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## Lost (It All) in Space: The Legality of Extra-Terrestrial Gambling

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# LOST (IT ALL) IN SPACE: THE LEGALITY OF EXTRA-TERRESTRIAL GAMBLING

*Robert M. Jarvis\**

## ABSTRACT

Is gambling in outer space legal under United States law? With commercial space flights now almost routine, and gambling growing by leaps and bounds, this question is becoming more pressing by the day. As it happens, three existing federal criminal laws—dating, respectively, from 1790, 1825, and 1951—make it clear that betting in outer space currently is illegal in nearly all instances.

## I. INTRODUCTION

Is gambling in outer space<sup>1</sup> legal under United States law?<sup>2</sup>

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<sup>1</sup> The term “outer space” refers to the universe beyond Earth’s atmosphere. The Kármán line, an imaginary boundary located 330,000 feet (62 miles) above sea level, generally is recognized as the place where outer space begins. The line is named for Theodore von Kármán (1881-1963), a Hungarian American scientist who, in 1956, published a paper on aerothermal flight limits. *But see* Thomas Gangale, *The Non Kármán Line: An Urban Legend of the Space Age*, 41 J. SPACE. L. 151 (2017) (arguing that von Kármán never proposed his namesake boundary).

At present, a universally accepted *legal* definition of outer space does not exist. For a further discussion, see Alex S. Li, *Ruling Outer Space: Defining the Boundary and Determining Jurisdictional Authority*, 73 OKLA. L. REV. 711 (2021); Timothy G. Nelson, *Where Does Space Begin? The Decades-Long Legal Mission to Find the Border Between Air and Space*, SPACENEWS (Mar. 26, 2019), <https://spaceneews.com/op-ed-where-does-space-begin-the-decades-long-legal-mission-to-find-the-border-between-air-and-space/>.

<sup>2</sup> No attempt has been made to consider what the answer might be under foreign law. Unquestionably, however, each country has the power to handle the subject as it sees fit. *See* SS *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (holding that sovereign nations are free to shape their criminal law as they see fit in the absence of an express international prohibition). The holding of the *Lotus* forms the basis of Articles III and VIII of the 1967 Outer Space Treaty, discussed *infra* note 15. The former Article provides: “States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations. . . .” The

This intriguing question is the subject of this article.<sup>3</sup>

Other than an anonymous article on a United Kingdom betting news web site,<sup>4</sup> it appears that no previous commentator has considered the legality of extra-terrestrial gambling.<sup>5</sup> Indeed, the only

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latter Article provides: “A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.” For a further discussion, see Reid White, Comment, *Plugging the Leaks in Outer Space Criminal Jurisdiction: Advocacy for the Creation of a Universal Outer Space Criminal Statute*, 35 EMORY INT’L L. REV. 333, 376 (2021) (arguing against the current nation-based approach and claiming that what is needed is “an Outer Space Criminal Statute, designed and ratified by all people.”).

<sup>3</sup> It is beyond the scope of the present discussion to suggest ways in which gambling could be regulated in outer space. It seems likely, however, that if humankind does establish a significant presence in outer space, gambling eventually will be regulated in much the same way that it is regulated on Earth, with the laws of Nevada, the United States’ principal gambling jurisdiction, serving as a model. See generally Erica Adler, *Nevada Regulators’ Vital Role Through the Growth of Gaming*, 26 GAMING L. REV. 165 (2022). See also *Can You Gamble in Space? What Are the Rules for Astronauts?*, LATESTBETTINGOFFERS.CO.UK (Oct. 19, 2021), <https://www.latestbettingoffers.co.uk/articles/can-you-gamble-in-space-what-are-the-rules/> [hereinafter Anonymous]:

Yet, how would gambling in space be regulated? Nobody owns it. Space is so vast that it cannot be said ‘this part belongs to the USA and that part over there is Russia’s and we’re floating in Germany’s zone,’ for example. The likelihood is that there would need to be a set of laws and rules thought up for the entirety of space. Who would create these is up in the air, but it would likely need to be an astronomical body, such as NASA. Of course, their focus has little to do with gambling legislation, so it is likely that a new branch . . . would need to be created that deals specifically with gambling.

<sup>4</sup> See Anonymous, *supra* note 3. Much of Anonymous’s focus is on the fact that due to the lack of gravity in outer space, playing such games as blackjack and roulette on a spaceship currently is impossible because the pieces “would float about uncontrollably.” While this will remain true until artificial gravity is invented, the problem can be overcome in the meantime by using electronic (*i.e.*, video) versions of any games that require, *e.g.*, balls, cards, chips, coins, or dice. See generally Adalene Lucas, *The Truth About Video Blackjack, Strategy, and Why These Games are Disappearing from Casinos*, DEBITCARDCASINO.CA (Nov. 3, 2018), <https://debitcardcasino.ca/2018/11/03/electronic-blackjack-strategy/> (explaining that many players avoid electronic blackjack machines because they wrongly believe that casinos manipulate them to increase the house’s edge when, in fact, the “RNG [random number generator] is programmed to deliver the same unpredictable shuffling odds of a genuine deck of cards. . . . [Thus, a] player who finds a game with favorable rules, then uses basic video blackjack strategy, will have the same odds as at a live blackjack table.”).

<sup>5</sup> Science fiction writers, on the other hand, have taken it as a given that there will be gambling—both legal and illegal—in outer space. See, *e.g.*, David Sheldon, *Sci-Fi’s*

other reference I have found that broaches the subject is an off-hand remark in *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*<sup>6</sup> In holding that the Tribe's indemnity lawsuit against NGV, its former casino developer, had to be dismissed because NGV had no colorable claim against the Tribe, the Ninth Circuit wrote:

In short, the Tribe—which does not itself face any potential liability to NGV—must try to fall back on its claimed sense of uncertainty about any future [ventures] into the gambling

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*Most Memorable Gambling Games*, CASINO.ORG (Sept. 14, 2017), <https://www.casino.org/blog/sci-fis-most-memorable-gambling-games/>; Ian Cullen, *Cards, Dice, and Aliens: Gambling in Science Fiction*, SCIFI PULSE (Nov. 24, 2016), <https://www.scifipulse.net/cards-dice-and-aliens-gambling-in-science-fiction/>; Nich Moore, *Seven Gambling Futures from Science Fiction (Part One)*, GAMINGZION (Apr. 17, 2015), <https://www.gamingzion.com/gambling/gambling-news/seven-gambling-futures-from-science-fiction-part-one/> (updated Oct. 6, 2017); and Nich Moore, *Seven Gambling Futures From Science Fiction (Part Two)*, GAMINGZION (Apr. 17, 2015), <https://www.gamingzion.com/gambling/gambling-news/seven-gambling-futures-from-science-fiction-part-two/> (updated Oct. 6, 2017).

Cashing in on the public's fascination with outer space, several current slot machines have space themes. See, e.g., Adam Haynes, *Top 5 Sci-Fi Themed Slots That You Can Play*, GAMBLING SITES.COM (Sept. 14, 2022), <https://www.gamblingsites.com/blog/best-sci-fi-themed-slot-machines/>; Sophie Drozd, *Top Space-Themed Slot Machines*, FEMS IN SPACE (Mar. 1, 2022), <http://www.femsinspace.com/slots-games/space-themed-slot-machines/>. In addition, some bookmakers will take bets on whether alien life exists in the galaxy. See, e.g., Kevin Oldroyd, *You Can Now Bet on Alien Life Being Found in 2021!*, GAMBLINGSITES.ORG (Dec. 8, 2020), <https://www.gamblingsites.org/news/you-can-now-bet-alien-life-being-found-2021/> (reporting on the odds being given by the Costa Rican sportsbook Bovada).

There also have been two real-life casinos that were decorated to look like they were from outer space. The first was Bob Stupak's Vegas World (1979-95). See *Vegas World Hotel and Casino*, CASINOCYCLOPEDIA, [https://casino.fandom.com/wiki/Vegas\\_World\\_Hotel\\_and\\_Casino](https://casino.fandom.com/wiki/Vegas_World_Hotel_and_Casino) (last visited Jan. 1, 2023). The second was the SpaceQuest Casino at the Las Vegas Hilton (1998-2008). See John Przybys, *'Star Trek: The Experience' Brought Otherworldly Fun to Las Vegas*, LAS VEGAS REV.-J. (Nov. 7, 2019), <https://www.reviewjournal.com/entertainment/star-trek-the-experience-brought-otherworldly-fun-to-las-vegas-1887812/>. See also Marc J. Randazza & Daniel Russell, *The Legal Status of Gambling in America's Senior Communities*, 8 MARQ. ELDER'S ADVISOR 343, 364 (2007) ("From the outside, Nevada seems to allow for almost any type of gambling. Bright lights advertise from miles away (even to outer space where the light beam from the Luxor casino in Las Vegas can be seen) that gambling is permitted within the state."). Lastly, in 2013 slot machine manufacturer IGT created an "outer space gaming experience" at the Global Gaming Expo (better known as the "G2E meeting") in Las Vegas. See Charles Pappas, *Casino Royale*, EXHIBITOR, <https://www.exhibitoronline.com/topics/article.asp?ID=1703> (last visited Jan. 1, 2023).

<sup>6</sup> *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008).

industry. But those uncertainties exist only in outer space—they surely cannot be trotted out against NGV, with which the Tribe no longer has any contractual relationship or any on-going exposure to liability.<sup>7</sup>

Despite the lack of scholarly commentary, the legality of gambling in outer space is becoming a more pressing question with each passing day, due to the advances being made by such private outer space companies as Jeff Bezos's Blue Origin, Richard Branson's Virgin Galactic, and Elon Musk's SpaceX.<sup>8</sup> Indeed, these enterprises—and countless others like them—already have given rise to the term “space tourism.”<sup>9</sup> Also making the question worthy of study now is the fact that Americans are gambling more today than ever before.<sup>10</sup>

## II. APPLICABLE FEDERAL CRIMINAL LAW

Any attempt to determine the legality of gambling in outer space must begin with two federal statutes: 15 U.S.C. §§ 1171-1178,

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<sup>7</sup> *Id.* at 773.

<sup>8</sup> See, e.g., Danielle Braff, *Blast Off: As Outer Space Becomes More Accessible, Space Lawyers Will Be in Greater Demand*, 107 A.B.A. J. 20 (Dec. 2021/Jan. 2022); Amanda Stevens, *SpaceX vs. Blue Origin vs. Virgin Galactic: What's the Difference?*, WHATIS.COM (Dec. 21, 2021), <https://www.techtarget.com/whatis/feature/SpaceX-vs-Blue-Origin-vs-Virgin-Galactic-Whats-the-difference>; Dylan Taylor, *The Future of Space Tourism*, SPACE.COM (Mar. 31, 2021), <https://www.space.com/future-of-space-tourism-op-ed>.

<sup>9</sup> See, e.g., ANNETTE TOIVONEN, *SUSTAINABLE SPACE TOURISM: AN INTRODUCTION* (2020); *SPACE TOURISM: THE ELUSIVE DREAM* (Erik Cohen & Sam Spector eds. 2019); *COMMERCIAL USES OF SPACE AND SPACE TOURISM: LEGAL AND POLICY ASPECTS* (Jan Wouters et al. eds. 2017). See also FRANCIS LYALL & PAUL B. LARSEN, *SPACE LAW: A TREATISE* 227-34 (2d ed. 2018).

<sup>10</sup> Much of the current growth is the result of the rise of “racinos” (pari-mutuel facilities with gambling games); the US Supreme Court's decision in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), which struck down the federal government's ban on sports betting; the proliferation of state laws authorizing commercial casinos; and Congress's decision to permit casinos on Indian land. In addition, the internet has become home to countless gambling sites (almost none of which are legal under current US law). For a further discussion, see ROBERT M. JARVIS ET AL., *GAMING LAW AND GAMBLING LAW: CASES, MATERIALS, AND PROBLEMS* 209-10 (racinos), 317-20 (sports betting), 399-404 (commercial casinos), 671-76 (tribal casinos), and 839-45 (internet gambling) (2d ed. 2021). See also Will Yakowicz, *US Gambling Revenue Hit Record \$53 Billion in 2021*, FORBES (Feb. 15, 2022), <https://www.forbes.com/sites/willyakowicz/2022/02/15/us-gambling-revenue-hit-record-53-billion-in-2021/?sh=560243197f50>; Stephen Marche, *America's Gambling Addiction is Metastasizing*, ATL. MAG. (Nov. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/world-our-casino/620791/>.

better known as the Johnson Act,<sup>11</sup> and 18 U.S.C. § 7, which makes “federal enclaves”<sup>12</sup> subject to the special maritime and territorial jurisdiction of the United States (SMTJ).<sup>13</sup>

The Johnson Act makes it “unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18.”<sup>14</sup> The SMTJ, in turn, expressly includes spaceships in its lists of federal enclaves:

Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over

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<sup>11</sup> The Johnson Act was passed by Congress in 1951 at the urging of Senator Edwin C. Johnson (D-CO). Formally known as the Slot Machine Act, it was amended in 1962 by the Gambling Devices Transportation Act. See Rufus King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 199, 204-06 (1964).

<sup>12</sup> A federal enclave is an area that is outside the territorial limits of any US state. For a further discussion, see generally Emily S. Miller, *The Strongest Defense You've Never Heard of: The Constitution's Federal Enclave Doctrine and Its Effect on Litigants, States, and Congress*, 29 HOFSTRA LAB. & EMP. L.J. 73 (2011).

<sup>13</sup> The SMTJ dates from 1790. See Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 112. As originally enacted, the SMTJ was intended to give federal officials authority to prosecute murders occurring on federal installations. See *Watts v. United States*, 1 Wash. Terr. 288, 297-98, 1870 WL 2118 (1870). Over time, the SMTJ has been amended repeatedly to include such places as Antarctica, the Guano Islands, and the high seas—the most recent change, in 2001, added US embassies in foreign countries to the list of covered places. See Pub. L. 107-56, tit. VIII, § 804, 115 Stat. 377 (2001). For a further history of the SMTJ, see *United States v. Corey*, 232 F.3d 1166, 1169-76 (9th Cir. 2000), cert. denied, 534 U.S. 887 (2001).

<sup>14</sup> 15 U.S.C. § 1175(a). Paragraphs (b) and (c) of § 1175, added between 1992 and 2000, create various exceptions for voyages that either take place in the waters of Alaska, Hawaii, or Indiana or qualify as “cruises to nowhere.” For a further discussion, see Trudy D. Fountain, *Down the Mississippi from Minnesota to Louisiana and Out into the High Seas—Riverboat Gambling and Cruise Ship Gambling*, ALI-ABA COURSE OF STUDY (Mar. 29, 2001), available on Westlaw at SF89 ALI-ABA 79.

the responsibility for the vehicle and for persons and property aboard.<sup>15</sup>

Taken together, these two statutes mean that while in outer space, Americans cannot legally engage in any form of gambling using a “gambling device” as that term is used in the Johnson Act.

The Johnson Act defines a gambling device as:

(1) any so-called “slot machine” or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to

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<sup>15</sup> 18 U.S.C. § 7(6). This provision was added in 1981. See Pub. L. 97-96, § 6, 95 Stat. 1210 (1981). See also *Corey*, 232 F.3d at 1171 (explaining that “Section 7 [now] reaches . . . NASA spaceships rocketing towards Mars, subsection 7(6)”; Leo Kanowitz, *American Labor Law and the United States Space Shuttle*, 34 HASTINGS L.J. 715, 740 (1983) (“Any doubt about the applicability of federal criminal statutes to events in outer space was recently removed by congressional enactment of section 7(6) of title 18 of the United States Code[.]” (footnote omitted)).

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (“Outer Space Treaty,” ratified 1967) and the Convention on Registration of Objects Launched into Outer Space (“Registration Convention,” ratified 1976) are two of the five principal treaties that currently govern outer space. The others are the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (“Rescue Agreement,” ratified 1968); the Convention on International Liability for Damage Caused by Space Objects (“Liability Convention,” ratified 1972); and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (“Moon Agreement,” ratified 1984). More information about these instruments can be found at the web site of the United Nations Office for Outer Space Affairs at <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html> (last visited Jan. 1, 2023). See also LYALL & LARSEN, *supra* note 9, at 27-116.



receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.<sup>16</sup>

Of course, many forms of gambling—including such popular casino games as baccarat, blackjack, craps, and poker—do not require a gambling device to play them.<sup>17</sup> As a result, neither the Johnson Act nor the SMTJ applies to them.<sup>18</sup> The same, of course, is true with respect to gambling on airplanes that is accomplished without a gambling device.<sup>19</sup>

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<sup>16</sup> 15 U.S.C. § 1171(a). Whether a particular machine qualifies as a “gambling device” depends on a careful evaluation of how the machine functions and its intended or actual use. *See, e.g., Shoman v. United States Customs & Border Prot.*, Civil Action No. 07-994, 2008 WL 203384, at \*1 (W.D. Pa. Jan. 24, 2008) (“A Pachislo machine is a token operated, skill stop slot machine that is legal in the Commonwealth of Pennsylvania. A Pachislo machine is not a ‘gambling device’ as defined in 15 U.S.C. § 1171(a).”).

<sup>17</sup> As a practical matter, however, these games do use “devices” (broadly construed) to aid in their playing, including caddies, chips, paddles, shoes, shufflers, sticks, and trays. Examples of such equipment can be viewed at such web sites as <https://www.americangamingsupply.com/> and <https://www.casinosupply.com/>.

<sup>18</sup> Depending on the facts, however, indictments under other federal criminal statutes might be possible. *See, e.g., United States v. Kaczowski*, 114 F. Supp. 2d 143 (W.D.N.Y. 2000) (rejecting defendants’ argument that they could not be prosecuted under the Illegal Gambling Business Act, 18 U.S.C. § 1955, Travel Act, 18 U.S.C. § 1952, Wagering Paraphernalia Act, 18 U.S.C. § 1953, or the Wire Act, 18 U.S.C. § 1084, for operating an illegal sportsbook because their customers’ bets, although placed in New York, were accepted at offices located in Central America and the West Indies). These statutes, however, normally are available only in connection with the prosecution of a large-scale illegal gambling operation (because the impetus for passing them was to give federal prosecutors additional weapons with which to combat organized crime). *See generally* Jonathan D. Cohen, *Put the Gangsters Out of Business: Gambling Legalization and the War on Organized Crime*, 31 J. POL’Y HIST. 533 (2019).

<sup>19</sup> *See* Louis V. Csoka, *Three Persisting Myths of Gaming Technology Law*, 16 NEV. LAW. 10 (May 2008). As this source explains:

Many of us have heard that, for over a decade, federal laws have prohibited gambling on all airplanes. Specifically, in 1994, the Gorton Amendment [49 U.S.C. § 41311] added the following provision to the United States Code: “An air carrier or foreign air carrier may not install, transport, or operate, or permit the use of any gambling device on board an aircraft in foreign air transportation.” As a result of the Gorton Amendment and the prior Johnson Act, the Federal Aviation Administration today prohibits (1) gambling on all flights

## III. ROLE OF STATE CRIMINAL LAW

Even if gambling occurs in outer space without the aid of a gambling device, it likely still will be illegal because of another federal statute: the Assimilative Crimes Act (ACA), 18 U.S.C. § 13.<sup>20</sup>

The ACA exists to fill gaps in the federal criminal law in areas that are subject to the SMTJ.<sup>21</sup> In relevant part, the ACA provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws

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within United States airspace, (2) gambling on flights to and from this country, regardless of the nationality of the carrier, and (3) gambling on all domestic and international flights of United States carriers.

A closer reading of the statute, however, reveals that not all forms of gambling are expressly prohibited by the Gorton Amendment. In particular, both the Gorton Amendment and the related Johnson Act only appear to be aiming their prohibitions at “gambling devices” and not, more generally, at all forms of gambling. Of course, to be a “gambling device,” one would anticipate that the prohibited item would have a “slot” and a “hopper” or, at a minimum, a “random number generator.”

Most significantly, given this narrower definition of a “gambling device,” gambling with cards, for example, does not appear to be expressly prohibited under the Gorton Amendment. This is particularly true when the airplane is in international airspace.

*Id.* (footnotes omitted).

<sup>20</sup> For the history of the ACA, which was enacted in 1825 and owes its existence to Daniel Webster, see *Williams v. United States*, 327 U.S. 711, 719-23 (1946).

<sup>21</sup> See *Lewis v. United States*, 523 U.S. 155, 160 (1998) (“The ACA’s basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves.”). Although federal judges at one time could fill gaps in the federal criminal law by creating common law crimes, they lost this power in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.<sup>22</sup>

Thus, the ACA authorizes federal courts to “borrow” state criminal law and treat it as a proxy for federal criminal law.<sup>23</sup> Accordingly, a gambling game played in outer space that does not run afoul of the Johnson Act is still illegal if the relevant state law makes it illegal.

The foregoing, of course, begs the question of which state’s law a federal court should use to determine whether the game in question was legal or illegal. Imagine, for example, that two astronauts—one from Nevada and the other from Utah—engage in gambling while in outer space. Utah outlaws all forms of gambling.<sup>24</sup> In contrast, Nevada permits almost all forms of gambling.<sup>25</sup>

To date, no ACA case appears to have ruled on the problem of which state’s law to assimilate when a crime takes place in a federal enclave that is not located within a state.<sup>26</sup> In the only two reported cases involving illegal gambling in a federal enclave, the crime took place within a particular state.

In the first, *United States v. Sosseur*,<sup>27</sup> a pre-Johnson Act case, the defendant was charged with operating slot machines on an Indian reservation located within the State of Wisconsin.<sup>28</sup> As a result, the Seventh Circuit upheld the district court’s decision to assimilate the gambling laws of Wisconsin.<sup>29</sup> The second, *United*

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<sup>22</sup> 18 U.S.C. § 13(a).

<sup>23</sup> In *United States v. Sharpnack*, 355 U.S. 286 (1958), the Court held that the ACA does not constitute an impermissible delegation of Congress’s legislative authority to the states.

<sup>24</sup> See Robert M. Jarvis, *Gambling in Hawai’i and Utah*, 14 GAMING L. REV. 755 (2010) (explaining that Utah’s opposition to gambling is rooted in the teachings of the Mormon Church).

<sup>25</sup> See Sonia Church Vermeys & Erin Elliott, *USA—Nevada*, GAMBLING L. REV. (May 9, 2022), <https://thelawreviews.co.uk/title/the-gambling-law-review/usa-nevada>.

<sup>26</sup> In contrast, federal law makes it clear that venue in such cases lies in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. 18 U.S.C. § 3238.

<sup>27</sup> 181 F.2d 873 (7th Cir. 1950).

<sup>28</sup> *Id.* at 874.

<sup>29</sup> *Id.* at 875.

*States v. Casserino*,<sup>30</sup> the defendant conducted a bookmaking operation inside a US post office located in New York City.<sup>31</sup> As a result, the US Attorney used the gambling laws of New York State to charge the defendant.<sup>32</sup>

In the absence of precedent, it seems likely that a court faced with a situation like the one in the Nevada-Utah astronaut hypothetical would apply standard choice-of-law principles, *i.e.*, which state has the most significant connection to the parties?; which state would suffer more if its public policy, as expressed in its criminal statutes, was ignored?; and which state's law represents the "better" law?<sup>33</sup>

In practice, however, it is likely that no conflict will be found to exist. This is because even states like Nevada tightly regulate gambling and require it to take place in licensed facilities run by licensed operators.<sup>34</sup> Thus, while it is true that Utah prohibits all forms of gambling and Nevada authorizes many forms of gambling, two astronauts—even if they are both from Nevada—cannot engage in gambling simply as they see fit to do so.<sup>35</sup>

#### IV. CIVIL LAWSUITS

So far, this article has been focused on criminal actions involving gambling in outer space. It is possible, however, to envision scenarios in which two astronauts while in outer space: (a) engage in gambling that is not prohibited by either the Johnson Act or any

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<sup>30</sup> 189 F. Supp. 288 (E.D.N.Y. 1960).

<sup>31</sup> *Id.* at 288-89.

<sup>32</sup> *Id.* at 289.

<sup>33</sup> In contrast to civil cases, relatively little attention has been paid to choice-of-law questions in criminal cases. For two useful examinations, *see generally* Robert A. Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 CASE W. RESV. L. REV. 44 (1974); Megan McGlynn, Note, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law*, 127 YALE L.J. 406 (2017).

<sup>34</sup> This is true in all states that permit gambling. For a side-by-side comparison of state gambling laws, *see* Stan Fox, *US State-by-State Gambling Laws*, LET'SGAMBLEUSA.COM (June 17, 2022), <https://www.letsgambleusa.com/laws/>.

<sup>35</sup> It is true that Nevada does allow unregulated "social gambling." *See* Vermeys & Elliott, *supra* note 25 (explaining that Nevada exempts from its gambling laws "games played with cards in private homes or residences in which no person makes money for operating the game, except as a player."). Of course, this does not provide a loophole in the astronaut hypothetical because such games must take place in a private home or residence. *Id.*

state law; (b) make a wager that will not be completed until they return to Earth (*e.g.*, betting on next year's Super Bowl); or (c) complete a wager that was made on Earth (*e.g.*, by having the loser pay the winner for a bet that was made on last year's Super Bowl or having the winner agree to accept from the loser less than the full amount of the bet). In these circumstances, a failure to perform by one side could give rise to a civil lawsuit by the other side.

Imagine, for example, that while in outer space the astronaut who lost the Super Bowl bet pays the winner in counterfeit bills (thinking, incorrectly, that she cannot be criminally prosecuted for passing counterfeit bills because she is not on Earth). Can the winner, upon her return to Earth, sue the loser to enforce the bet?

While not free from doubt, there does not appear to be any reason why, in any of the three scenarios listed above, a court on Earth should hesitate to give whatever relief is available under the law of the applicable state (as determined by ordinary choice-of-law principles).<sup>36</sup> In many instances, such suits will need to be filed in state court due to a lack of federal jurisdiction.<sup>37</sup>

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<sup>36</sup> The enforceability of gambling contracts and wagers differs from state to state and from country to country. For a further discussion, see, *e.g.*, Zheng Sophia Tang, *Cross-Border Enforcement of Gambling Contracts: A Comparative Study*, 7 INT'L J. PRIVATE L. 1 (2014); Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAPMAN L. REV. 87 (2002). At one time, US courts were reluctant to enforce gambling debts. See, *e.g.*, *Carnival Leisure Indus., Ltd. v. Aubin*, 53 F.3d 716 (5th Cir. 1995) (gambling debt incurred in the Bahamas could not be enforced in Texas); *Condado Aruba Caribbean Hotel, N.V. v. Tickel*, 561 P.2d 23 (Colo. Ct. App. 1977) (gambling debt incurred in Aruba could not be enforced in Colorado). With US society having become more accepting of gambling, see *supra* note 10, however, US courts have changed their views. See, *e.g.*, *Baluma, S.A. v. Huang*, Case No.: 2:20-cv-01547-GMN-VCF, 2021 WL 2562144 (D. Nev. Mar. 19, 2021) (gambling debt incurred in Uruguay could be enforced in Nevada); *Resorts World at Sentosa Pte Ltd. v. Chan*, CV. NO. 15-00499 DKW-KJM, 2016 WL 5660398 (D. Haw. Sept. 28, 2016) (gambling debt incurred in Singapore could be enforced in Hawaii).

<sup>37</sup> Other than diversity jurisdiction (28 U.S.C. § 1332), which requires the parties to be from different states and have a controverted amount of at least \$75,000, it is difficult to see how such suits could be heard in federal court. One pair of commentators, however, have asserted that federal courts can hear nearly any type of civil suit involving outer space based on federal question jurisdiction (28 U.S.C. § 1331). See Michael J. Listner & Joshua T. Smith, *A Litigator's Guide to the Galaxy: A Look at the Pragmatic Questions for Adjudicating Future Outer Space Disputes*, 23 VAND. J. ENT. & TECH. L. 53, 77 (2020):

Because of the federal government's right to authorize and, therefore, to maintain its continuing jurisdiction over the authorized

## V. CONCLUSION

As of this writing, a crime has not yet been committed in outer space.<sup>38</sup> However, in September 2021, Jared Isaacman, Founder and CEO of Shift4Payments and mission commander of SpaceX's Inspiration4 mission, made the first two sports "bets" from outer space via a proxy bettor at the BetMGM Sportsbook at MGM Grand in Las Vegas.<sup>39</sup> Isaacman placed \$4,000 on the Over (40.5) in the Washington Football Team vs. the New York Giants Week 2 game, and \$4,000 on the Philadelphia Eagles to win the 2022 Super Bowl.<sup>40</sup> Isaacman pledged all winnings from the bets placed from space to St. Jude Children's Research Hospital, to which BetMGM has also donated \$25,000.<sup>41</sup>

As is obvious, Isaacman's bets were not real bets. Not only did Isaacman make them in the form of charitable donations, his goal was to call attention to his company (Shift4Payments), which is BetMGM's official payment processor.<sup>42</sup> Similarly, BetMGM took Isaacman's bets to garner publicity and, like Isaacman, is making a charitable donation to St. Jude's. Nevertheless, Isaacman's bets<sup>43</sup>

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launches, the federal court system is the likely forum to adjudicate disputes involving US-registered private launches....[Furthermore,] absent specific legislation created by Congress that creates a special court to adjudicate outer space matters, the federal courts can conclude that they have subject matter jurisdiction over [outer space] matters as they pose a federal question....

<sup>38</sup> In 2019, US astronaut Anne C. McClain was investigated for committing identity theft while on the International Space Station but the charges were quickly dropped after officials realized that McClain's estranged wife (Summer H. Worden) had lied about McClain's actions. See Chelsea Gohd, *Astronaut Anne McClain's Estranged Wife Charged with Lying About Alleged 'Space Crime,'* SPACE.COM (Apr. 7, 2020), <https://www.space.com/astronaut-anne-mcclain-wife-charged-lying-space-crime.html>.

<sup>39</sup> Jay Ginsbach, *Payments Processing Billionaire Places Super Bowl Bet from Space,* FORBES (Sept. 17, 2021), <https://www.forbes.com/sites/jayginsbach/2021/09/17/payments-processing-billionaire-places-super-bowl-bet-from-space/?sh=3dfd889061c2>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Press Release, *Shift4 Payments Will Power BetMGM's Online Gaming and Sportsbook Platform,* SHIFT4, (June 21, 2021), <https://www.shift4.com/news/betmgm>.

<sup>43</sup> In addition to Isaacman, the Panamanian sportsbooks BetOnline and Sports-Betting have been announcing since 2021 that they plan to conduct coin flips in outer space and take bets on the outcomes. To date, however, these events have been postponed repeatedly for undisclosed reasons. See *Bet on a Coin Toss in Space,* GOODSPORTSBOOKS.COM, <https://www.goodsportsbooks.com/bet-on-a-coin-toss-in-space/> (last visited Jan. 1, 2023).

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make it clear that gambling in outer space is an issue that, sooner or later, will land on the desks of lawyers.