

# UPSTAGING U.S. GAMING LAW: THE POTENTIAL FANTASY SPORTS QUAGMIRE AND THE REALITY OF U.S. GAMING LAW

*[W]ork and acquire, and thou hast chained the wheel of Chance.<sup>1</sup>*

## INTRODUCTION

John was the General Manager of the San Diego Brush-Backs, a fantasy baseball<sup>2</sup> team occupying the second place position in the league. Although fantasy baseball uses statistics from professional baseball in its operation as a game, the Brush-Backs' success in the league was not particularly attributable to the instances of chance or luck that determine the outcome of professional games. John carefully viewed the games in full, employing various analytical skills and tactics. This enabled him to make profitable decisions, much like the decision he was about to make. At the end of the Mariners/Angels game, John witnessed Ichiro Suzuki, the right-fielder for the Seattle Mariners, break his hand when he was hit by a pitch, ending his season. Ichiro was a statistically dependable player, so John knew that another general manager would be interested in making a trade to compensate for Suzuki's injury. He had to act quickly.

John went straight to his computer and consulted the spreadsheet he had been perfecting since last summer. The spreadsheet was a compilation of statistical information on many Major League Baseball players, as well as some minor league players John determined were potentially useful in the game. John's spreadsheet contained every statistical category he considered relevant, cross-referenced with every player's

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1. THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON 153 (Brooks Atkinson ed. 2000).

2. Fantasy baseball is an interactive game played by fans using statistics of Major League players to compile the best "fantasy team." See generally JIM KEOUGH & GUS NUNZIATA, FANTASY SPORTS ONLINE FOR DUMMIES 7-16 (1999).

schedule, and modified to account for the effect each particular ballpark would have on an individual player's performance. John began creating spreadsheets last year when an unexpected injury ended his starting first baseman's season. John had been unprepared to replace him. After that incident, John knew only preparedness and careful analysis would ensure a successful season of fantasy baseball.

The spreadsheet's data showed that, of the available outfielders,<sup>3</sup> the San Diego Padres' Brian Giles had the most similar on-base percentage to Suzuki.<sup>4</sup> This indicated the most favorable trade. John noticed, however, that Giles's schedule was not statistically promising because he played most of his remaining games at Petco Park, a traditional "pitchers park."<sup>5</sup> As John searched for an alternative player to trade, he realized that the Arizona Diamondbacks were promoting Chris Young from their minor league team to the Diamondbacks. Young was a player that none of John's fellow general managers had claimed off the waiver wire.<sup>6</sup> His minor league statistics showed a remarkable similarity to Ichiro Suzuki's. Considering the favorable schedule remaining for the Arizona Diamondbacks, John believed Young would continue his positive statistical trend as a player on John's team. Young would be a prized commodity for any general manager in John's league. John's quick thinking and statistical analysis allowed him to claim Young off the waiver wire first, trading him to Suzuki's owner for a relief pitcher. Through this trade, John was able to lead his team to league victory, winning the one hundred dollar prize.

The types of trades exemplified above are common in the

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3. Fantasy sports, as in professional sports, operate a waiver wire and free agent system where players that are not part of a current roster are available to be picked up and placed on a roster in the event of injury or underperformance. See SAM WALKER, *FANTASYLAND: A SPORTSWRITER'S OBSESSIVE BID TO WIN THE WORLD'S MOST RUTHLESS FANTASY BASEBALL LEAGUE* 179 (2007).

4. On-base percentage, commonly referred to as "OBP," is a ratio measuring the amount of times a player reaches base via a hit, walk, or hit by pitch, compared to the amount of times a player has an at-bat. GLENN GUZZO, *THE NEW BALLGAME: UNDERSTANDING BASEBALL STATISTICS FOR THE CASUAL FAN* 20–21 (2007).

5. A pitchers park is one that is more favorable to a pitcher because of its dimensions and environment. See *id.* at 59–64.

6. See *supra* note 3 and accompanying text regarding waiver wires.

2009]

FANTASY SPORTS

game of fantasy sports. These trades involve detailed analysis of statistical information and a skilled assessment of players and games. This type of analysis and player assessment is similar to those made by General Managers of professional baseball teams. To that end, this sort of activity blurs the line between fantasy and reality sports.

Federal law recognizes that fantasy sports, because of their underlying skill requirement, are not an illegal form of gambling. At the federal level, Title VIII of the SAFE Port Act, also known as the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA” or “Act”), contains specific language stating that participation in fantasy sports does not constitute gambling.<sup>7</sup> Thus, while casinos, gambling dens, and even NCAA March Madness pools constitute illegal gambling, fantasy sports remain exempt from federal anti-gambling laws.<sup>8</sup>

Federal gambling laws, however, only facilitate the enforcement of state gambling laws. Under the Interstate Horseracing Act,<sup>9</sup> states are charged with the primary responsibility for classifying legal types of gambling within their borders.<sup>10</sup> States generally distinguish activities subject to such regulation as games of chance, as opposed to games of skill.<sup>11</sup> The classification of fantasy sports as a game of skill indicates that federal and state laws have properly left fantasy sports unregulated. Several indicators, however, demonstrate a possible shift toward regulation of fantasy sports in the near future.

First, several federal statutes threaten the current categorization of fantasy sports. For example, courts may interpret the Professional and Amateur Sports Protection Act,

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7. 31 U.S.C. § 5362(1)(E)(ix) (2006) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game . . .”).

8. *Id.*; 18 U.S.C.A. § 1955(b)(2) (West 2008) (“[G]ambling includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries . . .”).

9. 15 U.S.C. § 3001(a)(1) (2006) (“States should have primary responsibility for determining what forms of gambling may legally take place within their borders[.]”).

10. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet*, 2008 DUKE L. & TECH. REV. 6, 7 (2008); *see, e.g.*, Bruce P. Keller, *The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999).

11. Alexander, *supra* note 10, at 26.

which currently regulates sports-related gambling, to include fantasy sports.<sup>12</sup> Under the Act, it is unlawful for any person to operate a gambling scheme based *directly* or *indirectly* on the competitive games of professional or amateur athletes.<sup>13</sup> Because fantasy sports allow “gamers” to win or lose in their fantasy league based on the performance of one or more professional athletes, the Act’s language makes fantasy sports vulnerable to inclusion and regulation. Moreover, the adoption of the UIGEA, and its effective regulation of internet poker, illustrates that there is a trend toward increased regulation of online activities, even when the activity may not fit the traditional definition of “gambling.”<sup>14</sup>

Second, at least two State Attorneys General have already included fantasy sports on the list of prohibited gambling activities.<sup>15</sup> In 1991, the Florida Attorney General opined that while fantasy sports gamers may exhibit some level of skill, that exhibition is not enough to label fantasy sports as a game of skill.<sup>16</sup> Instead, fantasy sports qualifies as a game of chance, thus classifying it as a gambling activity in Florida.<sup>17</sup> In Louisiana, the element of skill was not the dispositive issue; however, that state’s Attorney General recognized skill as a relevant factor when determining that one fantasy football league was an illegal gambling operation.<sup>18</sup> In both cases, each state Attorney

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12. See 28 U.S.C. § 3702 (2000).

13. *Id.* The Act states:

It shall be unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

*Id.*

14. See 31 U.S.C. §§ 5361–67 (2006).

15. See Fla. Att’y Gen. Op. No. 91-3 (Jan. 8, 1991), available at 1991 WL 528146, and at <http://myfloridalegal.com/> (follow “AG Opinions: Searchable Database” hyperlink; then follow “Jump to Year: 1991” menu option; then follow “Last Page” hyperlink; then follow “AGO 91-03” hyperlink) [hereinafter Fla. A.G. Op. (1991)]; see also La. Att’y Gen. Op. No. 91-14 (1990–1991), available at 1991 WL 575105 [hereinafter La. A.G. Op. (1991)].

16. See Fla. A.G. Op. (1991), *supra* note 15.

17. *Id.*

18. La. A.G. Op. (1991), *supra* note 15. The ultimate factor that resulted in

2009]

FANTASY SPORTS

General acknowledged the concept of skill in their determinations of whether fantasy sports constituted gambling.<sup>19</sup>

Third, various legal scholars now assert that participation in fantasy sports games should be considered “gambling.”<sup>20</sup> Scholarship that advocates the regulation of fantasy sports points to a variety of similarities between the practice of fantasy sports and the current state of the law regarding gambling.<sup>21</sup> Commonly, fantasy sports opponents argue that the activity meets the common law standard of gambling because all gamers pay an entrance fee that contributes to the winning prize amount.<sup>22</sup> Opponents further dispute the skill/chance distinction, claiming that gamers exhibit a lack of skill when playing fantasy sports.<sup>23</sup> The determination of skill or chance is the linchpin issue in any gambling case.<sup>24</sup> However, the current test courts use to decide this issue is subjective and arbitrary.

Courts have generally held that when a game is not purely based on chance or skill, “[t]he test of the character of the game is not whether it *contains* an element of chance or an element of

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the Louisiana fantasy football league’s categorization as a gambling operation was that the league was being conducted as a business. *Id.*

19. See Fla. A.G. Op. (1991), *supra* note 15; La. A.G. Op. (1991), *supra* note 15.

20. See Aaron Levy, Note, *A Risky Bet: The Future of Pay-to-Play Online Fantasy Sports*, 39 CONN. L. REV. 325, 344 (2006); see also Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 228–29 (2002).

21. See Davidson, *supra* note 20, at 216–19.

22. *Id.* at 216; see, e.g., FCC v. Am. Broad. Co., 347 U.S. 284 (1954).

[A] program will fall within the ban . . . if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize . . . such winner or winners are required to furnish any money or thing of value . . . .

*Id.* at 288.

23. Davidson, *supra* note 20, at 218–19.

24. Inherent in all gambling statutes is the requirement that something of value be placed on the outcome of some activity. See 31 U.S.C. § 5362 (1)(A) (2006)

(“The term ‘bet or wager’ means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome[.]”).

Full discussion of that element is beyond the scope of this Note.

skill, but which is the *dominating element* that determines the result of the game?”<sup>25</sup> Courts refer to this as the “predominance test.”<sup>26</sup> The predominance test, however, is inadequate because it fails to account for the intricacies of games comprised of both skill and chance.<sup>27</sup> That is, the predominance test allows for a determination to be made, at any arbitrary point in a game, whether the game is predominantly skill-based or predominantly chance-based. But this test ignores the fluid dichotomy of varying levels of skill and chance in most games. This Note will propose a Stages Test that better accounts for the various levels of skill and chance within the structure of a game in order to determine which element truly controls the outcome of the game.

Part I of this Note discusses the history of fantasy baseball, from its early inception to its overwhelming popularity today. Part II considers the history of anti-gambling laws in America and the current regulations criminalizing online poker. Part III discusses the courts’ failed attempts to define skill and criticizes the current predominance test. Part IV proposes a Stages Test that would more uniformly determine what constitutes skill. Applying the proposed Stages Test, Part V explains how fantasy baseball passes this test, thus qualifying for exemption from anti-gambling laws. Part VI considers the legal and social consequences of classifying fantasy sports as gambling.

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

26. *See id.*; *see also* Alexander, *supra* note 10, at 26 (noting that when confronted with a game that has elements of skill and chance, courts must determine whether skill or chance predominate the outcome of the game).

27. Determining that the issue of what is “skill” and what is “chance” is a question of predominance. *See, e.g., Ellison*, 71 N.E. at 755 (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?”). Which of the two predominates often determines whether a game is classified as one of “skill” or one of “chance.” *See* discussion *infra* Part III.A–B.

2009]

FANTASY SPORTS

## I. FANTASY SPORTS AND THE CREATION OF A TIME-CONSUMING MONSTER

Fantasy sports grew from a relatively unknown parlor game to a multi-million dollar industry enjoyed by millions of Americans.<sup>28</sup> The analysis of statistical data has predicated the origin and growth of fantasy baseball.<sup>29</sup> At the inception of fantasy baseball, diligent fantasy gamers computed, by hand, the relevant statistics to compile a winning team.<sup>30</sup> Thus, interest in fantasy baseball increased, not because of a newfound interest in baseball, but because of greater accessibility to statistics.<sup>31</sup>

### A. *The Origins of Fantasy Baseball*

In the 1960s, when Bill Gamson was a research associate in social psychology at Harvard, the term “fantasy sports” did not exist.<sup>32</sup> Gamson liked baseball and wanted to find a way to interact with the game beyond his interest as a mere fan.<sup>33</sup> Gamson and his friends constructed a game involving baseball statistics, and each paid ten dollars to enter the game.<sup>34</sup> They created a \$100,000 imaginary budget, consulted copies of the *Sporting News*, and began “drafting” baseball players for each of their teams.<sup>35</sup> This new game attracted many students, and became an addicting sensation on the Harvard campus.<sup>36</sup> Its popularity compelled Gamson to name the game he had

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28. A recent survey conducted by the Fantasy Sports Trade Association, and revealed at their annual Business Conference and Research Symposium, showed that there are 19.4 million active players of fantasy sports and 34.5 million who have ever played. Fantasy Sports Trade Association, Fantasy Sports Conference Demographic Survey Shows Continued Growth (Aug. 2, 2007), available at <http://www.fsta.org/news/pressreleases/PRWeb-FantasySportsConference0807.pdf>.

29. See, e.g., KEOUGH & NUNZIATA, *supra* note 2, at 43–47 (explaining the use of different statistical categories to calculate a fantasy baseball score).

30. WALKER, *supra* note 3, at 68.

31. See *id.* at 72.

32. See *id.* at 59–60.

33. See *id.* at 60.

34. *Id.*

35. *Id.* Each team was given a \$100,000 budget with which they could bid on players and build their team, as long as they stayed within their budgetary means. *Id.*

36. *Id.* at 61.

invented.<sup>37</sup> The name, a subtle cloak to avoid being associated with bookies, was “The Baseball Seminar.”<sup>38</sup>

The pivotal point in fantasy baseball’s infancy was in 1965 when Dan Okrent, a college freshman, entered the room of his Assistant Professor, Robert Skylar.<sup>39</sup> Okrent was a student of Skylar and noticed his interest in baseball. Skylar explained the basic tenets of the game to Okrent, who began to create his own version of The Baseball Seminar.<sup>40</sup> By 1980, Okrent had polished his version of a baseball statistics game and called it “Rotisserie Baseball.”<sup>41</sup> The original Rotisserie Baseball League based a gamer’s score on eight statistical categories: four for offense and four for pitchers.<sup>42</sup> At the draft commencing the season, each team had an imaginary budget of two hundred and fifty dollars, which gamers used to purchase players from an auctioning pool.<sup>43</sup> The gamer whose team had the most favorable outcome based on the eight statistical categories would win the game. Okrent’s Rotisserie Leagues spread across the country, and by 1988, *USA Today* estimated that 500,000 people were playing the game.<sup>44</sup> Today, Rotisserie Baseball is one prominent format in which gamers play fantasy baseball.<sup>45</sup>

Approximately 34.5 million people in North America have played fantasy sports at some point in their lives.<sup>46</sup> This number

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37. *Id.*

38. *Id.*

39. *See id.* at 64.

40. *See id.* at 64–65.

41. *Id.* at 67. The game was named after the restaurant La Rotisserie Francaise in Midtown Manhattan. *Id.* at 66. It was here that fantasy baseball was introduced to the “Phillies Appreciation Society,” a group of Okrent’s friends who immediately loved the idea and continue to this day to play in a league with Okrent. *Id.*

42. *See id.*

43. *See id.* Many different forms of fantasy baseball exist today, including categorical fantasy baseball and head-to-head fantasy baseball. *See* KEOGH & NUNZIATA, *supra* note 2, at 43–47. Categorical fantasy baseball allots points based on where a team places in the standings in each one of the eight scoring categories. *Id.* at 43–46. Rotisserie Baseball is a form of categorical fantasy baseball. *Id.* at 43. Head-to-head fantasy baseball allots points based on the same eight categories as in categorical fantasy baseball, however, two teams are matched up week to week to compete against each other instead of competing against everyone in the league all at once. *Id.* at 47.

44. WALKER, *supra* note 3, at 71.

45. KEOGH & NUNZIATA, *supra* note 2, at 9, 43.

46. Fantasy Sports Trade Association, *supra* note 28, at 1.

2009]

FANTASY SPORTS

is equivalent to approximately ten percent of the U.S. population.<sup>47</sup> Moreover, there has been no shortage of fantasy games to play.<sup>48</sup> Fantasy games are available for almost any sport or activity.<sup>49</sup> The most common games are fantasy football and fantasy baseball, but other games include golf, hockey, auto racing, and even bass fishing.<sup>50</sup>

The concept of fantasy baseball is not a novel one. Parlor games, based on the statistical analysis of baseball players, have existed since 1925.<sup>51</sup> Though the infancy of fantasy baseball was little more than a niche game, the popularity it spawned is undeniable. Today, fantasy baseball has left the basements and offices of America to become as mainstream as its real-life counterpart. This heightened popularity, however, has exposed the general public to the workings of the game, inviting critical comparisons between fantasy sports and gambling.

#### *B. How Fantasy Leagues Operate Today*

Today, most fantasy leagues, regardless of the sport, operate in the same manner. Using online websites to host the league, the “commissioner” of the league gathers each gamer’s entry fee to create a cash prize.<sup>52</sup> Usually, the most successful gamers receive awards, with the first place winner receiving the

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47. U.S. Census Bureau, National and State Population Estimates, Annual Population Estimates 2000–2008, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Feb. 27, 2009) (according to the table, 304,059,724 people lived in the United States on July 1, 2008).

48. This Note will focus primarily on Fantasy Baseball. The judicial test of skill that follows and the policy arguments made can be applied to all fantasy sports, as all fantasy sports operate in the same fashion.

49. See ESPN Fantasy Bass Fishing, How to Play, <http://games.espn.go.com/basschallenge/bass/howtoplay> (last visited Feb. 27, 2009) (bass fishing); see also Yahoo! Sports, Fantasy Homepage, <http://sports.yahoo.com/fantasy> (last visited Feb. 27, 2009) (football, baseball, hockey, golf, and auto racing).

50. See Yahoo! Sports, Fantasy Homepage, <http://sports.yahoo.com/fantasy> (last visited Feb. 27, 2009) (football, baseball, hockey, golf, and auto racing); see also ESPN Fantasy Bass Fishing, How to Play, <http://games.espn.go.com/basschallenge/bass/howtoplay> (last visited Feb. 27, 2009) (bass fishing).

51. WALKER, *supra* note 3, at 61. In 1925, Clifford Van Beek patented a board game called National Pastime, a game based on players’ statistics. *Id.* In 1951, J. Richard Seitz improved the idea and created a game called APBA. *Id.* In 1962, Hal Richman created Stat-O-Matic, the dominant baseball parlor game prior to fantasy baseball. *Id.*

52. Davidson, *supra* note 20, at 202–04.

majority of the pool.<sup>53</sup>

Gamers select their teams in one of three ways: through an automated draft, an online draft, or a live draft.<sup>54</sup> In an automated draft, each gamer's team is automatically selected by a computer.<sup>55</sup> An online draft allows gamers to draft their teams via the internet in real time.<sup>56</sup> A live draft occurs when fantasy gamers meet in person to draft their teams.<sup>57</sup> During the draft, gamers build a team of professional baseball players.<sup>58</sup> The objective is to draft players who will be statistically successful in any number of categories.<sup>59</sup> A fantasy team owner receives points for the cumulative amount of homeruns, stolen bases, batting averages, and walks each professional baseball player makes during actual baseball games.<sup>60</sup> Additionally, a pitcher's strikeouts, earned runs, innings pitched, and saves also receive an allocation of points.<sup>61</sup>

Throughout the season, each gamer "owns" a fantasy team and acts as the team's general manager.<sup>62</sup> In most leagues, general managers use trades and waiver wires to exchange players.<sup>63</sup> In the event of injury or player under-performance, gamers alter their team rosters in an effort to raise their rankings.<sup>64</sup> Since the statistics used to play the fantasy sports

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53. *See id.* at 203, 203 n. 8 (stating that the top finishers receive prize money and, in anecdotal circumstances, the grand prize award was \$50,000).

54. Yahoo! Sports, Draft Basics, <http://help.yahoo.com/l/us/yahoo/baseball/drafts/index.html> (last visited Feb. 27, 2009) (providing detailed instructions on how to conduct each type of draft); Yahoo! Sports, Types of Drafts, <http://help.yahoo.com/l/us/yahoo/football/rules/frules-04.html> (last visited Feb. 27, 2009) (noting the three types of drafts for fantasy football).

55. Yahoo! Sports, Autopick Draft Basics, <http://help.yahoo.com/l/us/yahoo/baseball/drafts/baseball-101.html> (last visited Feb. 27, 2009).

56. Yahoo! Sports, How to Set up an Online Draft, <http://help.yahoo.com/l/us/yahoo/baseball/drafts/baseball-29.html> (last visited Feb. 27, 2009).

57. Yahoo! Sports, How to Conduct a Live Draft, <http://help.yahoo.com/l/us/yahoo/baseball/drafts/baseball-17.html> (last visited Feb. 27, 2009).

58. *See* KEOGH & NUNZIATA, *supra* note 2, at 65–74 (explaining strategies and tactics for assembling a winning team).

59. *See id.*

60. *See id.* at 124–25.

61. *See* WALKER, *supra* note 3, at 5.

62. *Id.*

63. A waiver wire allows gamers to replace members of their current rosters with other players who have not been drafted. *See* KEOGH & NUNZIATA, *supra* note 2, at 121–23; *see also* WALKER, *supra* note 3, at 179.

64. *See* KEOGH & NUNZIATA, *supra* note 2, at 121–23.

2009]

FANTASY SPORTS

game come from professional games, the more statistically favorable each player of a team is, the more points the gamer will earn.<sup>65</sup> Gamers earn points in several statistical categories, and the fantasy gamer with the most points wins.<sup>66</sup> Fantasy sports' sole reliance on real-life sporting statistics has led some to conclude that fantasy sports are merely the next generation of sports gambling—thus requiring regulation.<sup>67</sup>

## II. ANTI-GAMBLING HISTORY IN AMERICA

Anti-gambling legislation emerged as a result of growing concern about organized crime and its connection to gambling. The Wire Act and the UIGEA demonstrate the federal government's attempts to define and regulate gambling.<sup>68</sup>

### A. Federal Anti-Gambling Law

In an effort to curtail gambling and its negative social repercussions, the United States enacted statutes prohibiting activities potentially characterized as gambling.<sup>69</sup> Still, these statutes were unclear on what constituted gambling and which activities evaded such designation.<sup>70</sup> Congress attempted to answer these questions through the enactment of a variety of laws.

#### 1. Laying the Groundwork of Anti-Gambling Legislation

The Illegal Gambling Business Act of 1970 helped lay the foundation for future gambling regulations by prohibiting “illegal gambling businesses.”<sup>71</sup> An illegal gambling business is

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65. *See id.* at 124–26.

66. *See id.* at 125.

67. *See generally* Levy, *supra* note 20; Davidson, *supra* note 20.

68. *See* 18 U.S.C. § 1084 (2006) (Wire Act); 31 U.S.C. §§ 5361–67 (2006) (UIGEA); Levy, *supra* note 20, at 333 (explaining that the Wire Act was one of a series of laws passed to suppress organized gambling and bookmaking); *see also* Davidson, *supra* note 20, at 221–23 (noting that Congress originally passed anti-gambling laws in an effort to curtail organized crime).

69. *See* Levy, *supra* note 20, at 332–42 (giving a detailed explanation of several federal statutes aimed at the regulation of illegal gambling).

70. *See id.*

71. 18 U.S.C. § 1955(b)(1) (2000). The Act states:

As used in this section “illegal gambling business” means a gambling business which is a violation of the law of a State or political subdivision in which it is conducted; involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such

defined as any activity that offends state law, requires at least five persons to run, and either operates continually for more than thirty days or receives gross revenues in excess of \$2000 a day.<sup>72</sup> While this Act specifically lists activities that constitute gambling, it notes that the list is not exhaustive.<sup>73</sup> Sports wagering is not included on the list, but its inclusion is readily permissible by the statute.<sup>74</sup>

The legislative history of the Act indicates that Congress did not intend this provision to incorporate every venture that arguably meets each element of the offense, but rather only those ventures of “major proportions” and “greater magnitude.”<sup>75</sup> Under a plain-language reading of the terms “major proportions” and “greater magnitude,” the millions of Americans participating in fantasy sports could merit its inclusion under the statute. Fantasy sports generally require more than five participants to play. Further, games run the length of the actual season of each sport’s real-life counterpart, which lasts longer than thirty days. While the inclusion of fantasy sports under the Act was not the intent of Congress, courts may attempt to use this provision as a way to regulate or

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business; and has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

*Id.*

72. *Id.*

73. *Id.* § (b)(2) (“[G]ambling includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.”).

74. *See id.*

75. *See* H.R. REP. NO. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4029.

The intent of [this] section . . . is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who pry systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.

*Id.*

2009]

FANTASY SPORTS

prohibit fantasy sports as illegal gambling activities.

In order to prohibit sports wagering, Congress in 1992 also enacted the Professional and Amateur Sports Protection Act.<sup>76</sup> This law makes it unlawful for any private person to operate a wagering scheme based on a competitive game in “which professional or amateur athletes participate.”<sup>77</sup> Courts could construe this language to apply to fantasy sports because a fantasy sports game is a game in which professional and amateur athletes participate, at least statistically.

## 2. *The Wire Act Further Strengthens the Federal Government’s Reach*

In 1961, Congress passed a law governing the transmission of wagering information as part of its anti-racketeering agenda.<sup>78</sup> Commonly referred to as the “Wire Act” or “Interstate Wire Act,” it represents Congress’s continued battle against gambling.<sup>79</sup> Attorney General Robert F. Kennedy stated that the Wire Act would serve two distinct purposes: to aid in the enforcement of anti-gambling laws and to aid in the suppression of organized gambling activity.<sup>80</sup>

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76. 28 U.S.C. § 3701 *et. seq.* (2000).

77. *Id.* § 3702. The Act states:

It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

*Id.*

78. 18 U.S.C. § 1084 (2006); see Kiran S. Raj, Comment, *Drawing a Line in the Sand: How the Federal Government Can Work with the States to Regulate Internet Gambling*, 56 EMORY L.J. 777, 783–84 (2006) (stating that the Transmission of Wagering Information Statute, known as the Wire Act, was designed as a tool to combat gambling by organized crime and arguing that the Wire Act has less to do with aiding the states in their enforcement of anti-gambling laws and more with halting the spread of organized crime).

79. § 1084; Raj, *supra* note 78, at 783–84.

80. According to Attorney General Kennedy, the purpose of the statute was:

[T]o assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in

Two elements must be present for the Wire Act to apply: (1) the information that transmits over the wire must involve wagering something of value on the outcome of a sporting event; and (2) during the transmission, the alleged bettor must have been engaged in the business of wagering.<sup>81</sup> These elements were defined in 2001 in an internet gambling case.<sup>82</sup>

Although Congress enacted the Wire Act before the advent of the internet, Congress seems to have foreshadowed the capabilities present in internet gambling.<sup>83</sup> The Wire Act and advances in technology have reached a crossroads, and fantasy sports are now at the center of dispute. The use of the Wire Act to regulate fantasy sports may seem logical. The Act encompasses internet gambling and, as with internet gambling, fantasy sports games are played almost exclusively online, after participants pay entrance fees. But a clear distinction in the law between games and gambling can rightfully prevent fantasy sports' inclusion under the Act.

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the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for the transmission of certain gambling information in interstate and foreign commerce.

David B. McGinty, *The Near-Regulation of Online Sports Wagering* by United States v. Cohen, 7 GAMING L. REV. 205, 209 (2003) (quoting April 6, 1961 letter from Attorney General Kennedy to the Speaker of the House of Representatives) (internal quotation marks omitted) (McGinty quotes this letter as found in H.R. REP. NO. 87-967 (1961), reprinted in 1961 U.S.C.C.A.N. 2631, 2633); see also Raj, *supra* note 78, at 784.

81. See § 1084(a), (b); Truchinski v. United States, 393 F.2d 627, 630 (8th Cir. 1968) (noting that the two elements agreed upon by the parties are (1) "that the information transmitted on the telephone assisted in the placing of bets or wagers," and (2) "that the defendant during this time must have been engaged in the business of wagering or betting.").

82. See Cohen v. United States, 260 F.3d 68, 71 (2d Cir. 2001). The *Cohen* case was the first case to deal with whether the Wire Act incorporated online gambling. Cohen, a successful business man, formed the World Sports Exchange, an offshore gambling website. *Id.* at 70. At the time of the internet boom of the mid-1990s, Cohen and his friends started WSE, an off-shore sports betting business, where customers placed bets via telephone or internet. See *id.* at 70-71. Within 15 months, \$5.3 million in funds had been wired to them, of which they took 10% of each bet made. *Id.* Cohen argued that the Safe Harbor Provision applied to him and his behavior did not constitute wagering. *Id.* at 73. The court of appeals disagreed, holding that a plain language reading of the Wire Act, and a common sense view of what Cohen was doing, constituted wagering over a wire. *Id.* at 73-74.

83. *Id.*

2009]

FANTASY SPORTS

### 3. *The UIGEA and the Ever-Evolving State of Anti-Gambling Statutes*

In 2000, internet gambling generated profits of \$2.2 billion in the United States.<sup>84</sup> The popularity of internet casinos is palpable, removing the barriers of travel and accessibility associated with land-based casinos. While gamblers can find almost every land-based gambling game online, only one game has increased its online gambling popularity—poker.<sup>85</sup>

The UIGEA attempted to further secure U.S. ports in light of heightened security threats and the war on terror.<sup>86</sup> Poker's popularity and internet accessibility led Congress to include within the Act an amendment prohibiting online gambling institutions from collecting debts via electronic transfers.<sup>87</sup> Due to the ability to gamble across state and national borders, Congress found that the internet presented unique issues in regulating gambling activities.<sup>88</sup> The UIGEA dealt with this unique situation by prohibiting the manner in which participants could pay their gambling debts, as opposed to prohibiting gambling itself.<sup>89</sup>

The language used in the UIGEA is similar to that of other federal and state statutes in that it prohibits wagering something of value on the outcome of a competitive game.<sup>90</sup> It specifically

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84. McGinty, *supra* note 80, at 205 (citing Doug Bedell, *Millions Lay Money Down in World of Virtual Casinos*, DALLAS MORNING NEWS, July 5, 2001).

85. *Day-to-Day: Effects of Online Poker's Popularity on 'Real' Gambling* (National Public Radio broadcast May 3, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4628880>. Writer Kevin Arnovitz spoke of the growing popularity of online poker, stating that "\$187 million [is] wagered every 24 hours." *Id.*

86. See 31 U.S.C. §§ 5361–67 (2006); Robert Malone, *Bush Signs Safe Port Act*, FORBES.com, Oct. 13, 2006, [http://www.forbes.com/2006/10/13/safe-ports-act-biz-logistics-cxrm\\_1013port s.html](http://www.forbes.com/2006/10/13/safe-ports-act-biz-logistics-cxrm_1013port s.html).

87. See § 5363.

88. *Id.* § 5361(a)(4) ("New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.").

89. *Id.* § 5363 (prohibiting the acceptance of any financial instrument, including credit, cash, check, or electronic fund transfer, for unlawful internet gambling).

90. *Id.* § 5362(1)(A) ("The term 'bet or wager' means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance . . .").

states that a wager is the act of risking something of value upon “the outcome of a contest of others, a sporting event, or a game subject to chance . . . .”<sup>91</sup> However, the UIGEA goes further than any previously enacted federal statute in its definition of fantasy sports.<sup>92</sup> Recognizing the popularity of fantasy sports, and the level of skill required to play, Congress explicitly excluded fantasy sports from regulation under the Act.<sup>93</sup>

The UIGEA specifies that any game classified as a “fantasy sport” must meet three conditions to fall outside the scope of the Act.<sup>94</sup> These three specified conditions include: (1) that the participants know all prizes beforehand and that the prizes do not reflect the number of gamers playing; (2) that all winning outcomes are based on the relative *knowledge and skill* of the participants; and (3) no win is based on a point-spread or on one single performance in one single event.<sup>95</sup> The UIGEA incorporates the paramount distinction in determining what constitutes gambling under the law: the distinction between skill and chance.<sup>96</sup>

### B. Selected State Policies on Gambling

The Interstate Horseracing Act provides that “States should have primary responsibility for determining what forms of gambling may legally take place within their borders . . . .”<sup>97</sup> States regulate their own gaming institutions, resulting in differences in gambling laws across state lines. For example, Nevada permits land-based casinos and sports books, while Utah and Hawaii place an absolute prohibition on these activities.<sup>98</sup>

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91. *Id.*

92. *Id.* § 5362(E)(ix).

93. *Id.* § 5362(E)(ix) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game . . .”).

94. *Id.*

95. *Id.* § 5362(E)(ix)(I)–(III).

96. *See id.* § 5362(1)(A)–(E); *see also* People *ex rel.* Ellison v. Lavin, 71 N.E. 753, 755 (1904) (holding that while the term chance is easily understood, the amount to which chance exists in any worldly endeavor is far more complex).

97. 15 U.S.C. § 3001(a)(1) (2006).

98. *See* UTAH CODE ANN § 76-10-1102 (1996) (“A person is guilty of gambling if he . . . participates in gambling.”); HAW. REV. STAT. § 712-1221(I) (2004) (noting that promoting gambling activity is a class C felony); *see also* Raj, *supra* note 78, at 781 (discussing gambling prohibitions in various states, including Utah and Hawaii).

2009]

FANTASY SPORTS

Although fantasy sports are not currently regulated by state law, there is an alarming trend toward doing so.

### 1. *The Legality of Fantasy Sports: State Attorney General Opinions*

Two State Attorneys General have opined on the legalities of fantasy sports. The Louisiana Attorney General determined that a fantasy football league constituted gambling.<sup>99</sup> He argued that “person[s] risk[ing] the loss of anything of value in order to realize a profit” are participating in gambling ventures, and that fantasy leagues are no exception.<sup>100</sup> Similarly, in 1991, Florida’s Attorney General wrote:

[T]he operation of and participation in a fantasy sports league whereby contestants pay an entry fee for the opportunity to select actual professional sports players to make up a fantasy team whose actual performance statistics result in cash payments from the contestants’ entry fees to the contestant with the best fantasy team [is prohibited].<sup>101</sup>

While state gambling legislation does not expressly regulate fantasy sports, these Attorneys General in their opinions have included fantasy sports under their state gambling regulations. Due to fantasy sports’ popularity, other states may soon follow suit and even amend their gambling statutes to improperly regulate fantasy sports.

### 2. *Humphrey v. Viacom: A State Court Trend?*

In *Humphrey v. Viacom Inc.*, a federal district court in New Jersey addressed the issue of whether fantasy sports constitute gambling.<sup>102</sup> In that case, Charles Humphrey brought suit

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99. La. A.G. Op. (1991), *supra* note 15 (“That some person might be able to participate in ‘900 Fantasy Football’ without incurring any cost might remove that particular transaction from the scope of the statute, however with respect to all other persons who have incurred costs in order to participate, the activity constitutes ‘gambling’.”).

100. *See id.* 1-900 Fantasy Football provided customers with the ability to draft, trade and manage their fantasy team over the phone for \$2.00 per call. *Id.*

101. *See* Fla. A.G. Op. (1991), *supra* note 15; *see also* FLA. STAT. ANN § 849.14 (West 1997) (prohibiting the betting or wagering of any thing of value upon the outcome of a contest of skill, speed, power, or endurance of human or animal strength).

102. *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 U.S. Dist. LEXIS 44679, at \*6 (D.N.J. June 20, 2007).

against a group of media companies that operated, in different capacities, pay-for-play online fantasy sports leagues.<sup>103</sup> Humphrey asserted that these companies managed activities that required players to pay an entrance fee to compete for prizes.<sup>104</sup> Humphrey argued that these activities were games of chance, and therefore defendants violated both state and federal laws prohibiting such gambling.<sup>105</sup> The court dismissed Humphrey's complaint, stating that an entry fee was not a wager.<sup>106</sup> Instead, the court noted that the entry fee was analogous to consideration paid in a contract for services provided by a website.<sup>107</sup> In dicta, the court reaffirmed the determination that fantasy sports are not gambling under federal law.<sup>108</sup> Nonetheless, this case is indicative of a growing concern over the legality of fantasy sports. Though this case never reached the particular issue, it provided a stepping-stone for further litigation pursuing the question of whether fantasy sports constitute gambling.

The phrase "game of chance" appears in many state decisions, as well as multiple state statutes, and has become the major legal categorization in gambling suits.<sup>109</sup> States generally distinguish games of chance from games of skill, and only subject games of chance to gambling regulation.<sup>110</sup> Courts have broadly defined these terms, leaving them open to interpretation in the

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103. *Id.* at \*5–6.

104. *Id.* at \*6.

105. *See id.* at \*5–6; *see also* Complaint at \*2, *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007) (No. 06-2768).

106. *See Humphrey*, U.S. Dist. LEXIS 44679, at \*28–29 (“[I]n paying for the right to participate in the leagues and receive the Defendant’s services, participants simply do not “lose” anything, and certainly suffer no cognizable “gambling loss.”).

107. *Id.* at \*29.

108. *Id.* at 30–31.

109. *See, e.g., People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904) (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?”); KY. REV. STAT. ANN. § 247.155 (LexisNexis 1988) (stating that any gambling device or game of chance is prohibited within the confines of the grounds of the Kentucky State Fair); UTAH CODE ANN. § 76-10-1101 (1953) (stating that gambling involves risking money or thing of value on the basis of chance); P.R. LAWS ANN. tit.15, § 76 (2005) (providing language that analogizes gambling to a game of chance).

110. “The vast majority of state gambling laws covers only games of chance—not games of skill.” Alexander, *supra* note 6, at 28.

2009]

FANTASY SPORTS

eyes of the law.<sup>111</sup> This lack of bright-line definitions has led to arbitrary determinations of what constitutes skill.

### III. THE INADEQUACY OF CURRENT LAW REGARDING GAMES OF SKILL VERSUS GAMES OF CHANCE

The current state of the law distinguishes between games of skill and games of chance when determining which activities fall under anti-gambling regulations.<sup>112</sup> However, not all games are purely those of chance or skill.<sup>113</sup> When both elements are involved, the predominance test states that “the character of a game is not whether it contains an element of chance or an element of skill, but which is the *dominating element* that determines the result of the game.”<sup>114</sup> The predominance test is the controlling law when categorizing prohibited gambling activity.<sup>115</sup> This test, however, has led to different legal categorizations for similar games, as well as a particularly controversial result in the case of poker.

#### A. *The Predominance Test and Its Contradictions*

Although courts in various states use the predominance test to determine whether games are lawful, court decisions have

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111. See, e.g., *State v. Stroupe*, 76 S.E.2d 313, 316 (N.C. 1953) (holding that a game of chance is one where elements of chance predominate over elements of skill, and a game of skill is one where elements of skill predominate over elements of chance); see also *New York v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995) (holding that a shell game is a game of chance within gambling statute, but failing to define what constitutes a game of chance); *Las Vegas Hacienda v. Gibson*, 359 P.2d 85, 87 (Nev. 1961) (holding that golfing a hole in one is predominantly skill, regardless of whether some factor of chance was involved).

112. See *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y.1904) (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?”); see also Alexander, *supra* note 10, at 26 (noting that the vast majority of state gambling laws cover only games of chance and not games of skill).

113. For example, Poker contains an element of chance in the initial set-up of the game, but elements of skill in the operation of the game, as each player manipulates his cards to create a higher likelihood of success of winning the game.

114. *Ellison*, 71 N.E. at 755 (emphasis added).

115. See Anthony N. Cabot, Gregory R. Gemignani & Louis V. Csoka, “*Net Success*”: *Interactive Promotions in the Internet Age*, 6 GAMING L. REV. 295 (2002); see also Alexander, *supra* note 10, at 26.

led to seemingly contradictory results. For example, courts in some states have determined that slot machines, blackjack, dice games, and three-card monte are games of chance, and thus constitute illegal gambling.<sup>116</sup> However, courts in other states have determined that games such as hole-in-one tournaments, billiards, and, most notably, horseracing, are games of skill.<sup>117</sup> Although courts use the same balancing test, it is undoubtedly arguable that blackjack requires more skill than horserace betting. However, the current system of categorization does not reflect the skill involved in either activity.

Moreover, the predominance test often leads to contradictory results even with regard to the same game. For example, poker's categorization as a game of chance or skill varies depending on the jurisdiction.<sup>118</sup> Such confusion arises because the predominance test does not identify at which stage of the game the balancing factors of skill and chance should be measured. Without such clarification, arbitrary determinations of which activities fall within federal and state gambling regulations continue to be applied in different jurisdictions. Therefore, courts should adopt a Stages Test that adequately accounts for the various levels of skill and chance within the

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116. *See* *People v. Kay*, 102 P.2d 1110, 1114 (Cal. 1940) (holding that slot machines of the lever type are games of chance); *State v. Frisby*, 214 S.W.2d 552, 554 (Mo. 1948) (holding that the operating of a table designed for games whose outcome is determined by the rolling of dice is prohibited); *People v. Denson*, 745 N.Y.S.2d 852, 857 (N.Y. Crim. Ct. 2002) (denying motion to dismiss conviction of defendant operating a three card monte game); *State v. Eisen*, 192 S.E. 2d 613, 616 (N.C. 1972) (upholding conviction of defendant running a blackjack table by concluding that the game was a game of chance).

117. *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961) (holding that paying \$0.50 to win \$5,000 to hit a hole-in-one was a valid and enforceable contract, not a wager on a game of chance); *People v. Stiffel*, 308 N.Y.S.2d 64, 64 (N.Y. 1969) (holding that a game of billiards is a game of skill); *Engle v. State*, 90 P. 2d 988, 993 (Ariz. 1939) (holding that horseracing is not a game of chance).

118. *See, e.g.,* *People v. Mitchell*, 444 N.E.2d 1153, 1155, 1157 (Ill. App. Ct. 1983) (holding that games such as bridge and poker are games of chance); *State v. Terry*, 44 P.2d 258, 260 (Kan. 1935) (holding that five card stud poker is not a swindle or confidence game, but a game of skill and chance); *New York v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995) (holding that poker is a game of chance even though it includes a great deal of skill); *State v. McHone*, 90 S.E.2d 539, 539-40 (N.C. 1955) (holding that poker is a game of chance); *Gaudio v. State*, No. 05-91-01862-CR, 1994 WL 67733, at \*2 (Tex. App. Ct. March 7, 1994) (holding that poker is an equal chance of winning, except for the advantage of skill or luck).

2009]

FANTASY SPORTS

structure of a game.

*B. Poker Passes the Predominance Test Yet Fails in the Legal Arena: The Weakness of the Predominance Test*

Perhaps the most controversial activity that is subject to gambling regulation under the predominance test is poker. Poker has a long and colorful history in American culture.<sup>119</sup> In recent years, the popularity of poker has increased exponentially due to increased television coverage brought on by the invention of the “hole cam.”<sup>120</sup> Regardless of the popularity and general social acceptance of poker, it remains a form of illegal gambling in many jurisdictions.<sup>121</sup>

Poker’s categorization as either a game of chance or a game of skill varies across the nation. Many states, including Illinois, New York, and North Carolina have held the game to be one of chance.<sup>122</sup> Other states label the game as one of both skill and chance, but ultimately categorize the activity as one of chance, and consider it gambling.<sup>123</sup> Exploration of the game of poker will unveil how the predominance test allows for such variation in the law, and threatens the legal standing of other skill-based games, such as fantasy sports.

*1. Poker Set-Up*

Regardless of the type of poker, the initial set-up of the

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119. Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 447–50 (2005) (describing the history of poker).

120. U.S. Patent No. 5,451,054 (filed May 3, 1994). Invented by Henry Orenstein, the hole cam allows viewers at home to see what cards the players in the game are holding. *Id.*

121. *See, e.g., Mitchell*, 444 N.E.2d at 1155 (holding that games such as poker are games of chance that are specifically prohibited by the state’s anti-gambling statute); *Turner*, 629 N.Y.S.2d at 662 (holding that poker is a game of chance and not a game of skill, where games of skill are not covered by the gambling statute); *McHone*, 90 S.E.2d at 539–40 (holding that poker, as a game of chance, is an unlawful gambling operation under state law).

122. *See Mitchell*, 444 N.E.2d at 1155; *Turner*, 629 N.Y.S.2d at 662; *McHone*, 90 S.E.2d at 539–40.

123. *See, e.g., Gaudio*, 1994 WL 67733, at \*2 (holding that poker players have an equal chance of winning, except for the advantage of skill or luck); *Terry*, 44 P.2d at 260 (“The game may be played for entertainment only, or for gain. Frequently it is a gambling game. Those who participate in it as a gambling game may be prosecuted for a misdemeanor.”).

game is essentially the same.<sup>124</sup> The dealer shuffles a deck of cards and deals a number of cards to the players.<sup>125</sup> Whether the game is five-card draw or seven-card stud, the player executes no control over the initial cards dealt: The initial set-up is determined by chance.<sup>126</sup> Based solely on the initial deal, courts have ruled that poker is a game of chance.<sup>127</sup> This initial circumstance, however, is only evidence that the *deal itself* is predominantly governed by chance. The *course* of a poker game continually involves an individual player's ability and skill, as each player manipulates the sequence and outcome of the game. This relationship between chance and skill is also present in other games, including fantasy baseball.

## 2. *The Course of a Poker Game is Dependent upon Skill*

Poker requires many skills, including but not limited to, mental capacity and memory, probability, psychology, risk assessment, mathematics, and money management.<sup>128</sup> The game relies on a player's memory to judge the probability of desirable cards that the dealer will distribute based on the cards that have already appeared during the course of the game.<sup>129</sup> It requires the ability to read and understand competing players' body

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124. See ALBERT H. MOREHEAD, *THE COMPLETE GUIDE TO WINNING POKER* 13–15 (1967). The most popular variation of poker is called “Texas Hold ‘Em.” DAVID A. DANIEL, *POKER: HOW TO WIN AT THE GREAT AMERICAN GAME* 64 (1997). In Texas Hold ‘Em, a player is dealt two cards face down and then three cards are dealt face up, known as community cards. See *id.* The community cards may be used by all the players at the table. See *id.* Thus, three community cards and the players two initial face down cards create the players five card hand. *Id.* A round of betting takes place, followed by a fourth community card dealt face up. *Id.* at 65. Another round of betting followed by a fifth and final card dealt face up. See *id.* One final round of betting takes place after the fifth community card is dealt. See *id.*

125. See MOREHEAD, *supra* note 124, at 241 app. (“The dealer then shuffles the pack, has the cards cut by the player to his right, and deals one card face up to each player in rotation, beginning with the player at his left.”).

126. See *id.* at 242 app. (“Any player, on demand, may shuffle the pack before the deal. The pack should be shuffled three times in all, by one or more players. The dealer has the right to shuffle last and should shuffle the pack at least once.”).

127. See, e.g., *Turner*, 629 N.Y.S.2d at 662 (holding that the dealer's ability to control the initial set-up of the game “does not change the essential character of the contest, which, in this court's view, is a game of chance.”).

128. Cabot & Hannum, *supra* note 119, at 467.

129. See *id.* at 469–71.

2009]

FANTASY SPORTS

language, so as to call a player's bluffs.<sup>130</sup> It necessitates assessing risk when placing bets. Unlike other similar card games, poker players do not play against the "house," but must out-perform other players.<sup>131</sup> Despite the skill needed to surpass other players' hands, many states, as well as the UIGEA, consider poker a game of chance.<sup>132</sup>

Some members of Congress recently addressed poker's legal categorization by proposing the Skill Game Protection Act.<sup>133</sup> This bill will, among other things, label poker and online poker as games of skill.<sup>134</sup> Proposed findings in the bill state that, "[w]hile each of these games contains an element of chance, over any substantial interval, a player's success at any of these games is determined by that player's relative level of skill and is widely recognized as such."<sup>135</sup> Though this perspective reflects the true nature of the game of poker, because many jurisdictions still subject poker to gambling regulation, ambiguity in current gambling regulations remains.<sup>136</sup>

The predominance test balances the skill/chance factors. However, this balancing test is flawed because it results in gaming categorization that is unpredictable and unreasonable. Therefore, state and federal legislatures should adopt a new test that continues to emphasize the importance of the skill/chance distinction, but addresses the distinction in a predictable, well-defined manner, tailored to the course of any game.

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130. See DANIEL, *supra* note 124, at 101.

131. The "house" generally refers to the casino, or "the person or organization that provides playing space for a game and charges a fee for its use, or cuts the pot." MOREHEAD, *supra* note 124, at 265.

132. 31 U.S.C. §§ 5361–67 (2006).

133. Skill Game Protection Act of 2007, H.R. 2610, 110th Cong. (2007) (proposed amendment to 18 U.S.C. § 1084).

134. *Id.* at 2.

135. *Id.*

136. See, e.g., *People v. Mitchell*, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983) (holding that games such as bridge and poker are games of chance subject to state anti-gambling regulations); *New York v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995) (holding that poker is a game of chance even though it contains elements of skill); *State v. McHone*, 90 S.E.2d 539, 539–40 (N.C. 1955) (holding that poker is a game of chance subject to regulation).

#### IV. THE STAGES TEST: REQUIRING COMPREHENSIVE ANALYSIS FOR GAMING REGULATION

The inadequacy of the predominance test and the arbitrary results it produces necessitate a more comprehensive test to determine which activities should be subject to gambling regulation. Such a test, which could be called the “Stages Test,” would use a structured assessment to aid courts in distinguishing games of skill from games of chance. This test would be comprised of two components to ensure more adequate gaming categorizations. First, it would instruct the court as to the proper interpretation of the categorical terms, “chance” and “skill.” Second, it would require the court to consider the varying levels of skill and chance throughout the course of a game.

##### *A. Interpreting the Concepts of Skill and Chance*

Determining whether an activity is essentially one of skill or chance is an assessment states engage in when subjecting a game to possible gambling regulation.<sup>137</sup> This categorical distinction between skill and chance does, however, raise two questions as to how to make such an assessment. First, should the court assess the skill of the players engaged in the game or an inherent element of skill within the game? Second, how should the court define the somewhat ambiguous terms of skill and chance when assessing these concepts? Ultimately, the appropriate interpretation of skill under the test is the amount of control any player exhibits when playing the game.<sup>138</sup>

When analyzing whether a game is one of skill, the court must look to any inherent skill involved in the game itself, and not to the skill of the players.<sup>139</sup> The analysis must not be made indirectly and arbitrarily, on some notion as to whether a

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137. 15 U.S.C. § 3001(a)(1) (2006) (stating that states have “primary responsibility” when determining which activities constitute gambling within that state); Alexander, *supra* note 10, at 26 (stating that when states determine an activity’s gambling status, states generally use the skill/chance distinction when making that determination).

138. See *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1404 (E.D. Cal. 1994). (quoting *Finster v. Keller*, 96 Cal. Rptr. 241, 246 (Cal. Ct. App. 1971) (“In considering whether a game requires skill, the court looks to whether the players ‘exercise some control over the outcome.’”).

139. See, e.g., *In Re Allen*, 59 Cal. 2d 5, 6 (1962) (“It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill.”).

2009]

FANTASY SPORTS

particular player is skilled at the game or not: The analysis must categorize the game itself.<sup>140</sup> A game's categorization should be guided by the nature of the game, and whether *any* player could demonstrate skill when playing the game.<sup>141</sup>

As the court is to make its decision by the inherent nature of skill in the game, the court must also know how to interpret the concept of skill. *Las Vegas Hacienda, Inc. v. Gibson* is instructive on this point.<sup>142</sup> In that case, Plaintiff Gibson accepted a hotel's promotional offer and paid fifty cents in order to participate in a contest.<sup>143</sup> The hotel was offering participants a prize of \$5000 for successfully shooting a hole-in-one on the hotel's golf course.<sup>144</sup> Mr. Gibson shot a hole-in-one, but the hotel refused to pay him the prize money, arguing in the resulting litigation that the contract was an unenforceable gambling contract as shooting a hole in one is a feat of chance.<sup>145</sup> The court disagreed, adopting the position of a testifying golf professional that "luck is a factor in all holes in one where skill is not always a factor."<sup>146</sup>

In other words, luck or chance will always play a part in a resulting hole-in-one, whether it is the strength of the wind or the cut of the green. But a player can exhibit skill when engaged in the game, by choosing how much strength he will use when swinging the club, or adjusting the angle at which he will strike the ball. Attempting to hit a hole-in-one inherently requires *control* by any player. When assessing whether a game is one of skill, the court should look to whether any player engaged in the game has control over various aspects of the game.<sup>147</sup> A district court in the Ninth Circuit has adopted this definition of skill.<sup>148</sup> Conversely, the court should look to whether there is an absence of control when determining if the game is one of chance. With this interpretation of the concepts of skill and chance, the court

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140. *See, e.g., id.*

141. *See, e.g., id.*

142. *See* 359 P. 2d 85, 86 (1961).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 87.

147. *See Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1404 (E.D. Cal. 1994). (quoting *Finster v. Keller*, 96 Cal. Rptr. 241, 246 (Cal. Ct. App. 1971)).

148. *See id.*

can use these concepts in a comprehensive test, resulting in more accurate gaming categorizations.

*B. Operation of the Stages Test: A Method to Ensure Systematic Analysis*

Clearly defining the concepts of skill and chance is one way in which the proposed Stages Test is superior to the current predominance test. The Stages Test also commands a more precise analysis by the court by requiring the court to assess these concepts at the general stages that comprise any game. It operates in the following manner:

Stage One: The initial set-up.

The initial set up consists of all actions players take preceding the central component of the game. In Stage One, the court determines if the initial set-up is predominantly based on skill or chance. Regardless of the outcome of this initial assessment in Stage One, the court must then move on to Stage Two to analyze the central component of the game.

Stage Two: The central component of the game.

If it is determined in Stage One that the initial set-up is predominantly skill-based, the burden shifts to the prosecution, in Stage Two, to prove that the central component of the game is predominantly chance-based. If it is determined in Stage One that the initial set-up is predominantly chance-based, the burden shifts to the defendant, in Stage Two, to prove that the central component of the game is predominantly skill-based.

If Stages One and Two result in the same categorization of the game, that either skill predominates in both stages, or that chance predominates in both, there is no need to proceed to Stage Three. The game's categorization is simply determined by the consistent results of Stages One and Two.

Stage Three: The totality assessment.

If the court's analysis of Stage One and Stage Two results in different categorizations, the court must proceed to Stage Three. In Stage Three, the court must determine if the predominant

2009]

FANTASY SPORTS

element in one stage outweighs the predominant element in the other stage. Thus, Stage Three examines the totality of the game, assessing whether a game's primary characteristic is best described as one of skill or chance. The court must, when necessary, determine in Stage Three which element is truly dominant in the game. That will determine the game's ultimate and proper legal categorization.

#### Standard of Proof:

Skill and chance are abstract and elusive concepts at best. Furthermore, there is no obvious reason for either the prosecution or the defendant to bear a greater risk of error in the determination of whether a game is one of skill or chance. It is not a purely factual issue pertaining to a specific defendant's guilt in a particular case (which must be proven beyond a reasonable doubt by the prosecution), but rather a broad legal issue concerning how to define and categorize an entire game as a matter of law. It is a mixed question of law and fact, not a pure question of fact. Thus, the standard of proof for either side, in defining the game as one of skill or chance, should be the preponderance of the evidence, based on applying the Stages Test to all relevant and available facts of the game generally.

### V. APPLICATION OF THE STAGES TEST

The inadequacy of the predominance test has resulted in a lack of uniformity in gambling lawsuits. The Stages Test will rectify this procedural inadequacy by accounting for the various levels of skill and chance within the structure of a game in order to determine which element truly controls the outcome of the game. Here we will examine the outcome of the games of poker and fantasy baseball under the Stages Test.

#### *A. The Stages Test Applied to Poker*

In applying the Stages Test to poker, the analysis must begin with the set-up of the game. The set-up of the game of poker begins with the dealing of cards by the dealer. Card dealing in a poker game is entirely an act of chance because the player exerts no control over the cards he or she is dealt. Therefore, Stage One of poker is purely chance, thus shifting the burden to the player to establish, in Stage Two, that the central component of the game is skill-based.

In Stage Two, the player meets the burden of proving skill by establishing his or her ability to manipulate the hand dealt, and the utilization of skills such as risk assessment, mathematics, and psychology to win the hand.<sup>149</sup> This analysis will lead the trier of fact to conclude that skill was heavily involved in the central component of the game, thus resulting in a different categorization from Stage One. At this point, Stage Three analysis is necessary because of the differing categorizations in Stages One and Two.

In Stage Three, the trier of fact must assess the totality of the game to determine which element is truly the controlling, dominant element. The outcome of a game of poker is inherently dependent on a player's ability to manipulate what cards he is dealt, and control which cards he is left with in his final hand. As this control exceeds the existence of chance at the beginning of the game, the skill of a player exhibited in Stage Two outweighs the existence of chance in Stage One. Thus, the proper categorization for a game of poker is that it is one of skill.

In dividing the game into different stages, the trier of fact can accurately determine whether chance or skill actually influences the outcome of the game. While the design of any game can be substantively different from another, this test assesses the skill level involved in all games, and forces the court to engage in a more thorough analysis than what is currently required under the predominance test.

### *B. The Stages Test Applied to Fantasy Sports*

In applying the Stages Test to fantasy sports, the analysis must begin with the set-up of the game. For fantasy sports, Stage One is the draft.<sup>150</sup> During the draft, a gamer in a league exerts the most control over the game because he or she must examine the scoring system of the league and determine which players will yield the most points in respective statistical categories. The ability to project a player's future performance is not mere guesswork, left to the outcome of chance.<sup>151</sup> Gamers

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149. Cabot & Hannum, *supra* note 119, at 467.

150. KEOGH & NUNZIATA, *supra* note 2, at 70–71 (explaining in detail how a draft operates); *see also* WALKER, *supra* note 3, at 151–71 (discussing his personal experience with an auction style fantasy draft).

151. Many fantasy baseball gamers use a compilation of statistics, known as sabermetrics, to help them evaluate the most statistically favorable team of

2009]

FANTASY SPORTS

of fantasy sports compile and analyze years of statistical data when making projections of their players' capabilities in the coming season.

Fantasy sports, notably fantasy baseball, operate solely through the manipulation of statistics, where the primary objective for each gamer is to enlist players with the most favorable statistics.<sup>152</sup> Gamers compute and analyze statistics to find common patterns to help them predict players' future performances.<sup>153</sup> This form of objective and detailed analysis is known as sabermetrics.<sup>154</sup> The use of sabermetrics is the driving strategy behind fantasy sports players' success. Due to the ability of sabermetrics to predict future player performance, most general managers in Major League Baseball use this technique in forming their own teams. In fact, many teams employ at least one person to handle the statistical analysis to measure each professional baseball player's capabilities.<sup>155</sup>

For example, consider five pitchers from the 2008 baseball season: Jake Peavy (10-11), Cliff Lee (22-3), Joe Saunders (17-7), Matt Cain (8-14), and Felix Hernandez (9-11).<sup>156</sup> While the record indicates that Joe Saunders did statistically better in games than Jake Peavy and Felix Hernandez, the latter two pitchers had a similar season. A further analysis, however, will

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players. *See generally* David Grabiner, *The Sabermetric Manifesto*, THE BASEBALL ARCHIVE, <http://www.baseball1.com/bb-data/grabiner/manifesto.html>.

152. *See* KEOGH & NUNZIATA, *supra* note 2, at 13 (explaining that a good place to start one's valuation of a player is by looking at their "stats").

153. *See id.* at 93-112 (discussing the various forms of statistics used in fantasy baseball and how to utilize them in order to predict the future performance of players).

154. *See generally* David Grabiner, *The Sabermetric Manifesto*, THE BASEBALL ARCHIVE, <http://www.baseball1.com/bb-data/grabiner/manifesto.html>.

155. Boston Red Sox General Manager Theo Epstein reportedly keeps a copy of the *Baseball Forecaster* in his office. WALKER, *supra* note 3, at 56. The *Baseball Forecaster* is an annual publication created by Ron Shandler of sabermetric applications for fantasy league play. *See* Ron Shandler, *Baseball Forecaster*, <http://www.baseballhq.com/books/bfbio.shtml>. The Red Sox have won two World Series since Theo Epstein became the General Manager. Arguably, the Red Sox success is due in part to sabermetric application to evaluating player personnel.

156. ESPN, *MLB Player Pitching Stats: 2008*, <http://sports.espn.go.com/mlb/stats/pitching?league=mlb> (last visited Mar. 6, 2009) (noting pitcher win/loss statistics in parenthesis).

indicate that while Jake Peavy had an Earned Run Average (“ERA”) of 2.85 and an opposing batting average of only .229, Joe Saunders had an ERA of only 3.41 and an opposing batting average of .253.<sup>157</sup> To recognize and capitalize on these differences requires more than a cursory look at statistics; one must analyze various categories of statistics to determine the true abilities of each professional athlete. Thus, unlike poker players, fantasy baseball gamers exhibit a substantial amount of skill in Stage One. This shifts the burden to the state to show the predominance of chance in Stage Two, the central component of the game.

The central component of fantasy baseball is the actual playing of the Major League Baseball season. Recall the hypothetical at the beginning of this Note. John had to replace one of his star players from a small pool of available players. By reviewing the statistics of the different players on his opponents’ teams, John was able to wisely capitalize and trade players to compensate for his bad luck. Though this hypothetical demonstrates a successful trade, gamers spend a great deal of time preparing for such trades. On nearly a daily basis, fantasy baseball gamers spend their time viewing games, and gathering and charting statistical information to determine the best team lineups. This effort is similar to, if not more than, the effort poker players place in memorizing cards already dealt, reading opponents’ body language, and assessing the risks of their own hands. Therefore, in fantasy baseball, skill exists not only in Stage One, but also in Stage Two. The analysis in Stage Three is unnecessary because Stage Three is only required in instances of competing stages of skill and chance.

A brief look at a game like fantasy baseball may leave the impression that it is a game solely dependent on chance. The inability of the gamer to have any control over how professional baseball players will perform on the field, whether they will injure themselves, or even the availability of players during the draft all qualify this game to be categorized with chance when

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157. Earned Run Average is a statistic used to judge pitchers in which the amount of runs given up by a pitcher is averaged by nine, the number of innings in a baseball game. Baseball Prospectus, Baseball Prospectus Glossary, <http://baseballprospectus.com/glossary/> (last visited Mar. 6, 2009). Opposing Batting Average is a statistic that shows how many batters got base hits off a pitcher, a percentage taken out of 1.000. *Id.*

2009]

FANTASY SPORTS

applying the predominance test. Yet, when applying the far more concrete and accurate Stages Test, skill greatly outweighs the mere possibility of chance. This test effectuates the intent of U.S. gaming law to protect a skills-based game from erroneous identification and regulation as a game of chance.

#### VI. FAILING TO ADOPT THE STAGES TEST: FUTURE REPERCUSSIONS

As *United States v. Cohen* illustrates, internet gambling falls under the Wire Act.<sup>158</sup> If fantasy sports are classified as a form of online gambling, courts will prosecute those operating fantasy leagues. The legislative intent of the Wire Act is not to prosecute millions of Americans for participating in a popular fad.<sup>159</sup> Instead, the driving force of the creation of such anti-gambling statutes involves their connection to organized crime.<sup>160</sup> As Attorney General Robert F. Kennedy stated, the Wire Act serves to aid the individual states in enforcing their anti-gambling laws and to hinder the ability of organized gambling organizations to run their operations.<sup>161</sup>

The draw that gambling has to organized crime is the ability to “fix” the game in a manner that promises a win. Perhaps the most infamous gambling story involves the 1919 Chicago White Sox, when eight players “threw” the World Series because they were paid by gamblers to “fix” the result.<sup>162</sup> Because fantasy

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158. See *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001); see also McGinty, *supra* note 80, at 209.

159. See 18 USC § 1084 (2000). The Act states:

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

*Id.*; see also Davidson, *supra* note 20, at 207 (noting that the plain language of the statute limits the Act’s prohibition engaged in the business of “betting or wagering.”).

160. See McGinty, *supra* note 80, at 209 (stating that the Wire Act was created to help prosecute organized crime).

161. *Id.*; see also text accompanying footnote 80.

162. See generally ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963).

sports involve the success of overall statistics, and not individual games, it is unlikely that the activity will cross over to the criminal realm. Moreover, if states characterize fantasy sports as gambling activities, regulation will lead to the indictment of nearly ten percent of the U.S. population that participate in fantasy games. Such regulation is not only a waste of judicial resources, but it is also counter-productive to society.

Fantasy sports cause few if any detrimental social or financial effects, and regulating them would only cripple a thriving industry, which many U.S. citizens support.<sup>163</sup> Scholars argue that gambling creates “anti-social” effects on communities.<sup>164</sup> Studies show increased debt in areas of legalized gambling.<sup>165</sup> Also, divorce, homelessness, suicide, and domestic abuse are more prevalent in these locations.<sup>166</sup> Fantasy sports, however, do not threaten such consequences. Currently, the average American fantasy sports player invests only \$500 per year in this hobby.<sup>167</sup> Further, the average fantasy sports player is well-educated and well-adjusted.<sup>168</sup> Fantasy sports do not create nor do they attract “compulsive gamblers” who incur many of the societal costs of gambling.<sup>169</sup> While no studies currently exist on addiction to fantasy sports, casino games are likely more addicting because of the existence of immediate results.<sup>170</sup> Blackjack, roulette, and slot machines provide players

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163. Fantasy Sports Trade Association, *supra* note 28, at 1.

164. M. Neil Browne, *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?*, 78 NEB. L. REV. 37, 46–56 (1999) (explaining the common arguments for regulating gambling including increases in suicide, child and spousal abuse, and an increase in crime as products of gambling addiction).

165. *Id.* at 52–57.

166. *Id.* at 47–51.

167. M. Christine Holleman, *Recent Development: Fantasy Football: Illegal Gambling or Legal Game of Skill*, 8 N.C. J.L. & TECH. 59, 76 (2006).

168. *Id.*

169. *See, e.g.*, DonnaRae Jacobson, *Gambling: Its Effect on Families and Communities in North Dakota*, NORTH DAKOTA STATE UNIVERSITY, July 1995, <http://www.ag.ndsu.edu/pubs/yf/fammgmt/fs557w.htm> (stating that gambling creates financial problems and crime).

170. *See* Marilyn Davis, Perspectives Research and Creative Activities: Southern Illinois University-Carbondale, *Beating the Odds*, at 3, available at [http://www.siu.edu/~perspect/06\\_sp/gambling.html](http://www.siu.edu/~perspect/06_sp/gambling.html) (concluding that compulsive gamblers exhibit “delay discounting” which shows that compulsive gamblers are more likely to take a smaller payout immediately than to hold out for a larger payout that will be given later in time).

2009]

FANTASY SPORTS

instant results, allowing players to believe that they are “due.”<sup>171</sup> Unlike the immediacy of such results, fantasy sports last the length of the actual season. Fantasy baseball leagues, for example, last from April to September. This prolonged period may lead to compulsive gamblers being relatively disinterested in fantasy sports, since they may perceive that “lady luck” plays less of a role.

### CONCLUSION

Today, courts continue to use an archaic and arbitrary test in distinguishing between games of chance and games of skill to determine what activities are subject to gambling regulation. The law’s failure to provide any well-defined tests has led to the prohibition of the skill-based game of poker and leaves other skill-based games, such as fantasy baseball, vulnerable to such regulation. This Note proposes a Stages Test to overcome the shortfalls of the current test. By examining the game set-up, the course of the game, and players’ abilities to control results, the proposed test more accurately exempts skill-based games from anti-gambling legislation. In adopting this proposed test, courts will appropriately leave fantasy sports to their own fates. Rather than winning by chance, gamers will lead their teams to victory by employing their skillful tactics.

*Geoffrey T. Hancock\**

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171. *See id.* at 3–4.

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[Vol. 31:317