.

The underlying assumption that both proponents and opponents of sports betting have is that sports betting is currently illegal in California, and legislation or a constitutional amendment is necessary to allow sports betting in the state. There is, however, a legitimate argument that online sports betting, if properly structured, is not illegal in California. And, if that is so, it is also not illegal under federal law. This article lays out that argument.

More importantly, even if sports betting is currently illegal in California, the attitude towards sports betting in particular and gambling generally reflects California's (and perhaps the Nation's) oftentimes haphazard approach to gambling regulation. Under California law, there is no consistent approach to gambling. For example, gambling is promoted in some situations,[11] while in other cases, gambling is forbidden.[12] Also, in certain instances, gambling is merely tolerated;[13] while other times,

9. *See* Matthew Krendell, *For California Sports Betting, the Battle Between Cardrooms and Tribes Looms Large*, LEGAL SPORTS REP. (Dec. 19, 2019), https://www.legalsportsreport.com/36359/ca-cardrooms-sports-betting/.

10. *Id.*

11. *See infra* notes 76-78 and accompanying text (presenting the example of the California State Lottery as a situation where gambling is promoted).

12. *See* Cal. Penal Code §§ 330a-330.9 (noting that in California it is illegal to own, possess, or operate a slot machine, which is defined as a "slot or card machine, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played by placing or depositing therein" anything of value or redeemable for a thing of value and which is won or lost as a result of the operation of the machine, appliance, or device by reason of hazard or chance); *infra* Part II.D (explaining that the only exception permitting slot machines for gambling purposes is their allowance at Tribal Casinos, pursuant to tribal compacts with the state, which are discussed further in Part II.D).

13. For example, so called "loot boxes." "Loot boxes" (or virtual prizes) allow players of online games to pay for the chance to acquire a prize that will help the player advance in the game. "Loot boxes" have been criticized as a form of gambling because of the significant chance element – most "loot boxes" do not contain tools that will materially help the player. *See* David Lazerus, *Loot Boxes: Kid Stuff of Gambling*?, L.A. TIMES, Dec. 11, 2020 ("It's only reasonable that if games employ an element of gambling to make money, such wagers be treated as any other form of gambling."); Sheldon Evans, *Pandora's Loot Box* (St. John's Legal Studies Paper No. 20-0015, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733910. *See also* Contra Mason v. Mach. Zone, Inc., 140 F. Supp. 3d 457 (D. Md. 2015), aff'd, 851 F.3d 315 (4th Cir. 2017) (outlining that courts have rejected the contention that "loot boxes" involved gambling). In *Mason*, a player had the option, using real money, to purchase "digital gold," which the player could spend in the game's virtual casino. The casino offered a chance to bet on a spinning wheel, which in turn could produce a virtual prize which might contain tools that would help the player advance in the game. The District Court and Fourth Circuit Court of Appeal, rejected the claim that the virtual casino constituted gambling because the prizes had no real-dollar value attached to the prize; the prizes were only useful in the game itself and were not redeemable for real money, or the equivalent. The District Court, applying California law, also rejected

gambling is met with strong anti-enforcement action.[14] California lacks a consistently applied and thought-out approach on how gambling should be addressed in the State. This is perhaps most evident when we examine the assumed illegality of sports betting in California.

II. HISTORY OF GAMBLING IN CALIFORNIA

When California was admitted to the Union in 1850, gambling was common within the State;[15] however, within a few years of its admittance, public acceptance of gambling withered, and localized efforts to regulate gambling were attempted, generally with increasing success.[16]

In the aftermath of the Civil War, the California legislature enacted the first general criminal gambling statute in 1872.[17] More importantly, for purposes here, the legislature in 1909 enacted the predecessor to what is now Cal. Pen. Code § 337a. Section 337a specifically addresses bookmaking, which is closely associated with sports betting.[18] The key provision in current Section 337a(a) is subsection 6, which provides that it is a crime to "lay[], make[], offer[] or accept[] any bet upon the result of any trial, or contest of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus."[19] The role of this provision in

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the contention that "loot boxes" should be treated as "slot machines" because "loot boxes" were exclusively "software," whereas applications of California's ban on slot machines to video games, e.g., video poker, involved both "software" and "hardware". In other words, the court took the position that software downloaded into a device, such as a computer or smart phone, is not a machine, apparatus, or device under Cal. Penal Code § 330a. *See supra* note 12.

14. For example, internet gaming parlors, "internet cafes," allow patrons to purchase computer time. Along with the purchase, patrons receive points or credits that they may use to play on devices that resemble traditional gambling devices, such as roulette wheels, slot machines, etc. *See* People ex rel. Green v. Grewal, 352 P.3d 275 (Cal. 2015) (noting that the court rejected contentions that these transactions were for amusement and upheld the District Attorney's contention that the devices were "slot machines").

15. Roger Dunstan, *Gambling in California*, CAL. RSCH. BUREAU (CRB-97-003, 1997), https://www.standupca.org/reports/Gambling%20in%20California-1997.pdf (noting that between 1849 and 1855 gambling was widespread in California, with both state and local governments licensing gambling establishments).

16. *Id.* (noting that by the 1860s, the tide had turned and gambling became subject to legal scrutiny, with scrutiny strengthening over the next 50 years).

17. Cal. Penal Code § 330 (noting that Section 330 was enacted in 1872 as part of California's codification movement and criminalized a number of specific games and gambling formats).

18. Bookmaking is the practice of determining odds on contests or events and receiving money on the outcome of those contests or events. The association between bookmaking, sports betting, and criminal activity was a recurrent theme in legislative debates regarding sports betting. *See, e.g.* Virginia A. Seitz, *Whether Proposals By Illinois And New York To Use The Internet And Out-Of-State Transaction Processors To Sell Lottery Tickets To In-State Adults Violate The Wire Act, Memorandum Opinion For The Assistant Attorney General, Criminal Division* 8-9 (2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf, at 8-9 (noting that Congress's overriding goal in the Wire Act (18 U.S.C. § 1084) was to stop the use of wire communications by bookies for sports gambling).

19. Cal. Penal. Code § 337a(a)6.

determining whether sports betting is legal or illegal in California will be addressed later in this paper.

Although the California Penal Code criminalizes a number of gambling activities, the reality in California is that there are many expressly legal opportunities to gamble, subject to regulation by the State. In these contexts, gambling is unlawful only to the extent it is conducted outside the regulated environment.

A. HORSE RACING

Betting on horse racing was legal in California until 1909 when the Legislature banned pari-mutuel wagering.[20] In 1933, by Initiative, the California Constitution was amended to allow pari-mutuel wagering on horse racing, effectively negating the 1909 legislative ban.[21] The Legislature responded by amending Penal Code Section 337a to except pari-mutuel wagering at licensed facilities from the prohibition on pooling of bets.[22] Since that date, horse race wagering has been a legal form of gambling in California. In 2001, California legalized off-site betting and account wagering on simulcasted out of state and international horse races without the consent of race participants.[23] This allows racing tracks to accept bets on horse racing anywhere in the world as long as the bets are placed on the racetrack premises.

B. CARDROOMS

Cardrooms have been in operation in California since California became a state.[24] California cardrooms range from one to two tables to larger cardrooms with several hundred tables.[25] Cardrooms offer a variety of gaming opportunities, although the dominant game is poker. California state

20. CHARLENE WEAR SIMMONS, GAMBLING IN THE GOLDEN STATE, 1998 FORWARD (2006).

21. *See* Proposed Amendments to Constitution and Propositions, Special Election June 27, 1933, 5 (1933), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1313&context=ca_ballot_props (noting that California Proposition 3 was a legislature-sponsored measure to amend the California Constitution to permit betting on horse racing at state-licensed racetracks, and thereby raise state revenues, which had been adversely impacted by the Great Depression).

22. *See* Cal. Const., art. IV, § 19(b) (outlining that the California Constitution confers authority to the Legislature to provide for the regulation of horse racing and horse race meetings and wagering on the results); Cal. Bus. & Prof. Code, §§ 19400-19667 (stating that the Legislature has enacted a comprehensive scheme to implement that authority); Cal. Bus. & Prof. Code § 19420 (noting that the authority to regulate horse race betting is vested in the California Horse Racing Board); Cal. Bus. & Prof. Code § 19440(a)(1) (clarifying that the California Horse Racing Board's authority includes adopting rules and regulations for lawful wagering on horse races).

23. In 2001 online betting and off-tract betting were authorized by Assembly Bill 471 and took effect in 2002. *See* Assemb. B. 471, 2001 Sess. (Cal. 2001) (noting that Section 9.5 repealed the requirement in Bus. & Prof. Code 19595 that betting was limited to on-premises races and Section 10 permitted online wagering through advanced deposit accounts).

24. SIMMONS, *supra note* 20, at 107.

25. *Id.* A list of licensed California Cardrooms is maintained by the California Gambling Control Commission and is viewable on the Commission's website: http://www.cgcc.ca.gov/?pageID=ActiveGEGE.

voters rejected an effort by the Cardroom industry to have on-site slot machines.[26] Cardrooms cannot offer "house-banked" games, such as blackjack or baccarat. A "house backed" game is one in which the house (e.g., casino) participates in the game, taking on all comers, paying all winners, and collecting from all losers.[27] Cardrooms may, however, offer blackjack or baccarat if other players at the table bank those games.[28] In this form, third-party players sit at the table to act as the bank by accepting the "player-dealer" position – players bet against the third-party player, while the cardroom dealer simply distributes the cards but is not otherwise involved in the action. The cardroom profits from hosting the game by taking a percentage of the wagers ("Rake"). Under guidelines issued by the California Attorney General in 2016, the position of "banker" must be rotated among the players at the table every 60 minutes, but the offer may be declined, as it consistently is by the players at the table who do not want to assume the financial obligations of being the "bank." If the offer is rejected, the "third-party player" may continue to function as the "bank" after a two-minute recess.[29] As of the writing of this paper, the California Gambling Control Commission is considering changes to the Attorney General's approved procedures, but has not, as of yet, implemented any changes..[30]

C. LOTTERY

Lotteries in the United States date back to the colonial period. Lotteries helped finance the American Revolution;[31] indeed, it may be said America owes its existence to a lottery.[32] This did not, however, endear lotteries to the

26. *See* California General Election Official Voter Information Guide, 8 (2004), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2236&context=ca_ballot_props (noting that while the measure was soundly defeated, Proposition 68 on the November 2004 General Election ballot would have permitted race tracks and card rooms to have slot machines, subject to the condition that Native American Casino operators failed to agree to a punitive increase to the amount of fees they would have to pay the State of California to operate their Tribal casinos).

27. Sullivan v. Fox, 235 Cal. Rptr. 5, 8 (Ct. App. 1987).

28. Cal. Penal Code § 330.11.

29. Advisory Letter from Kamala Harris, Attorney General of the State of California (June 30, 2016), to all California Gambling Establishments, https://www.uspoker.com/wp-content/uploads/2016/07/Rotation-Letter-CA.pdf.

30. Letter from Stephanie K. Shimazu, State of California, Department of Justice, Regulations Workshop –December 18, 2019, https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/workshop-letter-120319.pdf (providing the text of the proposed new regulations).

31. Lotteries became an issue in the drive for independence of the colonies. The colonies protested the crown's rules for holding lotteries. In 1769, the crown tried to prevent lotteries from occurring without its permission. Once the war of independence started, the Continental Congress voted for a $10 million lottery to finance the war. The lottery had to be abandoned, however, because it was too large and the tickets could not be sold. Dunstan, *supra* note 15, at Part II. *See also* Becky Little, *Lottery Tickets Helped Fund America's 13 Colonies*, INSIDE HIST. (updated Oct. 11, 2019), https://www.history.com/news/13-colonies-funding-lottery.

32. MATTHEW SWEENEY, THE LOTTERY WARS: LONG ODDS, FAST MONEY, AND THE BATTLE OVER AN AMERICAN INSTITUTION 15-20 (2009) (noting that the Virginia Company's Jamestown settlement, England's first permanent settlement in North America, was largely sustained by a lottery).

public or politicians. America's relationship with lotteries has zigzagged between love and hate.[33]

Lotteries fell into disfavor in the first half of the Nineteenth Century due to evidence of corruption and fraudulent operation of some lotteries.[34] The demise of lotteries was also driven by a significant revival of religious attitude during the "Great Awakening" that began in the 1820s and lasted through much of the Nineteenth Century.[35] The main exception was the Louisiana Lottery that commenced in 1868 shortly after the Civil War and lasted, in one form or another, until 1907.[36] The Louisiana Lottery had a national draw because players could participate by entering through the U.S. mail. However, the Louisiana Lottery was essentially killed when Congress outlawed the use of the mail to purchase lottery tickets.[37] After the demise of the Louisiana Lottery, no legal lotteries operated in the United States for almost 60 years.

Recently, Americans have fallen back in love with lotteries.[38] In 1964, New Hampshire revived the lottery.[39] Since then, the great majority of states have embraced lotteries. As of 2010, 43 states, the District of Columbia, Puerto Rico, and the Virgin Islands offer government operated lotteries.[40] For fiscal 2016, United States lottery sales totaled $80.5 billion.[41] New York was the largest ($9.69 billion), followed by California ($6.28 billion).[42]

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33. *See supra* notes 31 and 32.

34. Dunstan, *supra* note 15, at Part II.

35. As moral rigor increased in this field [Temperance], so did it in others. The Sabbath was protected by an organization which became national in 1826. Dancing and theater-going became increasingly suspect. Lotteries, which once had financed buildings for both Harvard and Yale and innumerable churches, also fell under the ban. Obscenity and profanity came to be defined in far more religious terms, and in due course these evils aroused the crusading impulse of other moral reformers. Gradually, American would come to identify Puritanism and blue nosed Victorianism. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 415-454 (Yale University Press 1st ed. 1972) (noting that although the primary social concern during this Awakening was Temperance, religious revivalism included gambling in its ban).

36. *See* CABOT & MILLER, *supra* note 8, at 677-78

37. Section 3894, Revised Statutes (U.S. Comp. Stat. 1901, p. 2659 (1890). The statute was upheld in Ex Parte Rapier, 143 U.S. 110 (1892). The statute is presently codified at 18 U.S.C. § 1302. In 1895, Congress expanded this ban on the use of the mail by banning the interstate transport of lottery tickets, now codified at 18 U.S.C. §1301. With the reemergence of state-run lotteries in the second half of the twentieth century (see text and notes 38-43), in 1975 Congress enacted legislation exempting state-run lotteries from the bans noted above. Pub. L. 93-583, 88 Stat. 1916 (1975), now codified at 18 U.S.C. §1307.

38. SIMMONS, *supra* note 20, at 87 ("Lotteries are the most popular of all legal wagering games.").

39. *Id.*; CABOT & MILLER, supra note 8, at 678. The origins of the New Hampshire lottery are discussed on the lottery's website: https://www.nhlottery.com/About-Us.

40. *See Lottery Payouts and State Revenue*, 2010, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/financial-services-and-commerce/lottery-payouts-and-state-revenue-2010.aspx (last visited Nov. 2, 2021) (reporting gross lottery revenues of $53 billion in 2010, but note that the number of states participating in lotteries has increased since 2010).

41. S. Lock, *Sales of State Lotteries in the United States from 2009 to 2020*, STATISTA (Mar. 2, 2021), https://www.statista.com/statistics/215265/sales-of-us-state-and-provincial-lotteries/.

42. S. Lock, *Sales of Lotteries in the United States in 2020, by state*, STATISTIA (Mar. 4, 2021), https://www.statista.com/statistics/388238/sales-of-lotteries-by-state-us/.

Several lotteries are multi-state in that sales from different states are aggregated for a common drawing e.g., "Mega-Millions" and "Powerball." The multi-state lotteries are operated by the Multi-State Lottery Association and presently consist of 34 states, including California.[43]

D. TRIBAL CASINOS

The Indian Gaming Regulatory Act (IRGA)[44] provided the foundation for the dramatic growth of commercial casinos owned by Native-American tribes (Tribal Casinos). IRGA divides gambling into three classes: Class 1 consists of traditional tribal gambling games; Class 2 consists of bingo and non-house banked games, such as poker; Class 3 consists of commercial casino gambling, such as slot machines, video poker, house-backed table games, etc. IRGA allows each federally recognized tribe to enter into a compact with the state to permit Class 3 type gambling and requires the state to negotiate in "good faith" regarding proposed compacts.[45] In 2000, California voters approved constitutional Initiative 1A, which authorized the governor to negotiate compacts, subject to legislative approval.[46] Games allowed by Proposition 1A include: (1) slot machines, (2) lottery games, and (3) house-backed and percentage card games.[47] As of November 2016, the Legislature has approved 74 compacts.[48] California tribal casinos had gambling revenues in 2016 of $8.4 billion, which was approximately 25% of total Tribal casino gambling revenue in the United States.[49] By comparison,

43. *See* MULTI-STATE LOTTERY ASSOCIATION (MUSL), http://www.musl.com/ (last visited Nov. 2, 2021) (listing the members of MUSL, a non-profit, government-benefit association owned and operated by its member lotteries).

44. *See* 25 U.S.C. §§ 2701 et seq.; Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99 (2010) (noting that the Mr. Ducheneaux was lead counsel on Indian affairs in the House during the period the legislation was drafted, considered, and ultimately enacted, and that IRGA was the culmination of a contentious, politically divisive dispute between the States and Native American tribes regarding the rights of the tribes to offer gambling games on reservation lands).

45. 25 U.S.C. § 2710(d)(1) (requiring that State and Indian tribe enter into a compact before Indian tribe can offer Class III gambling games); 25 U.S.C. § 2710(d)(3)(A) (requiring State to negotiate in "good faith" with Indian tribe to enter into a compact permitting Indian tribe to offer Class III gambling games).

46. Cal. Const. art. IV, § 19.

47. Cal. Const. art. IV, § 19(f)(amended by Proposition 1A):
"Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slow machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compact."
Available at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=IV.

48. A list of approved compacts is maintained by the California Gambling Control Commission, available at http:/www.cgcc.ca.gov/?pageID=compacts.

49. Mark Anderson, *California Tribal Casino Growth Outpaces Nation*, SACRAMENTO BUS. J. (Oct. 12, 2018), available at https://www.bizjournals.com/sacramento/news/2018/10/12/california-tribal-casino-growth-outpaces-nation.html.

Nevada's gambling revenue in 2016 was $10.76 billion.[50] It would not be an understatement to say that Tribal Casinos are large and growing businesses in California.[51]

E. OTHER FORMS OF GAMBLING

California permits limited forms of gambling by organizations exempt from taxation under California law.[52] The types of games allowed include: (1) bingo, (2) poker, and (3) raffles. These games are subject to regulation, but the extent to which the State enforces them against the sponsoring organization is unclear. For example, charitable poker fundraisers require annual registration with the Bureau of Gambling Control, are limited to one fundraiser per year, have limits on prizes, the event must retain 90% of the fundraising revenues, and require a certain amount of record keeping.[53] There are no reported cases of recent prosecution or law enforcement activity related to these requirements. It appears that under-enforcement (perhaps non-enforcement is a more appropriate term) is the norm.

F. SPORTS BETTING

Sports betting does not fit into any of these categories of legal gambling in California. As noted earlier, the consistent position uttered by commentators is that sports betting is illegal where it has not been made legal.[54] But perhaps sports betting does not need to be made legal because it is possible that sports betting is not illegal. This paper answers this question by examining the three sources of law that could make sports betting illegal

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50. Jessica Welman, *Nevada Casinos Bring in Over $25 Billion in 2016*, PLAY NEVADA (Jan. 12, 2017), available at https://www.playnevada.com/1595/2016-casino-revenue-up-nevada/.

51. That growth has been significantly slowed by the COVID-19 pandemic which has devastated the hospitality industry, of which casino-style gambling is a part. California tribal casinos complied with Governor Newsom's initial shutdown orders. Lately, however, Tribal Casinos have reopened, defying the Governor's orders. Thomas Fuller, Asserting Sovereignty, *Indian Tribal Casino's Defy California's Governor and Reopen*, N.Y. TIMES (May 28, 2020), available at: https://www.nytimes.com/2020/05/28/us/california-virus-casinos.html.

52. Cal. Const., art. IV, § 19 (f). Eligible organizations must be exempt from taxation under one or more provisions of Cal. Rev. & Tax. Code §§ 23701(a), (b), (d) – (g), (k), (w).

53. Cal. Bus. & Prof. Code §§ 19985-87.

54. *See* e.g., CYBERCRIME AND SECURITY, § 4A:8, *Attempts to Amend UIGEA and Theory of Amendments* (Pauline Reich, ed. 2005) (noting that the United States Department of Justice continues to hold the view that all online gambling is illegal, except for horse racing and state lotteries, when the gambling touches a jurisdiction where gambling is illegal). A few states have directly addressed online gambling. See, e.g., Eloise Gratton, *Aiding & Abetting Liability Exposure of Affiliate Program Service Providers Under the New US Internet Gambling Law*, 10 J. INTERNET L. 1, 15 (2007) (listing 11 states). A number of states have expressly authorized online gambling. See, e.g., PLAY USA, available at https://www.playusa.com/us/ (identifying four states as permitting online casino gambling; five states as permitting legal online poker; and, 6 states as permitting legal online sports betting). Of course, states vary as to the extent such betting is allowed. In California, there is no specific rule making online gambling legal or illegal. Rather as noted by one commentator: "[T]here has been an absence of regulation with California, and the failure to designate online gambling as legal or illegal has led to a flood of online gambling websites, both legitimate and illicit." Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 6, 9 (2019).

under California law: (1) the State Constitution; (2) the State Penal Code; and (3) the State Common law. The paper then addresses how the status of sports betting under California law affects the impact of federal law, particularly the Wire Act, on the legality of sports betting in California.

III. THE CALIFORNIA CONSTITUTION

The California Constitution does not directly permit or ban gambling *per se*; rather, its provisions set out limits on the legislative power. The Constitution's gambling provisions do not criminalize conduct, nor do they *per se* make gambling illegal. However, the provisions do express a view as to whether and how gambling should be allowed in California and, therefore, are worthy of review.

Beginning with the State's first Constitution in 1849, the California Constitution has expressed a limitation on the Legislature's ability to legalize gambling. In 1849, the prohibition was expressly limited to "lotteries":

> No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed.[55]
>
> The provision did not define the term "lottery." In 1879, the prohibition was expanded to include "gift enterprises":
>
> > The Legislature shall have no power to authorize lotteries or gift enterprises for any purposes….[56]

Again, no definition of "lotteries" or "gift enterprises" was provided.[57] Since the 1879 gambling provision, the California Constitution has been frequently amended to allow horse track betting, government run lotteries, tribal casinos. It has also banned Nevada and New Jersey-type casino gaming. The current ban is found in Art. 4, §19.[58] Interestingly, the original

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55. Cal. Const. of 1849, art. IV § 27, https://digitalcommons.csumb.edu/hornbeck_usa_3_d/.

56. Cal. Const. of 1879, art. IV § 26, https://www.cpp.edu/~jlkorey/calcon1879.pdf.

57. A "gift enterprise" is generally understood to be a type of lottery. An example would be the sale for $5.00 of an item with a known value, e.g., $1.00, coupled with an item (Gift) having a value between $1.00 and $21.00. Prohibitions against "gift enterprises" were usually directed at business practices deemed unethical because the gambling element would boost sales. Recent Cases, Trading Stamps – "Gift-Enterprise," 14 YALE L. J. 120 (1904). When, however, the term was included in a constitutional limitation on legislative power, the term "gift enterprises" may be seen as an effort to interdict all forms of lotteries. Opinion of the Justices, 795 So. 2d 630, 638 (Ala. 2001). A modern variant of a "gift enterprise" is a "loot box." "Loot boxes" are found in online video games. A player can purchase a box that contains a number of items having a range of values. The value of one of the items may or may not be known, but the lure is the prospect of acquiring an item whose value exceeds the purchase price. *See* Note 13, discussing "loot boxes."

58. Cal. Const. art. IV, § 19 currently provides:

> "(a) The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.
>
> (b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

language barring lotteries and the sale of lottery tickets remains. At the same time, in another section, the Legislature is authorized to establish a "California State Lottery." More on this in a moment.[59]

Let us start at the top—what does it mean to ban "lotteries" and the sale of "lottery tickets"? How does one define "lottery"? Modern dictionaries generally provide two definitions – one narrow, the other broad. The narrow definition is consistent with modern, state-sponsored lottery play in the United States: "a drawing of lots in which prizes are distributed to the winners among persons buying a chance."[60] The broader definition is: "an event or affair whose outcome is or seems to be determined by chance.[61] The question is, which definition is intended in Section 19?[62]

(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes. (d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.

(e) The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.

(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

(f)1 Notwithstanding subdivision (a), the Legislature may authorize private, nonprofit, eligible organizations, as defined by the Legislature, to conduct raffles as a funding mechanism to provide support for their own or another private, nonprofit, eligible organization's beneficial or charitable works, provided that (1) at least 90 percent of the gross receipts from the raffle go directly to beneficial or charitable purposes in California, and (2) any person who receives compensation in connection with the operation of a raffle is an employee of the private nonprofit organization that is conducting the raffle. The Legislature, two-thirds of the membership of each house concurring, may amend the percentage of gross receipts required by this subdivision to be dedicated to beneficial or charitable purposes by means of a statute that is signed by the Governor."

59. In 1984, California voters amended the California Constitution to permit a state operated lottery. *See supra* text accompanying notes 76-8. The sale of private lottery tickets remains banned, except as a permitted raffle. *See infra* text accompanying notes 52-3.

60. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 681 (1977). At least one California court has read the Constitutional ban on lotteries broadly. In Finster v. Keller, 18 Cal. App. 3d 836, 842 (Ct. App. 1971), the court stated that the current prohibition in the California Constitution was not limited to "classical lotteries," i.e., the narrow definition. That statement was, however, dicta as the case involved the application of Penal Code Section 319's ban on lotteries, which is not restricted by Art. 4, §19 of the California Constitution. More importantly, the reasoning of *Finster* is directly inconsistent with subsequent decisions by the California Supreme Court. *See supra* text accompanying note 84.

61. *Id.*

62. Both forms of lotteries were in existence when the 1849 California Constitution was adopted in 1850. Lotteries of the first type were commonly used to fund projects, the project funds being the residue after a portion of the funds collected was paid to lottery winners. See, e.g., *Transatlantic Literature And Transivity*, 1780 – 1850 (Annika Bautz and Kathryn Gray, eds. 2017) (noting that the British Museum was founded through a lottery). Lotteries of the second type were evidence by land lotteries, where participants entered for a chance to be awarded land. See, e.g., *David F. Weyman, Peopling The Land By Lottery*?, 51 J. ECON. HIST. 835, 839-40 (1991) (describing lottery of land seized by Georgia from the Cherokee nation).

The arguments for the narrow definition are primarily historical. When the term first appeared in 1849, the popular, political culture had begun to turn away from legalized lotteries, which theretofore had been used for fundraising purposes. At the 1849 Constitutional convention, several delegates spoke to the issue of lotteries. Several delegates spoke in favor of lotteries, noting the revenue that a lottery could generate to fund state operations.[63] However, the greater weight of delegates spoke against a state-run lottery because many believed the State should raise revenues by more honorable means.[64] For example, despite California being considered a gambling community, Mr. Halleck did not think the State's Constitution should create a "gambling state" that raised revenues by "immoral" means.[65] Furthermore, Mr. Dimmick also voiced that while "gambling" might be permissible, using a lottery to raise state revenues would constitute a great evil.[66]

Those who favored barring the Legislature from authorizing a state-run lottery interpreted "lottery" in its narrow sense – as a means of raising revenue by a state-sponsored game of drawing lots to win a prize. This narrow interpretation was supported by the actual practice in California when the Constitution was adopted. Immediately preceding the adoption of the 1849 Constitution, gambling (other than lotteries in the narrow sense) was widespread and accepted in California. It would not be until after the Civil War that popular attitudes would coalesce against gambling, and restrictions would be put in place by the Legislature in the 1870s and thereafter. On the other hand, the historical process by which Section 19 has been amended and altered suggests that the term "lotteries" may have a narrow or broad interpretation. Let us look at each of the exceptions.

Section 19(b) allows the Legislature to regulate horse racing and wagering on the results.[67] The provision does not reference Section 19(a), which bans lotteries, as do other subsections of Section 19. Section 19(b) was adopted in 1933 to replace a prior ban on wagering on horse racing that California adopted early in the Twentieth Century.[68] The move to allow wagering on horse races was a Depression-era effort to increase state revenues. To do so, the prior legislative ban needed to be rescinded, which it ultimately was. If the term "lotteries" is narrowly defined, a constitutional amendment was unnecessary; a statutory Initiative would have been

63. J. Ross Browne, *Report of the Debates on the Convention on the Formation of the State Constitution, In September and October, The Making of Modern Law: Primary Sources*, 1620-1926, at 90-91 (1849) (statements of Mr. Price and Mr. McCarver).

64. *Id.* (statement of Mr. Dent).

65. *Id.* (statement of Mr. Halleck).

66. *Id.* at 91-92 (statement of Mr. Dimmick).

67. Cal. Const. art. IV, § 19(b) provides: "The Legislature may provide for the regulation of horse race meetings and wagering on the results."

68. *See supra* text accompanying notes 20-3.

sufficient to undo the 1909 legislative ban on pari-mutuel wagering.[69] If, however, "lotteries" is broadly construed to include all games of chance, a constitutional Initiative would be necessary to permit the Legislature to allow and regulate pari-mutuel wagering on horse racing. The analysis and arguments accompanying Proposition 3, the ballot Initiative that became Section 19(b), contains no discussion of why a constitutional, as opposed to statutory, Initiative was used to restore horse race "wagering" in California.[70]

Section 19(c), which is expressly set out as an exception to Section 19(a), permits the Legislature to allow cities and counties to authorize bingo games for charitable purposes.[71] Section 19(f), also set out as an exception to Section 19(a), and permits the Legislature to allow private, non-profit organizations to offer raffles under limited circumstances.[72] Both bingo and raffles are based on the drawing of lots in which prizes are distributed to winners among the persons buying a chance. As games possibly within the

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69. *See supra* text and notes 20-21 (noting that the term "pari-mutuel" was not defined in Proposition 3. The Legislature in implementing Proposition 3 created the California Horse Racing Board and authorized the Board to issue regulations defining permissible pari-mutuel wagering). *See* Cal. Bus. & Prof. Code § 19411 (defining pari-mutuel wagering generally as:

> ""Parimutuel wagering" is a form of wagering in which bettors either purchase tickets of various denominations, or issue wagering instructions leading to the placement of wagers, on the outcome of one or more horse races. The association distributes the total wagers comprising each pool, less the amounts retained for purposes specified in this chapter, to winning betters based on the official race results."

70. *See* Proposed Amendments to Constitution and Propositions, June 27, 1933 at 5-61 (arguments supporting and opposing).

71. Cal. Const., art. IV, § 19(c) provides: "Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes."

72. Cal. Const., art. IV, § 19(f) provides:

> Notwithstanding subdivision (a), the Legislature may authorize private, nonprofit, eligible organizations, as defined by the Legislature, to conduct raffles as a funding mechanism to provide support for their own or another private, nonprofit, eligible organization's beneficial and charitable works, provided that (1) at least 90 percent of the gross receipts from the raffle go directly to beneficial or charitable purposes in California, and (2) any person who receives compensation in connection with the operation of a raffle is an employee of the privates nonprofit organization that is conducting the raffle. The Legislature, two-thirds of the membership of each house concurring, may amend the percentage of gross receipts by this subdivision to be dedicated to beneficial or charitable purposes by means of a statute that is signed by the Governor.

Art. IV, § 19 has two subparagraphs (f)s because two ballot initiatives to amend Art. IV, § 19 were approved by voters at the same general election. See Cal. Const., Art. II, §10 and Art. 18 § 4, which address this issue. Charitable organizations are limited to the types of gambling games they may offer. Cal. Pen. Code § 337(j)(e)(i):

> [A]ny poker or pai gow game, and any other game player with cards or tiles, or both, and approved by the Bureau of Gambling Control, and any game of chance, including any gaming device, played for currency, check, credit, or any other thing of value that is not prohibited and made unlawful by statute or local ordinance.

Again, if the term "lottery" in Cal. Const. art. IV, § 19(a) was broadly construed to refer to any game of change, the legislative authorization in Penal Code Section 337(j)(e)(f) would be void. If, however, the term "lottery" is narrowly construed the legislative authorization is valid. That no one has ever questioned the legality of Section 337(j)(e)(f) is consistent with the view that the term "lottery" is understood to have the narrow interpretation described in this paper.

narrow definition of "lottery," an exception would naturally reference the ban on "lotteries" of Section 19(a).

Sections 19(e) expressly bar the Legislature from allowing (and expressly requires the Legislature to prohibit) Nevada and New Jersey type casinos.[73] Putting aside the definitional issue of what is a "Nevada or New Jersey type casino," the adoption of the provision raises some interesting questions as to the proper scope of the term "lotteries" in Section 19(a). Under the narrow interpretation of "lotteries," Section 19(e) is a necessary extension to bar casino-style gambling. On the other hand, under a broad interpretation of "lotteries," Section 19(e) is considered redundant and unnecessary. Giving the term "lotteries" a narrow interpretation avoids redundancy and assures that both Sections 19(a) and 19(e) have independent and stand-alone meanings. Avoiding redundancy and giving language in the Constitution independent meaning are often stated and valid goals of interpretation.[74] These guidelines also apply to ballot propositions.[75]

Sections 19(c), which permits a state run lottery, and Section 19(e), which bars commercial casinos, were part of Proposition 37 – The State Lottery Ballot Proposition, which the voters adopted in 1984.[76] The Proposition was an Initiative constitutional amendment that permits a California State Lottery. The Legislative Analyst analyzed Proposition 37, and a summary of their findings was mailed to registered voters. The Analysis explained that the State Constitution prohibits lotteries, the games proposed are lottery-type games, and a constitutional amendment is necessary to permit a California state lottery. The Analysis does not explain why the authorization is written as an exception to Section 19(a). Nor does it explain why a specific constitutional ban on "Nevada and New Jersey type

73. Cal. Const. art. IV, § 19(e) provides: "The Legislature has no power, to authorize and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." Section 19(e) was added in 1984 when California voters adopted a constitutional initiative authorizing a state operated lottery. See text and notes 76-77.

74. *Id.; See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 179 (2012) (stating that legal texts should be interpreted to avoid surplusage). This principle is consistently applied to both constitutional text (See Kelo v. City of New London, 545 U.S. 469 ("When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meanings, and that no word was unnecessarily used, or needlessly added") and statutes (see *San Jose v. Superior Court*, 850 P.2d 62 Cal. 1993) ("In using two quite different terms … the Legislature presumably intended to refer to two distinct concepts …. We ordinarily reject interpretations that render particular terms of the statute mere surplusage, instead giving every word some significance.")).

75. People v. Lin, 236 Cal. Rptr. 3d 818, 823 (Ct. App. 2018):

> "The court interprets a ballot proposition as it would a statute by the Legislature. The Court begins with the language of the proposition itself, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from the language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure."

76. California State Lottery Act of 1984, available at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=1.&title=2.&part=&chapter=12.5.&article=1.

casinos" was necessary.[77] Most of the Analysis speaks towards the economic benefits of a lottery.[78] One suspects the specific ban on "Nevada and New Jersey type casinos" was included to allay fears that approval of Proposition 37 would permit commercial casinos in California. That, of course, is supposition, but it is consistent with the narrow interpretation of the term "lotteries," and the essential equating of the type of games Proposition 37 would allow with the then existing prohibition on lotteries in Section 19(a). Nowhere in the Analysis does the Legislative Analyst address a residue role for Section 19(a) if Proposition 37 is approved. In fact, the only specific future ban on gambling mentioned is that against "Nevada and New Jersey type casinos." One could see Proposition 37 as effectively hollowing out Section 19(a), leaving it essentially a shell provision, i.e., one without meaningful content except to the extent it would bar the Legislature from allowing private lotteries or "Nevada and New Jersey type casinos."

A recent California Supreme Court decision provides some support for the view that (1) the term "lotteries" in Section 19(a) should be narrowly construed, and (2), as narrowly construed, Section 19(a) has been effectively eviscerated by Proposition 37. In 1998, California voters at the November General Election approved Proposition 5, a statutory Initiative, which would have allowed slot machines and house banked games at Tribal casinos.[79] However, less than a year after its approval, in *Hotel Employees & Restaurant Employees International Union v. Davis* (*Hotel Employees*),[80] Proposition 5 was struck down on the ground that it violated Art. 4, Section 19(e) – the no "Nevada or New Jersey type casino" provision that had been added to the State Constitution by Proposition 37.[81] The California Supreme Court made no effort to bring Proposition 5 within a broad reading of the term "lotteries" in Section 19(a). Rather, the focus was on whether Tribal casinos were like "Nevada and New Jersey type casinos." The court concluded they were and declared Proposition 5 unconstitutional.[82]

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77. See Proposition 37, 1984. https://ballotpedia.org/California_State_Lottery_Act,_Proposition_37_(1984). According to the analysis supplied to the voters, Proposition 37 would constitutionalize the existing statutory ban on casino style gambling in California, but the reason for doing so was not addressed. Proposition 37 Analysis By Legislative Analyst, available at https://repository.uchastings.edu/cgi/viewcontent.cgi? article=1926&context=ca_ballot_props.

78. *See* William G. Hamm, *Voter Information Guide for 1984 General Election*, 46 – 48 (1984).

79. Proposition 5 was titled: "The Tribal Government Gaming and Economic Self-Sufficiency Act of 1988."

80. Hotel Employees and Restaurant Employees Intern. Union v. Davis, 21 Cal. 4th 585 (1999).

81. *See supra* note 78.

82. *See supra* note 79 at 589. Ironically, while presented as a statutory Initiative, which required 5% of the votes cast for Governor at the last election, *see* Cal. Const., art. II § 8(b); *see also* Cal. Elec. Code § 9035), Proposition 5 received sufficient signatures to qualify as a constitutional Initiative, which requires 8% of the votes case for the Governor at the last preceding election. *Id.* Proposition 5 received over 1 million signatures. Approximately 433,000 signatures were necessary to qualify as a statutory Initiative; approximately 690,000 signatures were necessary to qualify as a constitutional Initiative. The Secretary of State's Office ceased the signature verification process once it determined that the measure easily qualified as a statutory initiative. Thus, while the proponents of Proposition 5 submitted sufficient signatures to have qualified the Proposition had it been submitted as a constitutional initiative; we do not

One must be careful not to read too much into an opinion, particularly silence.[83] It is, nonetheless, interesting that the court focused on the "Nevada and New Jersey type casino" ban and ignored another possible argument to support its position, that the games allowed by Proposition 5 were games of chance barred by Section 19(a) because they were "private lotteries" not within the allowance of Section 19(c).[84] On the other hand, the court's silence on this point is entirely understandable if (1) the term "lotteries" in Section 19(a) is narrowly interpreted or (2) Proposition 37 essentially eviscerated Section 19(a). If either (1) or (2) applied, the types of gambling envisioned by Proposition 5 would not violate Section 19(a). If the term "lotteries" is narrowly construed, it does not include gambling games that do not involve drawing lots in which the winner is awarded prizes. Card games, particularly "house banked" games, slot machines, and roulette do not involve the drawing of lots to determine a winner.[85] Likewise, Proposition 37 made Section 19(a) prohibition on conducting lotteries a nullity because the history of the prohibition is that it was directed at state-run lotteries. Thus the focus on Section 19(e) makes sense because Section 19(a) no longer has meaningful force and effect because Section 19(c) authorizes a state-run lottery.

Trying to assess the scope of the current ban on gambling in the California Constitution is problematic for the reasons noted above. However, it seems safe to say that the State Constitution affects sports betting only if the term "lotteries" in Section 19(a) is either broadly interpreted or sports betting is analogous to "Nevada and New Jersey type casinos." No California decision directly gives the term "lotteries" a broad interpretation. Rather, the discussion that exists about the term "lotteries" construes it narrowly. What about the ban on "Nevada and New Jersey type casinos"? The Supreme Court in *Hotel Employees* went to some lengths to conclude that some of the gambling games Proposition 5 authorized California Native American tribes to offer in their Tribal casinos were the types of games offered in "Nevada

know if the proponents submitted sufficient valid signatures to place the Proposition on the ballot as a constitutional Initiative.

83. It is often said that decisions are not authority for propositions not considered. *See* People v. Harris, 47 Cal. 3d 1047, 1071 (1989); *see also* McDowel and Craig v. City of Santa Fe Springs, 13 Cal. 4th 475, 485 (1996). The issue here, however, is not authority, but whether the court's actual practice leads to legitimate inferences as to the meaning of the term "lottery" and the continued viability of that term in art. IV, § 19.

84. *See* W. Telcon, Inc., v. California State Lottery, 13 Cal. 4th 475, 485 (1996) (prior opinion where court stated that the types of games permitted by Proposition 5 were the antithesis of lottery games). In *Hotel Employees*, the court only addressed this point in assessing whether Tribal casinos offering games authorized by Proposition 5 would fall under the ban of Nevada or New Jersey type casinos in Art. 4 § 19(e), *see supra* note 80.

85. *Supra* notes 71-72 and accompanying text. This interpretation is also consistent with the allowance of charities to offer games of chance for fundraising purposes. That allowance would not be valid if the term "lottery" in Section 19(a) was read broadly because the express exceptions in Sections 19(c) and 19(f) are limited to Bingo and Raffles.

and New Jersey type casinos."[86] Sports betting is offered at many Nevada casinos. Under *Hotel Employees*, sports betting would likely be a gambling game of the type offered by the "Nevada and New Jersey type casinos"; however, this simply begs the question: what makes a gambling establishment a "Nevada and New Jersey type casino"? If a sports bar takes bets, does that make it a "Nevada and New Jersey type casino"? Traditionally, casinos have been gambling establishments that offer a variety of gambling games. In *Hotel Employees,* Proposition 5 would have allowed Tribal casinos to offer a variety of gambling games. The Tribal casinos were designed to emulate Nevada casinos, and the court had little difficulty concluding that the type of gambling establishment Proposition 5 would allow was equivalent to that barred by Section 19(e).[87] Would a court see a dedicated sports betting site as equivalent to a "Nevada and New Jersey type casino"? Sports betting is not a "lottery" as that term is understood in *Hotel Employees*, but whether one gambling game or collection of gambling games would qualify the gambling establishment as a "Nevada or New Jersey type" casino is unclear and left unanswered by *Hotel Employees*. However, if it was determined that a sports betting facility qualified as a "Nevada or New Jersey type casino" under Art. 4, § 19(e), that would bring into play the constitutional requirement that the Legislature did not authorize the activity. This would strongly suggest that maintaining a sports betting facility, while not illegal *per se*, violates California public policy. The argument that a sports betting facility is equivalent or akin to a "Nevada or New Jersey type casino" is difficult to square with the discussion in *Hotel Employees* that emphasized the offering of multiple games of chance within the building, room, or facility.[88] It would be even more difficult to extend the comparison to online sports betting facilities that do not have a traditional physical presence as exemplified by brick-and-mortar casinos. For these reasons, it is unlikely that a stand-alone sports betting facility should be seen as a "Nevada or New Jersey type casino."

As noted earlier, the California Constitution, except with respect to "Nevada and New Jersey type casinos," does not directly prohibit gambling. The California Constitution now places a limit on the power of the Legislature to authorize private lotteries and "Nevada and New Jersey type

86. *Supra* note 80 at 605.
"Thus, a casino of "the type. . . operating in Nevada and New Jersey" may be understood, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines …. Proposition 5, including its model tribal/state compact, authorizes what would amount to prohibited casinos. With their tribal gaming terminal and grandfathered class III card games, tribal gaming facilities authorized under the measure would constitute facilities that offer gambling activities including those statutorily prohibited to card clubs in California in 1984, especially banked table games and slot machines."

87. *Id*. at 605-08.

88. *See supra* text accompanying note 86.

casinos." In this sense, activities the Constitution bars the Legislature from authorizing may be seen as contrary to California public policy. If the Legislature was, by reason of Art. IV, Section 19, barred from authorizing sports betting that would place sports betting in a difficult predicament because, as discussed in Part VI of this paper, it would permit federal prosecution of sports betting establishments that conduct business with California customers. However, that concern is unwarranted because there is no real argument that the terms "lottery" or "Nevada and New Jersey type casinos" can be understood as applying to the business of sports betting as a standalone activity.

Even if sports betting is not directly encompassed by Art. 4, §19 of the State Constitution, sports betting may be illegal based on California statutory law or California common law.

IV. THE CALIFORNIA PENAL CODE

California does not recognize the concept of "common law crime" as a basis for criminal prosecution. [89] In California, for conduct to be criminal, the conduct must be made criminal by statute.

Criminal proscriptions of gambling are primarily set out in California Penal Code Sections 330 through 337. Several of these provisions would likely be cited as sufficient to bar sports betting in California. However, it is unclear whether, separately or in the aggregate, these provisions are sufficient to do so when the actual placement of the bet occurs outside the State. As will be discussed throughout this portion of the paper, it is important to distinguish between the customer who makes the bets and the person (or entity) that accept the bets in determining whether a criminal act has occurred. It is the central theme of this paper that there is a significant difference under California law between a sport bet made and placed in California, and a sports bet made outside California in a jurisdiction where sports betting is legal. This distinction can be illustrated through two examples.

Example 1: Customer goes to Sam's Sports Bar in Los Angeles, California. At the Bar, Customer places a bet on the Los Angeles Lakers against their opponent, the Los Angeles Clippers. The bet is placed with Debbie's Sports Betting, which operates out of an office that is located in Sam's Sports Bar.

Example 2: Customer goes to Sam's Sports Bar in Los Angeles, California. While at the Bar, Customer texts Debbie's Sports Betting (Debbie's) which operates in Antigua, a jurisdiction in which sports betting is legal. Customer had previously deposited $1,000 with Debbie's. Customer sends a text to Debbie's instructing Debbie's to place a bet on Customer's

89. Cal. Penal Code § 6 expressly declares in relevant part: "No act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code, … or by some ordinance, municipal, county, or township regulation. . . ." Cal. Penal Code § 6. *See also* Keeler v. Superior Court 2 Cal. 3d 619 (1970).

behalf on the Los Angeles Lakers against their opponent the Los Angeles Clippers. Debbie's does so in Antigua by debiting Customer's account in the amount of the bet. Debbie's then sends a text to Customer confirming the bet.

There is no question that Example 1 constitutes a crime under California law.[90] Whether Example 2 constitutes a crime under California law is less clear. This format is not new; most online gambling operations use it. When prosecuted as a violation of federal law, the format has not been successful in avoiding a finding of criminal conduct, but the cases have all involved a touching of a jurisdiction that treats the conduct as unlawful.[91] As will be discussed in this section, the critical issues are (1) the nature of the "touching" and (2) whether the "touching" permits the application of a jurisdiction's (here California) laws to the transaction.

California Penal Code Section 337a(a)6 specifically addresses "bookmaking" with respect to sporting events. The subsections focus on the person taking the bet, i.e., the "bookmaker," and go into extensive detail to identify and criminalize the business of bookmaking.[92] In Example 1, Debbie's is taking bets on sporting events in California. Debbie's is engaging in conduct specifically criminalized by statute and can be prosecuted criminally for that conduct. In Example 2, however, Debbie's is not operating in California; rather, Debbie's is operating in Antigua, where sports betting is legal. Whether a criminal act occurred in Example 2, thus, turns on whether (1) Customer's actions subject Customer to criminal liability in California, or (2) whether Customer's actions subject Debbie's to criminal liability in California.

A. CUSTOMER'S CONDUCT

Customer is not a bookmaker. The only part of California Penal Code Section 337a that could possibly apply to Customer is Section 337a(a)6, which specifically subjects to criminal prosecution "every person who. . . [l]ays, makes, offers or accept any bet…" In Example 2, does Customer's action fall within the above prohibition? The two relevant terms are "makes" and "offers." Does Customer "make" or "offer" a bet or is Customer simply instructing Debbie's how to make a bet, but the bet is actually made (and offered) in Antigua where Debbie's consummates the transaction. If the bet is not actually "made" or "offered" in California, the argument may be made

90. Cal. Penal Code § 337a(a)(2) states that maintaining a place where bookmaking occurs is a crime; Cal. Penal Code § 337a(a)(3) states that engaging in bookmaking by receiving or transferring bets on sporting events is a crime; Cal. Penal Code § 337a(a)6 states that engaging in making or placing bets on sports events is a crime.

91. *See*, e.g., United States v. Cohen, 260 F.3d 68 (2d Cir. 2001) (bookmaking business set up in Antigua, but bets initiated in New York where conduct was unlawful); *see also,* (Fed. Wire Act, 18 U.S.C. § 1084(a). *See also* Santoro v. State, 959 So.2d 1235 (Fla. Dist. Ct. App. 2007) (bookmaking business set up in Costa Rica, but bets made and placed in Florida where conduct was unlawful). This issue is discussed in greater detail in Part VI of this paper.

92. Cal. Penal Code § 337(a).

that Example 2 does not literally fall within Section 337a(a)6 insofar as Customer is concerned.[93] This illustrates a problem common to many gambling statutes; the statutes were enacted long before the modern era of interstate communication, the internet, and electronic transactions. When Section 337a(a)6 was enacted, making a bet required physical presence or the physical embodiment of a transaction. A person would meet with or call a bookmaker, the transaction had a physical presence, and bets were paid in cash or cash equivalents. That world is far distant from the world of Example 2, and interpreting Section 337a(a)(6) to apply to Example 2 requires some legal legerdemain. When an instruction to engage in a transaction is made online, and all physical actions relevant to the transaction occur outside the jurisdiction, does the transaction sufficiently "touch" the jurisdiction (here California) to permit the jurisdiction to apply its law to the matter?

It may be argued that reading the words "make" and "offer" in the above manner is a somewhat strained interpretation of the terms "make" or "offer." Customer's text initiated the transaction, and Debbie's is exercising no independent judgment here other than deciding whether to accept the wager. Or to look at the same transaction somewhat differently, would it constitute a violation of Section 337a(a)(6), i.e., would Customer be "making" or "offering" a wager if Customer mailed instructions to a friend in Antigua to place the bet for him (Customer) in Antigua? Do the concepts "made" or "offered" extend to transactions that can be construed as "requests to make" or "requests to offer"?[94] Criminal statutes must be clear and distinct in identifying what is criminal. On the one hand, it may be argued that Customer has not "made" or "offered" a wager because a request is analytically precedent to the act (making or offering) itself. On the other hand, one could argue that Customer's conduct would satisfy either term. Customer is instructing Debbie's to take the amount of the bet out of his account and use those funds to bet on the Los Angeles Lakers. Although this message is framed as an instruction, the operative effect of the message could be understood as the making of a bet or an offer to make a bet. This is how Debbie's understands the message as evidence by Debbie's actions in Example 2. It is unlikely that a court would treat Customer's instruction as something other than an offer to make a bet.

It is somewhat anomalous that a statute would seek to criminalize the conduct of customers who engage with bookmakers. There are no reported cases of Section 337a(a)(6) being applied to customers, nor is there any legislative history evidencing an intent that Section 337a(a)(6) was to be applied to customers. Likely, the purpose of Section 337a(a)(6) was not to

93. No other subparagraph applies directly to customer's engagement with Debbie's business model as set out in Example 2.

94. Structuring commercial relationships in this manner is common when the provider of the service wants to maintain control over the terms of the transaction. For example, life insurance companies often use applications for insurance as a mechanism to allow the insurer to control the terms of the offer. *See* Robert E. Keeton, Alan I. Widiss, James M. Fischer, INSURANCE LAW, § 2.1(c)(1), (2d ed. 2016).

criminalize the conduct of customers who make bets but to criminalize the conduct of bookmakers who make bets. Bookmakers make bets in two ways.

Bookmakers do not usually make money by placing bets themselves but by charging a fee on their customers' bets. This fee is known as "virgorish," or "vig." Ideally, the bookmaker will be able to balance bets so that after the transaction fee is taken, the remaining money in the betting pool is sufficient so that losers pay off winners. The bookmaker does this by offering odds on the betting transaction that will induce an equal amount to be bet on both sides of the proposition and structuring payouts to guarantee a profit. Sometimes, however, the bookmaker finds a betting imbalance; too much money has been bet on one side of the proposition. For the bookmaker, this creates the risk of a large win or a large loss, rather than a guaranteed profit. To address the problem, the bookmakers use a technique known as "laying off," where they make bets with other bookmakers to balance the books.[95] The bookmaker is essentially purchasing insurance to prevent variance between the risk of a large win or a large loss. This reduces the guaranteed profit but avoids the variance created by the customers' betting imbalance. Bookmakers utilizing "laying off" techniques is clearly illegal[96] and a violation of Section 337a.[97]

The second way bookmakers make bets is by cheating. Sometimes a bookmaker will receive information on the outcome of a proposition, for example, a horse race, before other bookmakers. An unscrupulous bookmaker can use this information to make a bet with another less informed bookmaker to make a guaranteed profit. This tactic is known as past-posting and is also criminalized by Section 337a.[98]

As is fairly evident, neither of these applications involve customers, and it is likely that the use of the term "make" in Section 337a was designed to interdict these activities rather than make criminals of ordinary citizens who made a sports bet.

There is, however, a related issue involving the application of Section 337a(a)6: Even if Customer's conduct falls within Section 337a(a)6, there are no reported prosecutions of customers who make bets with bookmakers. It appears to be the practice of at least some District Attorney Offices in California that customers of bookmakers will not be prosecuted even though the customer's actions violate Sections 337a(a)6.[99] NFL football and NCAA Basketball Tournament betting pools are common in California. Such bets

95. *See* United States v. Gilley, 836 F.2d 1206 (9th Cir. 1988) (discussing "lay off" bookmaking).

96. *See* Flores v. Los Angeles Turf Club, Inc., 55 Cal. 2d 736, 744 (1961).

97. *See* People v. Oreck, 74 Cal. App. 2d 215, 220 (1946).

98. *See* Epstein v. California Horse Racing Bd., 222 Cal. App. 2d 831, 842 (1963) (holding that "post-posting" is a criminal violation of Cal. Penal Code Pen. Code § 337(a)(a)(6).

99. *See* People v. Garner, 72 Cal. App. 3d 214, 216-18 (1977) (undisputed evidence was that the Los Angeles Police Department and the district attorney's office have a policy neither to arrest not to prosecute betters while they do arrest and prosecute bookmakers). In *Garner*, the defendant, who was charged with being a bookmaker, argued that this policy constituted "selective enforcement," but the court rejected the contention. *Id*.

involve contributions by numerous individuals to a fund that is distributed to the winners, i.e., those who select winners. This betting format clearly falls under California Penal Code Section 337a as a pooling of funds; yet, no California participant, to this author's knowledge, has ever been charged with a violation of Penal Code Section 337a.[100] One would not be surprised if such "office pools" are conducted within the Governor's and Attorney General's offices. Everyone considers such conduct harmless and non-criminal. Should it matter that such conduct technically constitutes a violation of the letter of Penal code Section 337a and also subjects participants to criminal prosecution? What is the rationale for treating conduct as criminal when the law is not enforced, and the conduct is not just tolerated but widespread?[101]

Consistent, long-term non-enforcement of criminal statues may give rise to a legitimate expectation of continued non-enforcement. This is more commonly known as "desuetude,"[102] and while desuetude has been characterized as an "obscure" doctrine, it is based on the fundamental values of fair notice and reliance. That said, whether a court would accept the principle of desuetude to bar a criminal prosecution is unclear at best. In *United States v. Morrison*,[103] the court considered the principle of desuetude, but ultimately concluded that on the merits that it should not be applied.[104] *Morrison* involved the non-enforcement of laws regarding taxation of sales of cigarettes, the violation of which would result in criminal sanction. The sales occurred on Native American reservations without the payment of taxes. The court identified several factors that would influence whether desuetude should be recognized: (1) What are the reasons for non-enforcement; (2) Have the reasons for the statute's enactment ceased to exist; and (3) Is non-enforcement consistent with a shift in public attitudes regarding whether the conduct should be criminalized.[105] The *Morrison* court noted that the failure to enforce the State's taxing authority over sales of cigarettes on Native American reservations was not due to a change in the reasons for the enactment of the statute or due to neglect. The court noted that reservation sales of cigarettes was a problem the State sought to address, but Native Americans thwarted its efforts. Moreover, the court said there was no evidence of a shift in public attitudes to the payment of taxes on cigarette sales or approval of the tactic undertaken by Native Americans to thwart the payment of taxes.[106]

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100. Cal. Penal Code § 337(a).

101. *See infra* text accompanying notes 121-22.

102. *See* Desuetude, 119 Harv. L. Rev. 2209 (2006). "Desuetude" is based on the principle that enforcement of the law is as much a part of the law and the law's text. Consistent, long-term non-enforcement of law is thus seen as effectively the repeal of the law. *Id*. at 2210.

103. United States v. Morrison, 596 F.Supp.2d 661 (E.D.N.Y 2009).

104. *Id.* at 702.

105. *Id.* at 702-3.

106. *Id.*

Admittedly, desuetude is not a principle that courts have embraced, but even when it is rejected, as in *Morrison*, the court often finds that the case for desuetude has not really been made. This is likely due to the norms and principles that underlie desuetude – fair notice and justified reliance, both of which are connected to the reality that enforcement is a basic aspect of a law's standing and acceptance in society. A law that is ignored and shunned can hardly make the same claim for public recognition and acceptance as an enforced law. Enforcement bespeaks visibility and serves notice that violations will be prosecuted. So, can the claim be made that if desuetude was recognized, it would apply to customers who make bets with bookies?

The topic of non-enforced law has drawn some attention, both directly and indirectly. Indirectly, attention has been on the enforceability of laws, such as fornication and sodomy, that criminalize private, consensual conduct, which is rarely, if ever, enforced today; however, the brooding omnipresence of the criminal statute chills and discourages intimate associations because of the "fear" of criminal prosecution.[107] Much of the focus here is on whether individuals and groups have standing to challenge the legality and enforceability of these statutes that hang like a sword of Damocles over those who wish to engage in the activity the statute literally prohibits. In other words, is the "threat" of prosecution sufficient to constitute the particularized, concrete injury in fact that is necessary to permit judicial consideration of the issue?[108] Courts are divided on the issue, but many have declined to find standing in this context, concluding that the "threat" is too ephemeral and speculative to justify judicial intervention.[109]

A related theme is whether non-enforcement of a criminal statute constitutes implicit official acknowledgment that the statute criminalizes protected activity. For example, in *Lawrence v. Texas*,[110] the Court noted that a number of states that criminalized sodomy "engage[d] in a pattern of non-enforcement with respect to consenting adults acting in private" that "evidenced an 'emerging awareness that liberty gives substantial protection to adult persons [regarding private sexual conduct].'"[111]

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107. *See* Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29; *See also* Hillary Green, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169 (1997).

108. Leslie, *supra note* 107; Jason R. LaFond, *Injury-In-Fact, Justice-In-Fiction: Toward a More Realistic Definition of "Injury" in the Context of Unenforced Criminal Law*, 13 RICH. J.L. & PUB. INT. 1 (2009).

109. *See*, e.g., Berg v. State, 100 P.3d 261 (Utah 2004) (stating that fear of prosecution does not create standing necessary to challenge statutes criminalizing sodomy and fornication); *cf.* Collier v. Fox, Not Reported in Fed. Supp. (2018), 2018 WL 1247411 (D. Mt. 2018) (holding that a couple lacked standing to raise substantive due process challenge to state statute criminalizing bigamy because there was no genuine threat of prosecution for polygamous relationships).

110. Lawrence v. Texas, 539 U.S. 558 (2003) (upholding substantive due process challenge to Texas statute that criminalized sodomy between consenting, adult homosexuals).

111. *Id.* at 572.

Admittedly, neither of the above themes directly supports a claim that non-enforcement of a criminal law negates or nullifies the enforceability of that law. Both themes, however, provide support for the claim that non-enforcement, or more precisely a "pattern of non-enforcement," is a factor that should be seriously considered when determining whether a non-enforced criminal statute can be resurrected from the dead. Denying persons or groups seeking to challenge a dormant, non-enforced criminal statute and then giving the government free rein to prosecute persons for violating the same law raises substantial questions of fundamental fairness. Even if the activity that the state "literally" criminalizes does not involve intimate, private behavior, surely persons have a reasonable expectation that a pattern of official non-enforcement will continue, at least until the government announces a change in practice that will alert persons that the activity will no longer be tolerated.

If one looks directly at the topic of non-enforced law, one finds the courts have been divided on whether sustained, prolonged non-enforcement creates a legally enforceable bar to enforcement. Many courts have concluded that non-enforcement does not result in the statute's nullification or bar enforcement.[112] However, a few courts have refused to allow prosecution of criminal statutes after a prolonged period of non-enforcement. In *State v. Vadnais*,[113] the defendant was criminally prosecuted for violating a local ordinance that restricted dwelling in or parking a mobile home trailer except in a licensed facility. Defendant argued that he was the victim because the ordinance was enforced against him and not others who had parked residential trailers in violation of the ordinance. The court agreed and stated:

> A conscious exercise of some selectivity in enforcement, based on a rational exercise of police or prosecutorial discretion or a mere laxity in enforcement, does not itself establish a constitutional violation. However, an intentional or deliberate decision by public officials, acting as agents of the state, not to enforce penal regulations against a class of violators expressly included within the terms of such penal regulation does, in our view, under the principle of Yick Wo, constitute a denial of the constitutional guarantee of equal protection of the law.[114]

Similarly, in *Committee of Legal Ethics v. Printz*,[115] the defendant, an attorney, threatened to report a third party's misbehavior to law enforcement unless the third party made restitution.[116] For this conduct, defendant was

112. *See*, e.g., U.S. v. American Elec. Power Service Corp., 258 F. Supp. 2d 804, 806-07 (2003) (stating that there is no right to have a law go unenforced against you).

113. State v. Vadnais, 202 N.W.2d 657 (Minn. 1972).

114. *Id.* at 659.

115. Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 187 W. Va. 182, 183-84 (1992) (stating that the third party had embezzled funds from defendant's client).

116. *Id.* at 185 (citing W. Va. Code, 61–5–19 (1923)). The statute provided:

> "If any person, knowing of the commission of an offense, take any money, or reward, or an engagement therefor upon an agreement or undertaking, expressed or implied, to compound or conceal such offense, or not to prosecute therefor, or not to give evidence thereof, he shall, if such offense be a felony, be guilty of a misdemeanor, and, upon conviction, be confined to jail

disciplined by the West Virginia bar. The West Virginia Supreme Court reviewed the discipline charge. Critical to the court's decision was whether the defendant's threat was a legitimate or illegitimate negotiation tactic. A West Virginia statute made criminal the offering not to prosecute a crime in exchange for the return of funds lost due to the crime, which is what the defendant did.

Similar to the *Vadnais* court, the *Printz* court noted that prosecution under a long dormant criminal statute raises issues of the basic fairness of selective prosecution: "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it."[117]

Of course, as both *Vadnais* and *Printz* noted, some selectivity is inherent in law enforcement based on enforcement priorities and available resources. Selectivity becomes a problem, however, when a criminal statute is not enforced for a lengthy period of time, thus, creating a reasonable belief that the statute has become superannuated.[118] In *Printz*, the court identified several factors that would support a finding that non-enforcement would be a viable defense to a newly developed interest on the part of prosecutors to enforce a moribund criminal statute. First, did the statute prohibit conduct that was *malum per se* (conduct that is inherently morally wrong, such as larceny) or conduct that was *malum prohibitum* (conduct that is wrong only because it is legally proscribed, such as Sunday Closing laws)? Conduct that is *malum per se* remains proscribed even during periods of prolonged non-enforcement but conduct that is only *malum prohibitum* may lose its prohibited character as a result of prolonged non-enforcement.

Second, has there been open, notorious violations of the law during the period of non-enforcement? A law that successfully proscribes conduct does not become a victim of its own success. On the other hand, a law that is openly violated, without sanction, can create a reasonable, enforceable expectation that violations of the law on the book will not be enforced. As one court noted: "An unenforced law is little better that a nullity."[119]

Third, has there been an open, conspicuous policy of non-enforcement of the criminal statute? Here again, the emphasis is on reasonable expectations. Open, conspicuous non-enforcement provides support to the expectation that violations will not be prosecuted.

How do these factors apply to enforcement of Penal Code Section 337a(a)(6) to the customers of bookmakers? First, is sports betting (or gambling in general) *malum per se*? Although there are diverse groups in the

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not more than one year and fined not exceeding five hundred dollars; and if such offense be not a felony, unless it be punishable merely by a forfeiture to him, he may be confined in jail not more than six months, and shall be fined not exceeding one hundred dollars."

117. *Id.* at 186.

118. *Cf.* Wright v. Crane, 13 Serg. & Rawle 220, 228 (Pa. 1825) ("Total disuse of any civil institution for ages past may afford just and rational objections against disrespected and superannuated ordinances.").

119. Paul v. Wadler's Cash & Carry, Inc., 41 Cal. Rptr 18 (Ct. App. 1964).

United States that consider gambling to be morally wrong, that view is different, if not impossible, to square with the general public's attitudes towards gambling today. In most American jurisdictions, including California, gambling is not just tolerated, it is encouraged, albeit as a regulated industry. The United States Supreme Court recently observed that gambling does not violate California public policy.[120]

Second, is sports betting open and notorious in California? One only needs to follow news and sports media to identify how pervasive sports betting is in California, although on a private level that resists verification. California news and sports media regularly report betting odds on college and professional games. That reporting suggests interest in sports betting information and likely usage of that information in private wagering. It has been estimated that the underground sports betting market in the United States is large. A report by the United States National Gambling Impact Study Commission estimated that illegal sports betting in the United States ranged from $80 billion to $380 billion.[121] Those are 1999 dollars and would be higher today. The America Gaming Association's estimates that the illegal sports betting market in the United States is approximately $150 billion.[122] Both of these estimates evidence that sports betting in the United States is widespread and known to exist. While I do not have specific figures for California, if one simply extrapolates based on California's population, which is approximately 10% of the United States population, that equates to approximately $8 billion to $38 billion (in 1999 dollars), using the National Impact Study estimate, or $15 billion, using the American Gaming Association estimate.

Lastly, has there been conspicuous non-enforcement of the criminal statute? There have been no reported decisions of prosecutions for bookmaking under Section 337a(a)(6). Prosecutions against bookmakers are brought under other subsections of Penal Code Section 337a. There are no

120. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 201-11 (1987); *see also* Metropolitan Creditors Service v. Sandri, 19 Cal. Rptr.2d 646, 652-53 (Ct. App. 1964) (California does treat the enforcement of gambling debt as violative of public policy but California courts have not consistently extended this characterization to gambling in general); s*ee infra* Section V of this paper. Indeed, the Sandri court noted the increased public tolerance and limited legalization of gambling in California, which is difficult to reconcile with a strong anti-gambling public policy. *Id*. at 653.

121. NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT, 2-14 (June 1999), available at https://govinfo.library.unt.edu/ngisc/reports/fullrpt.html. The report also noted:

> The popularity of sports wagering in most states, both legal and illegal, makes it a regulatory challenge. Legal sports wagering – especially the publication in the media of Law Vegas and offshore-generated point spreads – fuels a much larger amount of illegal sports wagering. Although illegal in 48 states, office betting is flourishing. This type of informal or small-scale betting, which is often considered innocuous and not worth prosecuting from a law enforcement standpoint, is often ignored and goes largely unregulated.
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> *Id*. at 3-9.

122. *See* Press Release, American Gaming Association, 97% of Expected $10 Billion Wagered on March Madness to be bet Illegally (Mar. 12, 2018), available at https://www.americangaming.org/new/97-of-expected-10-billion-wagered-on-march-madness-to-be-bet-illegally/.

reported decisions of a prosecution against a customer under any part of Section 337a, much less Section 337a(a)(6). Significantly, as previously noted, the District Attorney of Los Angeles, California's largest county, represented to the court that it was the policy of that office not to prosecute customers.

In summary, if a court was disposed to follow *Vadnais* and *Printz*, a very credible case can be made that Penal Code Section 337a(a)(6) cannot be applied to customers of bookmakers, at least until state and local officials state an intention to do so and follow through with that intention.

Courts have noted that public attitudes toward gambling have evolved significantly over the last several decades. A consumer-oriented economy and society has created a culture in which gambling is seen as both acceptable and desirable. The reluctance to treat "social gambling" as a crime surely reflects the view that a person not in the business of gambling should not be criminally prosecuted for activities that a state actively encourages in other gambling contexts, e.g., California State Lottery.[123] Even if one does not accept the full argument that consistent, long-term non-enforcement of criminal statutes results in the effective nullification of the statute, it is fair that a State should be held to the position it has effectively taken until it announces the intent to no longer engage in non-enforcement. This is close to saying that the doctrine of estoppel should be applied here. Having established, by policy or simple inaction, a visible and long-standing practice of non-enforcement of sports betting laws against customers who bet, fundamental fairness requires that those who bet be forewarned that henceforth non-enforcement will not be the norm. More importantly, such a pronouncement should be backed-up with effective action, else the statement will be rightfully perceived as lacking substance and credibility.

California recognizes that equitable estoppel may be asserted against the government. In *Long Beach v. Manse*,[124] the court observed that an equitable estoppel may be applied against the government "in those exceptional cases where justice and right require."[125] It is, of course, always difficult to define what is an exceptional case. California courts have refused to apply an estoppel against the government when to do so would be injurious to the policy of protecting the public. For example, in *Pittsburg*

123. Limiting criminal culpability to persons engaged in the business of gambling is common. See, e.g., Federal Wire Act, 18 U.S.C. § 1084(a) ("Whoever being engaged in the business of betting or wagering…."); The Travel Act, 18 U.S.C. § 1962(b) (defining "unlawful activity" as including "any business enterprise involving gambling"). California does not, however, require that a bookmaker be in the "business" of bookmaking. See Cal. Pen. Code § 337a(e) ("This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.").

124. City of Long Beach v. Mansell, 476 P.2d 423 (1970).

125. *Id.* at 451.

Unified School Dist. v. Commission on Professional Competence[126] the court refused to apply an equitable estoppel when to do so would place high school students at risk by preventing dismissal of a teacher. There are no cases that directly raise the issue of estoppel in the context of non-enforcement of a gambling statute, but it is difficult to identify how the public would be harmed if an estoppel were to be recognized in the context of sports betting by customers. It is irrefutable that Californians gamble and particularly engage in sports betting. If they are being harmed by the activity, the government has not acted on that harm since the ban on bookmaking was enacted in 1909 and the general prohibitions on gambling were first enacted in 1872. One would think if the public was being harmed, the government would have noticed it by now and acted accordingly.

That said, many courts have rejected the argument of lax or non-existent prosecution as a defense against the enforcement of criminal law.[127] On the other hand, in *Raley v. Ohio*[128] and *Cox v. Louisiana*,[129] defendants were allowed to challenge a prosecution on the ground that their conduct had been induced by reliance on advice given by state officials. Although the defense was framed as "entrapment," the force of the entrapment defense was "detrimental reliance," and it is not uncommon to refer to this as "entrapment by estoppel."[130]

Estoppel usually involves affirmative conduct, and it is sometimes said that mere silence cannot raise an estoppel,[131] but that is incorrect. When from all the facts and circumstances it appears that silence did in fact induce prejudicial reliance and this was known to the party to be estopped, but nothing was done, an estoppel may arise.[132] This is known as "misleading silence." For example, when a patent owner objects to another party's actions

126. Pittsburg Unified Sch. Dist. v. Commn. On Prof. Competence, 194 Cal. Rptr. 672 (Ct. App. 1983).

127. *See, e.g.*, State v. Yates, 168 P.3d 359, 374 – 376 (Wash. 2002) (abrogated on other grounds); State v. Gregory, 427 P.3d 621 (Wash. 2018); State v. Drown, 797 N.W.2d 919, 922 (Wis. App. 2011).

128. Raley v. State of Ohio, 360 U.S. 423, 425-26 (1959) ("We hold that in circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment and must be reversed…. After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."); the circumstances of the cases were that the defendants had invoked the privilege against self-incrimination after being informed they had the right to remain silent, but were then convicted of criminal contempt for not answering the questions posed.

129. Cox v. State of La., 379 U.S. 559, 572-73 (1965) (In Cox the defendant was told by the Chief of Police that he (Cox) could lead a large contingent of demonstrators to a site near a courthouse. Cox was arrested and convicted of violating a Louisiana statute that barred "picketing" near a courthouse. The Court reversed the holding that Cox was activity misled to his detriment by the Chief of Police.).

130. *See* Sean Connelly, *Bad Advice: The Entrapment By Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627 (1994).

131. Hottel Corp. v. Seaman Corp., 833 F.2d 1570, 1573 (Fed. Cir. 1987); Waldrip v. Olympia Oyster Co., 244 P.2d 273, 277 (Wash. 1952).

132. People v. Ocean Shore R.R., 196 P.2d 570, 580-81 (Cal. 1948) ("An estoppel may arise from silence but only when there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak and knowing that circumstances require him to speak, remains silent").

as constituting a possible infringement and then remains silent in the face of continuing activity by the second party before seeking relief, courts have deemed the patent owner's silence to be misleading.[133] Applying this principle to Penal Code Section 337a(a)6, one could argue that having once objected to the conduct of customer betting, by enacting a statute, the government has since remained silent, by never enforcing that statute, and thereby induced in the general public the reasonable belief that betting is not criminal insofar as the customer is concerned.

B. DEBBIE'S CONDUCT

Even if in Example 2, Customer's conduct is not deemed criminal, does Debbie's actions in accepting the bet and notifying Customer that the bet has been placed subject Debbie's to prosecution in California? As noted previously, functionally Debbie's has "accepted" a bet, which is clearly made criminal by California Penal Code Section 337a(a)(6), and other subparts of Subsection 337a. Can those provisions be asserted against Debbie's, which operates out of Antigua and has no physical presence in California?

Does Debbie's out-of-state activities permit criminal prosecution by California? As a federal constitutional matter, the answer is "yes." In *Strassheim v. Daily*,[134] the Supreme Court held that states could criminally prosecute conduct that occurred outside the state when the out-of-state conduct was intended to produce and did produce detrimental effects within the state.[135] Debbie's conduct would on the surface appear to satisfy this test. Debbie's is deliberately accepting bets from Customer who is in California, which makes accepting bets a crime. And, while it is well-settled that "minimum contacts" is the rule for personal jurisdiction in civil cases, in criminal cases the defendant's intent is the central focus.[136] The issue is whether there is a "nexus" between the defendant's deliberate conduct and the forum,[137] such that the assertion of criminal jurisdiction over the defendant's out-of-state actions is fundamentally fair and not arbitrary.[138] Here, Debbie's would be hard-pressed to refute that it had that intent given that it engaged in a transaction and maintained a relationship with Customer, who Debbie's knew or should have known was a California resident at all relevant times.[139]

133. Meyers v. Asics Corp., 974 F.2d 1304, 1308-09 (Fed. Cir. 1992) (discussing cases but finding rule not applicable based on the record); *see* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995) (discussing when silence may create reasonable expectation of assent or reliance).

134. Strassheim v. Daily, 221 U.S. 280 (1911).

135. *Id.* at 285.

136. State v. Amorosa, 975 P.2d 505, 508 (Utah App. 1999).

137. United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990).

138. United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

139. "Geolocation" enables an online service provider to find and determine the exact location of a computer or networking device that is connected to the provider. "Geolocation" is used by online gambling services to ensure that services are only provided in jurisdictions where the gambling site is

A state's authority to subject out-of-state conduct to criminal prosecution in the state is not, however, self-executing. The state must have a law permitting it to subject out-of-state conduct to its criminal jurisdiction.[140] Many states, including California, have such statutes, but those statutes were not designed with the internet in mind.

California Penal Code Section 778 provides:

> When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefor in this State in an competent court within the jurisdiction territory in which the offense is consummated.[141]

Section 778 dates from 1872[142] when "consummated" had a tangible, physical connotation. In the internet era, what does "consummated" mean in the context of Example 2?[143] In the physical world, the answers are easy. Mailing a forged or counterfeit check from another state to a California bank for negotiation satisfies the "consummated in California" requirement.[144] Embezzling funds from a person in California, even though the embezzler is in another state also satisfies the "consummated in California" requirement.[145] In both cases, physical acts occurred in California – checks were negotiated or accounts were depleted; thus, the detrimental effects were physically connected to California. In Example 2, however, the only physical acts that occur in California are the sending of money to Debbie's "on account" and the transmission of information relating to the making of a bet. Both of these actions precede the actual consummation of the transaction, which occurs outside California. It is difficult to understand pre-transaction

licensed. *See* James Warmington, *How Does Sportsbook Geolocation Work in New Jersey?*, SPORTS BETTING (Oct. 19, 2019), https://www.gambling.com/us/online-betting/knowledge/how-does-sportsbook-geolocation-work-in-new-jersey-2115100 (discussing use of Geolocation by online gambling sites to insure compliance with licensing requirements that sites provide services only to users within jurisdictions that authorize gambling on the site); Steve Ruddock, *The Backbone of Legal Online Gambling in the US, Part 1: Geolocation*, BETTING USA (Oct. 31, 2019), https://www.bettingusa.com/geolocation-interview-geocomply/ (discussing need for online gambling sites to use Geolocation to insure regulatory compliance).

140. This is particularly true in California, which, as noted previously, has adopted the principle that conduct cannot be prosecuted as criminal unless it has been made criminal by statute; *See supra* note 89 and accompanying text; *See also* MODEL PENAL CODE § 1.03 explanatory note (Am. L. Inst., Proposed Official Draft 1962) ("[A] state has jurisdiction when . . . conduct outside the state constitutes an attempt or conspiracy within the state or is prohibited by a statute of the state specifically directed at such out-of-state conduct.").

141. Cal. Penal Code § 778 (1872).

142. *Id. credits*.

143. Jean-Bapiste Maillart, *The Limits of Subjective Territorial Jurisdiction in the Context of Cybercrime*, 19 ERA F. 375 (2019) (Ger.), https://doi.org/10.1007/s12027-018-0527-2 (questioning the utility of territorial concepts when addressing jurisdiction questions in the digital era).

144. People v. Sansom, 173 P. 1107, 1108-09 (Cal. App. 1918).

145. Ex Parte Hedley, 31 Cal. 108, 114 (1866).

activity as "consummation." "Consummation" is an action-effect relationship, with the event being "consummated" when the effect is realized, e.g., the negotiation of the forged check or the depletion of funds through embezzlement.[146] In Example 2, the transaction is not structured in a manner that it can be said that the prohibited act – bookmaking by the making of a bet– was consummated within California.

In *Hageseth v. Superior Court*,[147] the court addressed the application of Section 778 "consummated in California" requirement to criminal activity involving the internet. The activity involved the purchase through the internet of prescription medications. The request for the medication was made on the internet from within California.[148] The request was reviewed and approved in another state by a non-licensed person. The person in California paid for the medication by credit card in California. Subsequently, the recipient of the medication overdosed and committed suicide. The defendant was charged with practicing medicine in California without a license. The court held the "consummation in California" requirement was met.[149] The court noted that under the applicable statute (Business & Professions Code §2052) there was no requirement that an injury or harm be caused; all that was required was that the defendant hold oneself out as practicing any method of treating the sick or afflicted in California. Defendant clearly did this by prescribing and providing medications to a person in California.[150] Defendant deliberately engaged in conduct that had an effect in California – the "holding oneself out as" – and, thus, was properly subject to California criminal jurisdiction. California does not, however, criminalize "holding oneself out as a bookmaker"; California criminalizes the making, offering and accepting of bets.[151]

In *Hageseth*, there was a direct connection between the defendant's out-of-state actions and the effect or consequence of those actions in California. Although the transaction occurred on the internet, the key was not the mode of communication but the defendant's intent to hold himself out in California as a licensed Physician – and that holding out occurred in California where it was received by the recipient of the information. While *Hageseth* is correct, it provides little assistance in the context set out in Example 2, where the transaction occurs out of state. If *Hageseth* had found jurisdiction when the recipient went to the defendant's location to physically, or by a written or electronic communication, place the order with the defendant knowing the recipient would return to California with the medication, it would be

146. *See Consummate*, BLACK'S LAW DICTIONARY 389 (4th ed. 1968) (defining "consummate" as "to finish by completing what was intended; bring or carry to the upmost point or degree; carry or bring to completion; finish, perfect"); NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 393 (2d ed. 1973) (defining "consummate" as "to sum up, finish").

147. Hageseth v. Sup. Ct., 59 Cal. Rptr.3d 385, 390 (Ct. App. 2007).

148. *Id.* at 388.

149. *Id.* at 399.

150. *Id*.

151. Cal. Pen. Code § 337a(a)(6) (2010).

analogous to Example 2. However, the court in *Hageseth* did not rely on the recipient's actions to find "consummation." When the transaction is structured so that the defendant conducts the business entirely out-of-state, but the recipient returns to California where the effect is realized, California courts have found that the conduct does not fall within Section 778.[152]

Penal Section 778(a)[153] addresses the converse problem, i.e., the defendant acts in California, but the crime occurs outside California. For the statute to apply, there must be some meaningful conduct connected to the criminal activity that occurs in California. For example, planning and preparing in California to commit the crime would be sufficient even though the crime is actually committed out of state.[154] In one case, the court found Section 778(a) applied when the defendant, who had lost his license to practice medicine in California, advertised and met with patients in California, although the actual medical procedures took place out-of-state.[155] It is unclear whether Debbie's connections with California, as set out in Example 2, compare with the activities courts have held satisfy Section 778(a). Debbie's likely advertises, but internet advertising is not focused to particular jurisdictions, like traditional advertising. Internet advertising tends to be search driven, i.e., the ad recipient finds the advertising through a search engine like Google. Debbie's is likely aware that Customer is in California, but the only physical act that occurs in California is Customer's communication to Debbie's of Customer's desire that a bet be made. Decisions applying Section 778(a) have all involved more direct connections to California than set out in Example 2. Whether less significant connections would suffice has not been determined. There is only one matter in which Section 778(a) was found not to be satisfied. In *Fortner v. Superior Court*,[156] the defendant was charged with domestic violence that occurred in another state. The court found no evidence that the defendant had engaged in conduct in California that was preparatory to the commission of the crime in another state. Example 2 falls somewhere between the "no connection" in *Fortner* and the more significant connections in the matters described above where courts have found that Section 778(a) was satisfied. So, Debbie's is at some

152. Fortner v. Superior Ct., 159 Cal. Rptr. 3d 128, 133 (Ct. App. 2013) (stating that mere fact that activity conducted entirely in another state will have an "effect" in California when the person returns to California does not satisfy the "consummation" requirement of Cal. Pen. Code § 778(a); it must be intended by the defendant that the act will have an effect in California).

153. Cal. Pen. Code § 778(a) (2002) ("Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in the same manner as if the crime had been committed entirely within this state.").

154. People v. Morante, 975 P.2d 1071, 1084 (Cal. 1999); People v. Chapman, 139 Cal. Rptr. 808, 810 (Ct. App. 1977).

155. *See* People v. Brown, 109 Cal. Rptr.2d 879, 885-887 (Ct. App. 2001) (explaining that while illegal surgery performed by defendant on California resident occurred outside California in Mexico, prosecution of defendant was proper when defendant met with patient in California and returned to California with patient after illegal activity).

156. *See supra* note 152.

risk that its activities as set out in Example 2 would constitute a violation of Penal Code Section 778(a), but it is difficult to define with any precision the magnitude of the risk.

V. CALIFORNIA COMMON LAW

As noted previously, there are no common law crimes in California;[157] however, whether a transaction constitutes illegal common law gambling can have important criminal ramifications insofar as federal criminal statutes are concerned.[158] The federal ramifications will be discussed shortly. Here, the paper addresses whether the transaction set out in Example 2 would be an illegal gambling contract under California common law.

The primary common law proscription on gambling dates from 1710 with Parliament's adoption of the Statute of Anne.[159] The Statute of Anne sought to interdict gambling by taking any and all profit out of the activity by declaring such transactions void. This was accomplished by allowing losers to recover their losses from winners, and by permitting suits to recover losses against winner by interested third persons. The first part of the Statute of Anne that declared gambling transactions void was, quickly construed as a general ban on the collection of gambling debts by winners against losers.[160] Thus, as enacted and judicially construed, the Statute of Anne allowed gambling losers to recover their losses from gambling winners and prevented gambling winners from recovering their winnings from gambling losers. Gambling became a "no win" proposition for participants. Of course, gambling obligations might be honored between family and friends, but honor would not likely discourage a customer from suing a gambling establishment or stranger to recover losses or dissuade the customer from opposing a lawsuit to collect on a gambling debt the customer did not wish to pay. These common law proscriptions were recognized early on by California courts as to the recovery of gambling debt.[161] The recovery of gambling losses by losers against winners (as permitted by the Statute of Anne) has, however, not been recognized in California.[162] California courts

157. *See supra* note 89 and accompanying text.

158. Many federal statutes that address gambling require that the conduct be unlawful under state law. *See*, *e.g.*, Wire Act, 18 U.S.C. § 1084. *See infra* Part VI.

159. An Act for the Better Preventing of Excessive and Deceitful Gaming, 1710, 9 Ann. c. 14, § 1 (Eng.); 7 MATTHEW BACON ET AL., A NEW ABRIDGEMENT OF THE LAW 456 (Charles Edward Dodd eds., 7th ed. 1832). Prior to the Statute of Anne, English law had focused on preventing cheating while gambling and limiting judicial enforcement of large gambling debts. *See* Ronald J. Rychlack, *Lotteries, Revenues, and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L. REV. 11, 17-18 (1992).

160. Blaxton v. Pye, 2 Wils. K.B. 309, 95 Eng. Rep. 828 (1766) (holding that gambling debts were not judicially cognizable).

161. Metro. Creditors Serv. v. Sandri, 19 Cal. Rptr. 646, 652-53 (Ct. App. 1993) (enforcement of gambling debt violates California public policy regardless of legality of gambling activity).

162. A number of states have incorporated the provisions of the Statute of Anne into their statutory law. *See, e.g.*, W. Indies, Inc. v. First Nat. Bank of Nev., 214 P.2d 144, 152 (Nev. 1950) (discussing

failed to incorporate the Statute of Anne into California common law, as was the pattern in many other states.[163]

In *Bryant v. Mead*,[164] decided shortly after California became a state, the court addressed a claim for recovery of a gambling debt. The defendant lost $4,000 playing faro, a card game. Plaintiff sought to recover the debt. The California Supreme Court refused to enforce the debt, relying extensively on English precedents that treated such obligations as unenforceable in a court of law or equity. At the time, California permitted the operation of licensed gambling houses. The plaintiff was apparently unlicensed, but the court commented that even if the plaintiff held a license, "such license should not be construed as conferring a *right to sue* for a gambling debt but as a *protection* solely against a criminal actions."[165] Two years later, in *Carrier v. Brannan*,[166] the California Supreme Court reaffirmed the rule against judicial enforcement of gambling debts. The proscription on the recovery of gambling debt in courts of law or equity has been carried forward to modern times, and aside from one contrary decision,[167] had been the settled law in California since statehood.

The allowance of recovery of gambling losses from winners, authorized by the Statute of Anne, has not found judicial favor in California; rather, California courts have relied on statutory proscriptions on illegal conduct to refuse to permit the recovery of gambling losses by losers from winners. This is largely the result of the codification movement, which was accepted in California in 1872.[168] While proscriptions on the enforcement of illegal bargains were added to the Civil Code, the Statute of Anne's allowance of the recovery of gambling losses was not included. California courts have, until recently, been consistent in their refusal to permit any actions founded on a gambling transaction, even one based on equitable notions of reimbursement of losses. California courts have tended to see the unlawfulness of the gambling transaction as trumping all competing considerations. Legal and equitable doctrines, such as "in pari delicto,"

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incorporation of Statue of Anne into Nevada law and reconciling incorporation with the legalization of gambling in the state).

163. Rychlack, *supra* note 159, at 20 ("As the New World developed, the Statute of Anne, like other common law doctrines, became part of the law of every state").

164. Bryant v. Mead, 1 Cal. 441 (1851).

165. *Id.* at 444.

166. Carrier v. Bowman, 3 Cal. 328 (1853).

167. Crockford's Club Ltd. V. Si-Ahmed, 250 Cal. Rptr. 728, 728, 730 (Ct. App. 1988) (enforcing English judgment based on a gambling debt; holding that acceptance of gambling in several forms in California made it no longer tenable to refuse to recognize a foreign judgment on the ground that enforcement of gambling debt violated California public policy).

168. The relationship between code and common law in California has been complicated from the outset. *See* Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994). *Compare* Metro. Creditors Serv. v. Sadri, 19 Cal. Rptr.2d 646, 648 (Ct. App. 1993) (citing the Statute of Anne as evidence of prohibition against gambling debts being "deeply rooted in Anglo-American jurisprudence") *with infra* notes 170-178 and accompanying text (finding that the statute's express authorization of lawsuits to recover gambling losses has been completely ignored when lawsuits of this type have been brought before California courts).

unclean hands, and illegality have been deemed superior to the norm expressed in the Statute of Anne that the profit should be taken out of gambling by permitting the recovery of gambling losses.[169]

Recently, some California courts have been receptive to enforcing gambling contracts, although there remains contrary authority and one could not opine with confidence where California law currently stands on this matter. Two decisions illustrate the difference in position on this point at the current time.

Kelly v. First Astri Corp.[170] is an interesting case on its facts. *Kelly* involved a type of Class III gambling (banked games) before the California Constitution was amended to allow Tribal Casinos to offer Class III gambling under the Indian Gaming Regulatory Act.[171] The controversy involved a casino on Sycuan Reservation land in Southern California. The Sycuan tribe contracted with defendant First Astri Corp. to manage the casino. The casino offered a banked "twenty one" game; however, the plaintiff Kelly, not defendant First Astri Corp., acted as the bank.[172] Kelly claimed that First Astri Corp. negligently or intentionally allowed the placement of "marked" cards in the decks used to play the game Kelly banked. Kelly sought to recover his losses. The court concluded that Kelly was in violation of California Penal Code Section 330, which criminalizes the playing of the game of "twenty one" and all "banking games…played with cards…"[173]

The court concluded that California public policy bars the recovery of gambling losses regardless of whether the losses arise out of lawful or unlawful gambling contracts or transactions.[174] At the time Kelly incurred his losses at the Sycuan Tribal Casino, the game Kelly banked was likely illegal because the tribe had not entered into a compact with the State of California authorizing Class III gambling on reservation land.[175] For that reason, the courts comments regarding whether Kelly could recover his losses if gambling were legal should be seen as dicta. However, the dicta is

169. S*ee e.g.*, Wallace v. Opinham, 165 P.2d 709, 709-10 (Cal. 1946) (finding that if a party is cheated while illegally gambling, "law and equity" will not support the enforcement of "rights growing out of that illegal transaction" in the absence of a statute allowing recovery for gambling losses). Not all jurisdictions take such a strict approach. *See also* Webb v. Fulchire, 25 N.C. 485, 486 (holding that money taken fairly in an illegal gambling game cannot be recovered, but money taken through cheating in an illegal gambing game can).

170. Kelly v. First Astri Corpo., 84 Cal. Rptr. 2d 810 (Ct. App. 1999).

171. The Indian Gaming Regulatory Act permits Native American tribes to provide gambling games on tribal lands. *See* 25 U.S.C. § 2701; See 25 U.S.C. § 2702 . Class III games are those that are generally offered in commercial casinos. See 25 C.F.R. § 502.4(a)(1). Class I games are traditional American gambling games. *See* 25 C.F.R. § 502.2. Class II games are non-banked gambling games (including bingo and poker). *See* 25 C.F.R. § 502.3.

172. *See supra* notes 27-29 and accompanying text (discussing use of Player-bank versus House-bank at California cardrooms).

173. *See* Kelly, 84 Cal. Rptr. 2d at 829.

174. *Id.* at 827-28.

175. *See supra* notes 44–51 and accompanying text (discussing the legalization of California Tribal Casinos).

consistent with prior judicial statements that treat the legal-illegal distinction as irrelevant. Simply put, by serving as the bank for the game of "Sycuan 21," Kelly was committing a crime and therefore was "in pari delicto", i.e., as much responsible for his losses, if not more so, than defendant First Astri Corp, which operated the casino in which Kelly played.[176]

The court also emphasized California's strong public policy against recognition, recovery on, or enforcement of gambling contracts and that this policy may allow the refusal to recognize, recover on, or enforce gambling contracts, even transactions that are legal in the state where the gambling occurred.[177] The court noted that under California law, the consideration for a contract must be lawful.[178] Contracts and transactions in violation of criminal law are not lawful. However, even if the transaction is lawful, e.g., it does not violate Penal Code Section 330, a contract may still be unlawful if it is contrary to "'an express provision of law,' 'the policy of express law, though not expressly prohibited,' or 'good morals.'"[179] The court found, based on prior case law, that California consistently treated gambling contracts and transactions as contrary to good morals and unenforceable in all respects in California courts, including claims to recovery gambling losses.[180]

The distinction between enforcement of a gambling contract and enforcement of gambling debt was recently addressed in *Kyablue v. Watkins*.[181] The plaintiff Kyablue provided funds to defendant Watkins to be used for playing in lawful games of poker. Kyablue terminated the arrangement consistent with its terms and sought recovery from Watkins of funds Kyablue had advanced to Watkins but Watkins had not spent as of the date of termination. Watkins refused to return the funds, and Kyablue sued to recover. Watkins successfully demurred before the trial court to Kyablue's complaint on the grounds that California public policy forbids enforcement of gambling-related contracts. The Court of Appeal reversed. [182]

The *Kyablue* court took a different approach from that in *Kelly*. First, the court noted that even if a contract is found to be illegal, California courts have permitted enforcement in compelling circumstances, particularly to avoid unjust enrichment of the defendant at the expense of the plaintiff.[183]

176. *See* Kelly, 84 Cal. Rptr. 2d at 828-29. The "crime" was Kelly's violation of Cal. Pen. Code § 330 which bars "housed-backed games" at California cardrooms. *See supra* notes 27-29 and accompanying text. Kelly's conduct would now be lawful in California if Kelly secured a license as a Propositional Player. Ron Bona, California Attorney General, Third-Party Providers of Proposition Players Registration, available at https://oag.ca.gov/gambling/forms/forms_card.

177. *Id.* at 827.

178. *Id.* at 820 (citing Cal. Civ. Code § 1607).

179. *Id.* (citing Cal. Civ. Code § 1667).

180. *Id.* at 827.

181. Kyablue v. Watkins, 149 Cal. Rptr. 3d 156 (Ct. App. 2012).

182. *Id.* at 158.

183. *Id*. at 159 ("[E]ven when a contract is found to be illegal, in compelling cases it may be enforced to 'avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.'"(quoting Southfield v. Barrett, 13 Cal. App. 3d 290, 294 (Ct. App. 1970))).

Second, the court acknowledged that while significant California precedent condemns gambling as violative of public policy, that precedent must be placed in context. More recent precedent has noted that California's historic antipathy towards gambling has significantly eroded.[184]

Third, the court noted that Kyablue's arrangement with Watkins was limited to playing poker where poker could be lawfully played. Thus, there was no reason here to address the issue of criminality under Penal Code Section 330, or for that matter the defense of "in pari delicto." Simply put, under the Kyablue-Watkin's arrangement there was no "delicto."[185]

Fourth, the court found *Kelly* unpersuasive because it relied on decisions involving illegal gambling and the enforcement of gambling debt.[186] *Kyablue* did not involve illegal gambling, nor did it involve the collection of gambling debt. The court emphasized the distinction between the public acceptance of gambling and the enforcement of gambling debt. California courts have refused to enforce gambling debt even when gambling was legal in California. The distinction is well taken. Gambling on credit encourages gambling and has been claimed to contribute to problem gambling.[187] Permitting gamblingbut refusing to enforce gambling debt is consistent with player protection. A casino that allows a player to gamble on credit assumes some risk that it will not be able to collect on the debt if the player does not pay the debt.[188] In theory, this will encourage casinos to be careful and diligent in the extension of credit gambling to those who can afford to wager more money than they physically brought to the casino. I say, in theory, because there are legal strategies casinos may invoke in some jurisdictions that will allow them to enforce gambling debt obligations

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184. *Id.* at 159–60.

185. *Id.* at 160–61.

186. *Id*. at 160 (noting that the court in Metro. Creditors Serv. v. Sandri, 19 Cal. Rptr. 646 (Ct. App. 1993) distinguished between gambling in general and enforcement of gambling debt in particular). The *Kyablue* court concluded:

> The clear policy against enforcement of gambling losses and debts does not control the decision here. Analyzing the contract's *illegality* involves interpreting the public policy it offends, since California does not criminalize gambling outright. In this case, the pertinent policy concerns are with regard to gambling generally rather than the historic distaste for judicial resolution of "action for recovery of gambling losses and actions to enforce gambling debts."

Kyablue, 149 Cal. Rptr.3d at 160 (quoting Kelly v. First Astri Corpo., 84 Cal. Rptr. 2d 810, 812 (Ct. App. 1999)).

187. *See* Tony Schellinck & Tracy Schrans, *Identifying Problem Gamblers at the Gambling Venue: Finding Combinations of High Confidence Indicators*, 16 J NAT'L ASS'N GAMBLING STUD. 8, 16 (2003) (Austl.). Credit gambling is an issue that has divided jurisdictions that have legalized gambling. *See* Responsible Gaming, Regulations and Statutes, AMERICAN GAMING ASS'N (Sept. 2019), https://www.americangaming.org/wp-content/uploads/2019/09/AGA-Responsible-Gaming-Regs-Book-FINAL.pdf (identifying states that do or do not bar or impose restrictions on credit gambling). Recently, regulatory authorities in Britain barred the use of credit cards to pay for non-lottery gambling transaction to combat problem gambling. Kate Olton & Elizabeth Howcroft*, Britain Bans Betting on Credit Cards to Fight Gambling Addiction*, REUTERS (Jan. 12, 2020), https://www.reuters.com/article/us-britain-gambling/brtain-bans-betting-on-credit-cards-to-fight-gambling-addiction-idUSKBN1ZD0PF.

188. A jurisdiction may restrict the amount of credit debt a casino may write off against taxes owed.

against recalcitrant player-debtors.[189] That said, distinguishing between lawful gambling contracts and transactions and gambling debt represents a reasonable accommodation of competing interests in the relatively new age of legalized gambling.

California thus has a somewhat unique common law approach to gambling. California law mirrors the part of the Statute of Anne, as judicially construed,[190] that bars the enforcement of gambling debt, but rejects the remainder of the statute. Rather than taking the profit out of gambling, California public policy has historically taken the courts out of gambling by treating gambling contracts and transactions as immoral and not subject to judicial review, at least civilly. As *Kyablue* evidences, there has been some recent judicial pushback against the blanket treatment of gambling contracts and transactions as immoral and against public policy, but the case law remains mixed. Looking at California case law as a whole, the weight of past authority certainly favors the *Kelly* approach, even if one believes that decisions such as *Kyablue* represents a sounder, better reasoned emerging body of law.

If these common law precedents were to be applied to sports betting, all California courts would treat sports betting as illegal conduct if sports betting is criminal – the issue address in Part IV of this paper. If sports betting is not criminal, some California courts would treat sports betting as illegal on the theory that gambling is immoral and, thus, contrary to the public policy of the state. This approach is represented by *Kelly*. Other courts, however, would not find sports betting illegal if it is not criminal. These courts rejected the older approach of equating gambling with immorality; rather, these courts see gambling contracts as simply a form of contract that parties may enter into, subject to the general law of California governing contract creation and enforcement. This approach is represented by *Kyablue v. Watkins*.

VI. FEDERAL LAW CRIMINALIZING ONLINE GAMBLING

Two federal statutes are of primary importance in the context of online sports betting. The Wire Act[191] and The Unlawful Internet Gambling

189. Perhaps the most extreme example of this is the Clark County, Nevada (Las Vegas) District Attorney's practice of prosecuting gamblers who pay their gambling debts with a check that is subsequently dishonored. Joel Schectman, *The Las Vegas Bad Check Unit: One of a Kind*, REUTERS (Sept. 30, 2016), https://www.reuters.com/article/usa-vegas-shell-badcheck/the-las-vegas-bad-check-unit-one-of-a-kind-idUSL2N1C514Y. Alternatively, the casino may sue in a jurisdiction that recognizes gambling debt as a legally enforceable obligation and enforce that judgement using the Full Faith & Credit Clause (U.S. Const. art. IV, § 1. *See* MGM Desert Inn v. Holz, 411 S.E.2d 399 (N.C. 1991)) (holding that Full Faith & Credit clause required recognition of Nevada default judgment for gambling debt).

190. *See supra* note 160 and test.

191. 18 U.S.C. § 1084.

Enforcement Act ("UIGEA")[192] are the principle federal laws that potentially apply to Debbie's business as outlined in Example 2 earlier. The Wire Act prohibits the use of instruments of interstate commerce in connection with the business of betting. Instruments of interstate commerce would include online transactions.[193] While there has been disagreement over the scope of the Wire Act, there is no disagreement that it applies to sports betting.[194] The key term here is that the transaction must be "illegal." By its terms UIGEA does not apply to legal gambling. This paper will generally focus on the Wire Act as the application of both the Wire Act and UIGEA to Example 2 would follow the same analysis. If the Wire Act does not apply to Example 2, UIGEA does not apply.

UIGEA consists of two parts. First, UIGEA provides that no person or organization engaged in the business of betting may accept payment by credit card, wire or electronic funds, transfers, checks, etc., for an illegal internet gambling transaction.[195] Second, UIGEA imposes significant burdens on financial institutions (e.g., banks, credit cards companies) to ensure that they do not facilitate or enable the use of credit cards, wire or electronic fund transfers, checks, etc., for illegal internet gambling.[196]

The Wire Act was designed to be supplementary to state laws that made gambling illegal.[197] The Wire Act does not criminalize wagering when wagering is legal under state law. Thus, sports betting, which is legal in several states, does not violate the Wire Act even if instrumentalities of interstate commerce are used to make the wager as long as the wager is legal in the state(s) where the wager is made and placed.

This paper assumes that the relevant jurisdiction for determining whether gambling is illegal is California,[198] however, that assumption is slightly contestable. Online communication between Customer and

192. 31 U.S.C. § 5361–5366.

193. United States v. Lombardo, 639 F.Supp.2d 1271, 1289 (D. Utah 2007) ("[T]he Wire Act itself, although enacted long before the advent of the internet, clearly contemplates any form of electronic transmission via wire…."); United States v. Corrar, 512 F. Supp.2d 1280 (N.D. GA. 2007) (same). That the Wire Act applies to online transmissions has been the consistent policy of the Department of Justice. *See* Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1 (2011).

194. The Department of Justice has taken inconsistent positions on the scope of the Wire Act. In the 2011 Opinion cited in note 193, the Office of Legal Counsel opined that the Wire Act was limited to sports betting and did not encompass other forms of online gambling. In 2018, however, the DOJ reversed course and returned to its pre-2011 position that the Wire Act was not limited to sports betting. *See* Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. 1 (2018). In New Hampshire Lottery Comm. v. Rosen, 986 F.3d 38 (1st Cir. 2021) the court concluded that the DOJ got it right in 2011. As of the writing of this paper it is unknown whether the Biden administration will return to the more lenient policies expressed in the Obama administration (Note 188) or the more rigorous policies of the Trump administration.

195. 31 U.S.C. § 5363.

196. 31 U.S.C. § 5364.

197. G. Robert Blakey & Harold A. Kurland, *Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 959-965 (1978) (legislative history of Wire Act showing intent to assist, not preempt, states).

198. The other jurisdiction, Antigua, has legalized sports betting.

Debbie's, as described in Example 2, may result in the incidental or intermediate routing of data into states, other than California, which expressly make sports betting by the customer illegal. The Department of Justice has taken the public position that the Wire Act extends to such incidental routing.[199] This concern led to the 2011 Office of Legal Counsel opinion mentioned earlier in note 193. Both Illinois and New York wished to sell their lottery tickets online. The sales would be intrastate, i.e., only to purchasers within each state; however, because it was possible that the incidental routing of the internet data respecting the online lottery purchase would cross state lines, Illinois and New York were concerned the transaction would be subject to the Wire Act. The 2011 opinion avoided that issue by opining that the Wire Act was limited to sports betting and, thus, did not extend to the sale of lottery tickets. The 2018 DOJ opinion did not address the incidental routing issue.

Although there is some disagreement and differences of opinion among federal courts, most federal courts have read the interstate commerce requirement in federal criminal statutes broadly. Some courts have concluded that the mere use of instrumentality "by", "in", or "of" interstate commerce is sufficient.[200] Other courts find that the incidental routing of the communication is sufficient to satisfy the jurisdictional requirement.[201] This issue here, however, is somewhat different. It may be conceded that the use of the telephone or internet to place a bet satisfies the interstate commerce requirement. The critical issue here is whether the incidental contact the wire transmission has with a state that makes sports betting illegal is sufficient to

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199. Letter dated January 2, 2004, from David M. Nissman, U.S. Attorney, District of the Virgin Islands, to Judge Eileen R. Peterson, Chair of the U.S. Virgin Islands Casino Control Commission:

> While several federal statutes are applicable to Internet gambling, the principal statutes are Section 1084… of Title 18, United States Code…[W]e believe that the acceptance of wagers by gambling businesses located in the Virgin Islands from individuals located either outside of the Virgin Islands or within the Virgin Islands (but where the transmission is routed outside of the Virgin Islands) would itself violate federal law….

See also Mark Hichar, *The Unlawful Internet Gambling Act of 2006 Is Not a Greenlight for Intrastate Internet Gambling*, PUB. GAMBLING INFO. (November 2006), https://www.pgridigitallibrary.com/uploads/4/3/1/5/43157305/hichar_2006_november.pdf (noting consistent DOI policy that "Existing Federal Law Prohibits Intrastate Gambling, Unless the Electronic Wagering Data Remains in the State"). The issue of "incidental routing" was not addressed in DOJ's most recent pronouncement on the scope of the Wire Act. *See supra* note 194.

200. In *United States v. Davila*, 592 F.2d 1261 (5th Cir. 1979) the court held that incidental interstate routing of a Western Union wire transfer satisfied the interstate commerce requirement of the federal wire fraud statute, 18 U.S.C. § 1843. In *Davila*, funds transferred between two banks located in the state of Texas were routed through the state of Virginia. The court rejected the defendant's argument that the interstate nexus was "too minimal and incidental" to satisfy the statute's jurisdictional element. The court concluded that the wire transfers "were essential" to carrying out the offenses charged, "and they went of necessity on interstate facilities." *Id*. at 1264. *See also* United States v. Laedeke, No. CR 16–33–BLG–SPW, 2016 WL 5390106 (D. Mont. Sept. 26, 2016) (wire fraud prosecution; interstate commerce requirement satisfied by in-state email messaging that was incidentally routed out of state.).

201. United States v. Giordano, 442 F.3d 30, 39 (2d Cir. 2006) (concluding that interstate use of the telephone constituted use of a facility of interstate commerce); United States v. Mandel, 647 F.3d 710 (7th Cir. 2011).

allow the federal government to use that state's position to support a Wire Act prosecution based on transmission that begins and ends between jurisdictions that permit sports betting.

The primary argument against treating "incidental routing" as triggering the laws of states that touch the transmission is UIGEA. UIGEA expressly provides that incidental routing of data into another state does not affect the intrastate character of the transaction.[202] The argument is that Congress would not intend to exempt intrastate transactions with incidental routing from the requirements of the UIGEA if those same transactions were illegal under the Wire Act. And while the Department of Justice has publicly rejected this approach,[203] it has not brought a Wire Act prosecution based on the theory that "incidental routing" would support the use of the law of a jurisdiction that touched the transmission to support the Wire Act prosecution.

It may be noted that the sports betting transaction in Example 2 does not involve an "intrastate" transaction, but it is clearly one that is international, because Antigua is outside the United States. This observation is technically correct but misses the larger issue in play. The critical issue is whether the incidental routing of the wire transaction through a state that treats sports betting as illegal is sufficient to allow that state's laws to be applied to characterize the transaction as illegal. For this purpose, whether the wire transmission is intrastate (within the state for purposes of sending and receipt), or interstate (within different states for the purposes of sending and receipt), or international is irrelevant; the critical issue is the state of law at the point of sending and the point of receipt. As long as the transmission is legal at both points, both interested jurisdictions have expressed their position. Jurisdictions through which the wire transaction only travels due to transmission issues have no interest in having their law applied to the transactions regardless of whether the transaction is intrastate, interstate, or international. It is difficult to see what interest incidental routing states would have in applying their law to a transaction that has no impact on the state's residents or to the protection of the state's residents. It is analogous to a state seeking to apply its laws on the use of alcohol to a commercial passenger jet flying over the state.

There were efforts in the 113th and 114th Congress to amend the Wire Act to specifically reference "incidental routing."[204] For example, House

202. 31 U.S.C. § 5362(10)(E).

203. *Internet Gambling Prohibition Act of 2006: Hearing on H.R. 4777 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. On the Judiciary,* 109th Cong. 12 (2006) (statement by Bruce G. Ohr, Chief of the Organized Crime and Racketeering Section, United States Department of Justice). *See also Reconsidering Whether the Wire Act Applies to Non-Sports Gambling,* 42 Op. O.L.C. 1 (2018) (reiteration of position that intrastate exemption in UIGEA does not apply to the Wire Act).

204. These various proposals were put forth under the title "Restore America's Wire Act." Versions of this legislation were introduced in the 113th and 114th Congressional sessions. *See* Senate Bill S. 2159, 113th Cong. (2014) and House Measure H.R. 4301, 113th Cong. (2014) each of which was introduced in

Measure H.R. 707 would have expressly included "incidental" transmission as satisfying the interstate commerce requirement. See, e.g., H.R. 707 (114th Cong. 1st Sess.) §2 (Wire Act Clarifications), at § C(3):

> The term 'uses a wire communications facility for the transmission of interstate or foreign commerce of any bet or wager' includes any transmission over the internet carried interstate or in foreign commerce, incidentally or otherwise….[205]

It is not entirely clear what the added term "incidentally" would have accomplished. It is well accepted that the "use" of a telephone or the internet is interstate commerce even if the call or internet transaction involves persons within the same state. The added term "incidentally" has importance if it would allow the application of a state's laws through which the call or transaction was incidentally routed to determine if the bet was illegal. However, the language does not specifically address this application. None of the measures made it out of committee, and the committee records and hearings are silent on this particular point. This issue will, however, rise in importance as more states legalize sports betting and the routing of online bets through states that do and do not permit sports betting becomes more prominent.

This still leaves us with the question whether, pursuant to the facts of Example 2, Debbie's could be prosecuted under the federal Wire Act based on the argument that the transaction was illegal under California law. How is "illegality" understood under the Wire Act? Does it require that the conduct be criminal under California law or is it sufficient that the conduct is prohibited, based on norms of morality and public policy?

Federal courts have found that the Wire Act can apply even though the state has not made gambling (sports wagering) a criminal act as long as the state treats sports wagering as illegal. In *United States v. Cohen*[206] the defendant was charged with Wire Act violations for accepting sports bets in Antigua from customers (law enforcement personnel) in New York. Cohen's business model was essentially the same as described in Example 2 of this paper. Cohen argued that they could not be prosecuted for Wire Act violations because while New York treated bookmaking as "illegal," it did not treat bookmaking as a "crime."[207] The court rejected Cohen's claim. The court noted that Cohen relied on the Wire Act's "safe harbor" provision that exempts interstate transmission of sports betting information that is (1) legal in both the place of origin and the place of destination and (2) the

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the 113th Congress, and Senate Bill S. 1668, 114th Cong. (2015) and House Measure H.R. 707, 114th Cong. (2015) in the 114th Congress.

205. *Restoration of America's Wire Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the Comm. on the Judicary H.R.*, 114th Cong. (2015).

206. United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

207. *Id.* at 74-75.

transmission is limited to information that assists in the placing of sports bets as opposed to making the bets themselves.[208] The safe harbor provision (18 U.S.C. § 1084(b)) does not use the term "criminal," it uses the term "legal." The court concluded that the safe harbor provision would only apply it sports betting was legal in the affected jurisdictions.

This is why the analysis of California statutory and common law is critical. Even if a customer placing a bet is not a criminal act, to escape Wire Act prosecution Debbie's must show that sports betting is not illegal. This is where the *Kelly v. First Astri Corp / Kyablue v. Watkins* debate becomes critical.[209] *Kelly* takes the position that sports betting is illegal; thus, if *Kelly* is followed, a Wire Act prosecution against Debbie's can be made.[210] On the other hand, under *Kyablue*, gambling that has not specifically been made criminal should be seen as legal. Thus, if *Kyablue* is followed, sports betting in California, as set out in Example 2, would not support a Wire Act prosecution, if the view was accepted that the Customer's actions do not constitute a violation of Penal Code Section 337a(a)(6), for the reasons set out in Part IV of this paper.

Under the Wire Act, there is also a distinction between transmission of information assisting in the placing of bets and the transmission of the actual bets themselves. The Act prohibits one engaged in the business of betting or wagering from knowingly using "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or context…."[211]

The Act's safe harbor provision carves out an exception that covers the transmission of information assisting in the placing of bets but not the transmission of actual bets themselves.[212] Debbie's would certainly argue that its conduct falls within the safe harbor provision because only "information assisting the placing of bets" occurs in California, the bet itself is placed in Antigua. The question, thus, is what does "information assisting in the placing of bets" mean?

Although the issue has not been as clearly stated as one would like, the incidental routing issue is tied to the placing of bets. When the Wire Act and other federal statutes addressing gambling (except UIGEA) were adopted, the focus was on organized crime. In that pre-internet world, betting was a more personal endeavor and the focus of these federal statutes was to strike at organized crime by depriving it of the profits of gambling.[213] The question

208. *Id.*

209. See Text and Notes 170-190.

210. The Wire Act is not used to prosecute customers as it is limited to those in the business of bookmaking. United States v. Scavo, 593 F.2d 837, 842 (8th Cir. 1979).

211. 18 U.S.C. § 1084(a).

212. 18 U.S.C. § 1084(b).

213. The Department of Justice asserted in 1974, shortly after the Organized Crime Control Act was passed:

here is whether and how a statute drafted with specific goals in the pre-internet era can and should be applied to internet transactions.

The Wire Act criminalized both the transmission of a bet and the transmission of information that assists in the placing of bets.[214] The "Safe Harbor" provision, however, exempts information that assists in the placing of bets from criminal sanction if the information is transmitted from and into a state or states in which such betting is legal.[215] The question thus reduces itself to how "placing a bet" differs from "information assisting in the placing of bets." Debbie's will argue that in Example 2, no "bet was placed" until Debbie's accepted and consummated the bet in Antigua.[216] All Customer did was transmit "information that assisted in the placing of the bet."

Most decisions addressing this issue have focused on the criminalizing aspect of Section 1084(a), i.e., did the defendant violate the Wire Act because the defendant received information that assisted in the placing of bets. Thus, courts have found that Section 1084(a)'s transmission of information proscribed was violated when the defendant provided information such as stories on the playing status of athletes or providing scores.[217] Providing betting odds would satisfy this standard.[218] In this context, the transmission of information prong of Section 1084(a) essentially complements the placing of bets prong. Bookmaking operations commonly use both prongs in their operations.[219] Courts have also held that providing information necessary for the placement of bets, such as providing account numbers and PINs constitutes information that assists in the placing of bets.[220] Debbie's would argue that information transmitted to enable a bet (account numbers, PINs) is fundamentally no different from Customer sending information to Debbie's that enables Debbie's to consummate a bet in that jurisdiction. Although it may appear strange that Debbie's, as the defendant, would argue for a broad interpretation of "information assisting" in Section 1084(a), Debbie's reasoning is logical if its argument is that the same interpretation should be given to the identical language in the Safe

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> It is the unanimous conclusion of the President, the Congress and law enforcement officials that illegal organized gambling is the largest single source of revenue for organized crime…. [It] provides the initial investment for narcotic trafficking, hijacking operations, prostitution rings, and loan-shark schemes.

Quoted in United States v. Fatico, 458 F.Supp. 388, 395 (E.D.N.Y. 1978) (Weinstein, J.) (also noting that the Department's position has been disputed).

214. 18 U.S.C. § 1084(a).

215. 18 U.S.C. § 1084(b). United States v. Ross, No. 98 CR.1174–1(KMV), 1999 WL 782749 (S.D. N.Y. Sept. 16, 1999) ("Read together [Section 1084(a) and (b)] impose federal criminal liability… for some conduct (the transmission of 'information assisting in the placing of bets') where, but only where, gambling is not legal in both jurisdictions where the transaction occurs….").

216. Ross, *supra* note 215, slip op. at *4.

217. United States v. Reeder, 614 F.2d 1179, 1185 (8th Cir. 1980).

218. United States v. Corrar, 512 F.Supp.2d 1280, 1288 (N.D. Ga. 2017).

219. *See* H.R. REP. No. 87 – 967, at 1–2 (1961) (stating that "the immediate receipt of information as to the results of a horse-race" exemplifies information that assists gambling operations).

220. United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014) (noting that providing account numbers is required to place a bet with the defendant); United States v. Corrar, 512 F.Supp.2d at 1288.

Harbor provision.[221] In other words, if Debbie's conduct constitutes criminal information assistance under Section 1084(a), it necessarily constitutes "information assistance" under the Safe Harbor provision of Section 1084(b). This, however, creates a conundrum: providing information assistance must necessarily be different from the placing of bets, otherwise the language in Section 1084(a) is redundant, which violates a fundamental canon of construction.[222]

No court has accepted or rejected the above argument. In the few decisions that have addressed the scope of the Wire Act's Safe Harbor provision, the courts have tended to adopt a transaction focus that assesses how close the information assistance is to the bettor's actions that initiate the bet. For example, in *United States v. Ross*,[223] the court was confronted with a transaction that mirrored Example 2. The defendant argued that no bet was made or placed until the transaction was actually consummated in Curacao, where the transaction was legal. The bettor simply made an offer to contract, which was essentially information that assisted in the making of a bet.[224] The government argued that the bets were made when the bettor (a government agent) made the bet and the bet itself was merely "recorded" in Curacao.[225]

The *Ross* court appeared to concede that the Wire Act was ambiguous when it came to differentiating and providing information assisting in the placing of a bet, for the court proceeded to craft a test that the court felt met the concerns that courts have identified as central to the statute.[226] The court also identified its test as the *more* reasonable interpretation of Congress's distinction between "bet" and "information," thus, also conceding that defendant's reading of the Wire Act was "reasonable."

The test the *Ross* court proposed was to identify how close the informational assistance was to the actual initiation of the bet. Background information, such as the posting of odds, the providing of account numbers, etc., was seen as fundamentally distinct from the initiation of the transaction by the making of an offer to place a bet.[227]

The *Ross* decision does have the benefit of certainty; however, that certainty is achieved by an artificial hierarchy that results in similar language having one meaning in Section 1084(a) of the Wire Act, but a different

221. It is a fundamental canon of construction that language in a statute should receive a consistent interpretation unless the contrary is unmistakably clear.

222. It is a basic rule of statutory construction that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage. *See* United States v. Menasche, 348 U.S. 528, 538-39 (1955); Dyna-Med, Inc. v. Fair Emp. & Hous. Com., 743 P.2d 1323, 1327 (Cal 1987) ("A construction making some words surplusage is to be avoided.").

223. United States v. Ross, No. 98 CR.1174–1(KMV), 1999 WL 782749 (S.D.N.Y. Sept. 16, 1999).

224. *Id.* at *4.

225. *Id.*

226. This concern appears to be that the Wire Act "reach those transactions in which callers place bets with bookmakers via the telephone because that is what 'persons engaged in the business of betting or wagering' do; '[b]ookies take bets, they receive them, they handle them.'" *Id*., (quoting United States v. Tomeo, 459 F.2d 445, 447 (10th Cir. 1972)) (footnote omitted).

227. *See supra* Note 223, at *4.

construction in the Wire Act's Safe Harbor provisions (Section 1084(b). Treating the terms consistently in both provisions would, however, be consistent with general judicial rules of statutory construction. The consequence of doing so would be that the Wire Act would not be able to capture all forms of betting made possible by modern technology. But that result is the consequence of a statute that was written in the pre-internet, pre-modern financial world. The Wire Act, drafted in the early 1960's, simply cannot be stretched and massaged to address transactions unforeseen (and probably unforeseeable) at that time. Trying to accommodate "horse and buggy" statutes to "jet age" problems is a difficult endeavor. Here is an example where it might be preferable for courts to read the Wire Act as a statute of its time and leave it to Congress to amend or revise the Wire Act, if so desired, to reach internet transactions that often defy traditional territorial boundaries.

VII. CONCLUSION

I have attempted to show in this paper that a reasonable case can be made for the proposition that the type of online sports betting arrangement set out in Example 2 is not presently illegal under California law, and thereby not illegal under federal law. When only the bet is made in California by the customer, a person not in the business of bookmaking, it is reasonable to interpret California Penal Code Section 337a(a)(6) as not applicable to the transactions.[228] It is more reasonable to interpret Section 337a(a)(6) as applicable to bookmakers, rather than customers. Even if Section 337a(a)(6) is extended to customer betting, it is simply unreasonable to ignore a pattern of non-enforcement of Section 337a against customers since the statute was enacted in 1909 as evidencing anything other than an accepted practice that the statute will not be enforced to the letter of the law.[229] This paper has also shown that common law proscriptions against gambling have significantly eroded in California, leaving little in place of the old broad view that gambling was illegal and violated the state's public policy, other than a refusal to recognize the lawfulness of gambling debt for purposes of judicial enforcement.[230] These twin findings lead, in turn, to the conclusion that federal proscriptions against sports betting fail because they depend on sports betting to be illegal under state law to be proscribed by federal law.[231] When one looks in detail at the way California and the federal government address sports betting, one walks away with the strong conviction that neither jurisdiction has addressed the issue with sufficient clarity and precision to justify criminalizing such transaction, particularly when structured as in Example 2.

228. *See supra* notes 93-98 and accompanying text.
229. *See supra* notes 99-133 and accompanying text.
230. *See supra* Part IV.
231. *See supra* Part VI.

I am not suggesting that efforts to address sports betting in California by legislation and/or constitutional amendment are not necessary. California law on gambling is well developed, albeit largely dated, and exerts a strong gravitational pull to trap new methods of gambling that resemble those forms expressly prohibited. The argument in this paper is just that – an argument. Specific legislation defining the terms and conditions under which sports betting can be conducted will provide the certainty many proponents of sports betting would like to see.[232] Of course, specific legalization may also constrict the opportunity to engage in sports betting.[233] Sports betting will eventually be legal in California. It will come about either through official means that will delineate the terms and conditions under which sports betting may be conducted or it will arrive surreptitiously, sponsored by risk takers who will promote their online sports betting operation because sports betting is a large market. Sports betting will thus eventually come to California either through legal action (legislative or initiative) or through ongoing erosion of the non-enforced proscriptions of the law.

232. SCA 6 proposed by Senator Bill Dodd (note 7) represents a fair, comprehensive, and balanced approach to legalizing sports betting (and other gambling activities) in California. That did not prevent special interests from criticizing the measure.

233. The California Legalize Sports Betting on Indian Lands Initiative (#19-0029) is a constitutional Initiative that Native America Tribal Casino owners have qualified for the November 2022 ballot. Ballotpedia, California 2022 ballot propositions, available at https://ballotpedia.org/California_2022_ballot_propositions. The measure would allow sports betting only at Tribal casinos and at race tracks. Not surprisingly, as the measure is sponsored by Tribal casino owners, the measure would also expand the types of gambling games that could be offered by Tribal casinos beyond that authorized by Proposition 1A, which was earlier approved as a constitutional amendment. See text and notes 44-51. The California Legalize Sports Betting on American Indian Lands Initiative can be reviewed at https://ballotpedia.org/California_Legalize_Sports_Betting_on_American_Indian_Lands_Initiative_(2022).

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