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Cover Page Footnote

Associate Member 2014–2015 University of Cincinnati Law Review. The author wishes to express his gratitude to Professor Janet Moore for her guidance in the research of this piece. The author also wishes to thank William Siderits and Kelly Pitcher for their input during the writing process.

REFUSING TO FOLD: HOW LAWRENCE DICRISTINA WENT BUST FIGHTING FOR A NOVEL INTERPRETATION OF THE ILLEGAL GAMBLING BUSINESS ACT

*Jonathan Hilton**

I. INTRODUCTION

When Lawrence DiCristina was charged with violating the Illegal Gambling Business Act (IGBA) in 2011, he devised a novel defense: that the for-profit Texas hold 'em poker games he admitted to running could not lead to an IGBA conviction, since playing poker for money does not constitute “gambling.”¹ Since Congress passed the IGBA in 1970, defendants (often deep-pocketed) have already tested the federal antigambling statute in nearly every conceivable way. Yet, over forty years later, Jack Weinstein, a federal judge for the Eastern District of New York, agreed with the DiCristina’s novel interpretation in a 120-page slip opinion,² leading poker players across the nation to rejoice.³ Particularly, Judge Weinstein held that, in order to obtain a conviction under the IGBA, prosecutors must show that the defendant’s business is of the gambling variety; i.e., that it is based on a “game of chance,” as defined by federal common law.⁴ Because DiCristina’s business involved Texas Hold 'Em—a “game of skill” under federal common law—it did not fall inside the IGBA’s purview.⁵

The Second Circuit swiftly reversed Judge Weinstein.⁶ It held that DiCristina’s poker games indeed constituted gambling, because poker is illegal under the gambling laws of New York, where DiCristina’s games took place.⁷ Thus, the Second Circuit’s view is that an activity constitutes gambling under the IGBA whenever state law makes it so.

* Associate Member 2014–2015 *University of Cincinnati Law Review*. The author wishes to express his gratitude to Professor Janet Moore for her guidance in the research of this piece. The author also wishes to thank William Siderits and Kelly Pitcher for their input during the writing process.

1. *United States v. DiCristina*, 886 F. Supp. 2d 164, 168 (E.D.N.Y. 2012).

2. *United States v. DiCristina*, No. 1:11-cr-00414-JBW (E.D.N.Y. Aug. 21, 2012) (slip opinion).

3. *See, e.g.*, Press Release, Poker Players Alliance, *PPA Applauds Federal Court Ruling that Poker is a Game of Skill and Not Illegal Gambling* (Aug. 21, 2012), available at https://www.scribd.com/fullscreen/103497849?access_key=key-14ofv3favrb80jdvyyv82.

4. *DiCristina*, 886 F. Supp. 2d at 169–70.

5. *Id.*

6. *United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013).

7. *Id.* at 98 (“Pursuant to § 1955(b)(1)(i), we look to *state law* definitions of gambling.”) (emphasis added).

This Casenote criticizes the Second Circuit’s interpretation of the IGBA as problematic as a matter of statutory construction. In addition to contending that Judge Weinstein’s interpretation is preferable, it argues that whether a particular activity constitutes gambling is a matter of fact that must be decided by a jury—it is not a matter of law for a judge, as Judge Weinstein held.⁸ Part II first provides the background of DiCristina’s case. It then outlines the IGBA’s statutory text, summarizes the IGBA’s legislative and interpretive history, and offers an overview of the multitudinous definitions of gambling under state law. Part III discusses specific flaws in the Second Circuit’s interpretation. After accepting the need for a federal common law definition of gambling, it argues that Weinstein’s definition is sensible. Then, it contends that the determination of whether an activity constitutes gambling should be decided by a jury. Finally, Part IV speculates as to why the Supreme Court denied certiorari in the case, and what the impact of *DiCristina* might be on future IGBA cases.

II. BACKGROUND

A. *The Case Against DiCristina*

DiCristina’s arrest stemmed from his hosting twice-a-week poker “game nights” at his electric bike shop warehouse in Staten Island, New York.⁹ His poker club was a local two-table operation whose only advertising was by word of mouth—specifically, by text message.¹⁰ The club took a five percent “rake,” or cut, from each poker hand, a quarter of which it kept as profit.¹¹ The prosecution alleged no other illegal activity by DiCristina.¹² Nevertheless, his operation involved the efforts of “five or more persons” and had been in “continuous operation for a period in excess of thirty days,” making it eligible for prosecution under the IGBA.¹³ DiCristina initially pled guilty; however, after devising his novel defense that playing Texas Hold ’Em for money did not constitute gambling, he withdrew his plea.¹⁴

8. *DiCristina*, 886 F. Supp. 2d at 168.

9. Petition for Writ of Certiorari, *DiCristina v. United States*, 2013 WL 5936540, at *7 (Nov. 4, 2013).

10. *DiCristina*, 726 F.3d at 95.

11. *Id.*

12. Petition for Writ of Certiorari, *supra* note 9, at *7.

13. 18 U.S.C. §§ 1955(b)(1)(ii)–(iii) (2014).

14. *DiCristina*, 726 F.3d at 169.

The IGBA, part of the Organized Crime Control Act of 1970, which includes, under Title IX, the Racketeer Influenced and Corrupt Organizations Act (RICO), was passed to allow federal law enforcement to target the number-one source of revenue for organized crime: gambling operations.¹⁵ To the prosecution, DiCristina's shop had all of the makings of organized crime. First, Stefano Lombardo, DiCristina's co-defendant who pled guilty early in the case, claimed in mitigation that he had agreed to promote game nights by text message to pay off a \$5,000 gambling debt he owed DiCristina.¹⁶ The 33-year-old Lombardo, a single man living with his parents with a previous conviction for selling oxycodone, had fallen on tough times financially.¹⁷ He had seen DiCristina's game nights as a way to raise money for himself and his family,¹⁸ but had instead ended up as a type of indentured servant.

Second, the prosecution asserted that DiCristina's operation "generated thousands of dollars of revenue, sought to conceal its existence from law enforcement and the public at large, and employed dealers, an armed security guard, and a waitress who doubled as a masseuse."¹⁹ During hearings on the Organized Crime and Control Act, then Attorney General, John D. Mitchell pledged that the Department of Justice would use the act's broad provisions and open-ended language "strictly in accord with its legislative purpose,"²⁰ that is, targeting organized crime, particularly mafia crime families.²¹ DiCristina, with his Italian surname and word-of-mouth poker tournaments in Staten Island, was an obvious target.

A jury initially convicted DiCristina.²² However, the court instructed that jury that poker constituted gambling under the IGBA as a matter of law.²³ After the verdict, Judge Weinstein dismissed the indictment by holding that Texas Hold 'Em was not, in fact,

15. *Id.* at 208, citing Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws & Procedures of the S. Comm. on the Judiciary, 91st Cong. 158 (Statement of Sen. Tydings), "[t]he greatest single source of revenue for organized crime is its gambling activities, which net an estimated seven (7) to fifty (50) billion dollars a year...." [hereinafter Senate Judiciary Hearings].

16. Criminal Sentencing Memoranda, United States v. Stefano Lombardo, No. 11-CR-414 (S-2)-01 (JBW), 2012 WL 3620370 (Mar. 13, E.D.N.Y.).

17. *Id.*

18. *Id.*

19. Government's Mem. of Law in Opp'n to Def's Rule 29 Motion 1, United States v. DiCristina, No. 11-CR-414 (S-2) (JBW), 2012 WL 3620372 (July 27, E.D.N.Y.).

20. Organized Crime Control: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 194 (1970) (Statement of John N. Mitchell).

21. Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong. 1st Sess. 124 (1969).

22. United States v. DiCristina, 886 F. Supp. 2d 164, 168 (E.D.N.Y. 2012).

23. *Id.* at 169.

gambling.²⁴ He reasoned that although the IGBA outlaws certain kinds of “gambling businesses,” it did not precisely define the term gambling.²⁵ In crafting a definition, Judge Weinstein used the common law and a nonexhaustive list of examples of gambling in the IGBA’s text, which featured lotteries, bookmaking, slot machines, and roulette wheels, among other chance-based games, as a guide. He eventually adopted the “predominance test” as his definition for gambling: “wagering something of value on the outcome of a game in which chance predominate[s] over skill.”²⁶ Based on lengthy expert testimony, he concluded that Texas Hold ’Em poker is predominately a game of skill, making DiCristina’s conduct innocent under the IGBA. He also ruled that whether a particular activity constitutes gambling under the IGBA is a matter of law, not a fact for the jury.²⁷

When the Second Circuit Court of Appeals reversed Judge Weinstein’s dismissal, it used a plain-language approach to hold that, under the IGBA, there is no need for a federal common law definition of gambling; rather, the IGBA simply incorporates state law definitions of gambling.²⁸ Because Texas Hold ’Em constitutes illegal gambling under New York state law, DiCristina’s poker business was gambling under the IGBA.²⁹ The Second Circuit reinstated DiCristina’s conviction and remanded the case to Judge Weinstein for sentencing.³⁰ DiCristina lost any potential reduction in the offense level he might have had by pleading guilty, but Judge Weinstein stayed the imposition of DiCristina’s sentence while the case was being appealed to the U.S. Supreme Court.³¹

B. The Statutory Text of the IGBA

The IGBA is a relatively short statute, totaling just over five hundred words. The first two parts state the elements of an IGBA offense:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

24. *Id.* at 235.

25. *Id.* at 201.

26. *Id.* at 227.

27. *Id.* at 168.

28. *United States v. DiCristina*, 726 F.3d 92, 102 (2d Cir. 2013).

29. *Id.*

30. *Id.* at 94.

31. *United States v. DiCristina*, 2014 LEXIS 19038, at *4 (Jan. 24, 2014, E.D.N.Y.).

(b) As used in this section—

(1) “illegal gambling business” means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) 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.

(2) “gambling” 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 . . .³²

Other parts include section (c), which sets the standard for probable cause for searches and seizures of illegal gambling businesses; section (d), which allows for civil forfeiture of properties used in violation of the IGBA; and section (e), which provides an exemption for a “bingo game, lottery, or similar game of chance conducted by an organization exempt from tax.”³³ The exemption in section (e) is relevant because, by noting that “similar game[s] of chance” were excluded from the IGBA, Judge Weinstein was able to conclude that whether a game is one of chance or skill is relevant to federal definition of gambling.³⁴

C. Legislative & Interpretive History

According to then-President Nixon, the IGBA was included in the Organized Crime Control Act of 1970 to allow the federal government to target “organized crime’s principal source of revenue: illegal gambling.”³⁵ Congress believed that federal enforcement of state law was necessary because the mafia had corrupted local law enforcement officers.³⁶ The previous federal antigambling statutory

32. 18 U.S.C. § 1955 (2014).

33. *Id.*

34. United States v. DiCristina, 886 F. Supp. 2d 164, 227 (E.D.N.Y. 2012).

35. *Id.* at 203, citing S. Rep. No. 91-617 at 71 (1969).

36. The IGBA singles out for federal prohibition “the element of gambling operations involving the corruption of local law-enforcement officials . . . and to make it possible for the Federal government to intervene where local and State governments have become . . . incapable of law enforcement by reason of the corruption of responsible officials.” State v. Dadanian, 818 F.2d 1443(9th Cir. 1987), quoting S. Rep. No. 617, 91st Cong., 1st Sess. 74 (1960).

scheme required the prosecution to prove a nexus, or specific link, between the particular instance of gambling at issue and interstate commerce.³⁷ The IGBA capitalized on the Supreme Court's expanded understanding of the Commerce Clause, particularly the "cumulative effects doctrine," to eliminate the nexus requirement.³⁸

A proposed version of the IGBA had included a narrower definition of gambling, which stated that "illegal gambling business means betting, lottery, or numbers activity."³⁹ However, Congress eventually settled on a longer list, and it replaced the word "means" with the phrase "includes but is not limited to" in section (b)(2). Thus, although some of the original focus of the IGBA was on the mafia's numbers racket, a type of lottery similar to the Powerball today, which at that time was "draining from the poorest inhabitants of our ghettos and slums and their families precious dollars which should be spent for food, shelter and clothing,"⁴⁰ the IGBA was intended to have a wider scope. The bill gave "broad latitude" to the Department of Justice to assist states in targeting organized crime.⁴¹

Courts have interpreted the IGBA's provisions broadly to accommodate Congress's intent. Although they have sometimes referenced the usual rule that criminal statutes should be construed narrowly,⁴² courts have primarily focused their analyses on construing the IGBA in accord with its legislative purpose. That is, in the spirit of RICO, courts have recognized Congress's intent to create a statute criminalizing broad swaths of behavior. For instance, in *United States v. Dadanian*, the court held that a poker club was an illegal gambling business under the IGBA even though wagering on poker did not constitute illegal gambling under California state law.⁴³ Rather, the defendants' business merely lacked a license to operate a poker club as required by city ordinance.⁴⁴ Looking to the purpose of the IGBA, the court held that the city's licensing requirement "surely

37. House Judiciary Hr'gs at 156–57 (statement of Att'y Gen. John N. Mitchell).

38. The IGBA easily survived early challenges to Congress's authority to pass it under the Commerce Clause: "Illegal gambling has been found by Congress to be in the class of activities which exerts an effect upon interstate commerce. Where the class of activities is regulated and that class is within the reach of federal power, the courts may not excise as trivial individual instances of the class." *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972), citing *Wickard v. Filburn*, 317 U.S. 111 (1942).

39. S. 2022, 91st Cong., 1st Sess., § 201; see also Br. and Special App. for the U.S., No. 12-3720, 2012 WL 6800562, at 23 (Dec. 20, 2013, 2 Cir.).

40. Senate Judiciary Hearings, *supra* note 15.

41. *Dicristina*, 886 F. Supp. 2d at 205, citing 116 Cong. Rec. 601 (Jan. 21, 1970) (statement of Sen. Hruska) (citations omitted).

42. *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

43. *United States v. Dadanian*, 818 F.2d 1443, 1448 (9th Cir. 1987).

44. *Id.*

is designed to prevent the infiltration of criminal elements into gambling” in the city, and noted that “[a]cceptance of the construction offered by the Dadanians would afford a shield to criminal activity.”⁴⁵ In convicting the defendants, the court also considered that local police forces were corrupted in order to further the interests of the poker club, even though nothing in the text of the IGBA requires a showing of local corruption. In stretching the text of the IGBA to fit the defendants’ behavior, the court noted that “[t]he collusion between the Dadanians and the local corrupt city administrator . . . is one of the kinds of conduct § 1955 contemplated.”⁴⁶

Other portions of the IGBA have also been interpreted broadly. For instance, in *United States v. Avarello*, one court construed what were in fact two smaller, separate businesses as a single entity in order to satisfy the requirement under (b)(1)(ii) that a gambling business have five or more persons. Specifically, it found that two bookkeeping operations were one business for purposes of the IGBA, because the evidence showed “a regular exchange of line information and layoff bets” between the two.⁴⁷ Layoff bets allow bookkeepers to place bets against each other to diffuse risk. Although the businesses had separate owners,⁴⁸ the court construed them as one merely because they worked together.

Additionally, courts have limited the defenses available to defendants in IGBA actions. Thus, defendants have not been able to invoke some defenses that would otherwise be available under state law. For instance, in *United States v. Revel*, the Fifth Circuit rejected the defendant’s argument that he could invoke the statute of limitations of the state whose law was used as a predicate for his IGBA conviction.⁴⁹ The court noted that “Congress *could have* incorporated the [state] statutes of limitation under § 1955,” but it did not do so; the IGBA merely incorporated state law when defining the conduct prohibited.⁵⁰

In another case, *United States v. Smalldone*, the Tenth Circuit upheld an IGBA conviction even though the state law the defendant violated had been repealed before his prosecution.⁵¹ According to the Tenth Circuit, what mattered was that the defendant’s conduct

45. *Id.*

46. *Id.*

47. *United States v. Avarello*, 592 F.2d 1339, 1339 (5th Cir. 1979).

48. *Id.* at 1342–43.

49. *United States v. Revel*, 493 F.2d 1, 2 (5th Cir. 1974).

50. *Id.* at 2–3.

51. *United States v. Smalldone*, 485 F.2d 1333 (10th Cir. 1973).

was illegal under state law at the time he engaged in it, not whether the state law was still in force at the time of the indictment.⁵²

Notwithstanding this trend towards broad interpretation of the IGBA, one prior case did apply the rule of lenity to spare a defendant, as Judge Weinstein did. In *United States v. Gordon*, the defendant's gambling business had violated merely "nonpenal" regulations of the Nevada Gaming Commission.⁵³ The Ninth Circuit issued a short *per curiam* opinion holding that a defendant whose gambling business violated a nonpenal civil law, as opposed to a criminal law, could not be convicted under the IGBA.⁵⁴ Because the element of the IGBA requiring that the defendant's conduct be "a violation of the law of a State or political subdivision in which it is conducted" could be plausibly read to refer to either state criminal law or civil law, the court applied the rule of lenity to acquit the defendant.⁵⁵

Given the sheer number of arguments already attempted by IGBA defendants, it is surprising that, more than forty years after the statute's enactment, a trial court would accept a new defense to the statute. Prior case law either stated or implied that there are only three elements, subsections (b)(1)(i),(ii), and (iii), of an IGBA violation.⁵⁶ However, DiCristina's argument essentially added an additional element to the offense. Surprisingly, until DiCristina's case, no court had ever opined as to what types of games constitute gambling under the IGBA. In *United States v. Atiyeh*, the court passed on a similar question when a handler of gambling-related moneys asserted that was not involved in gambling under the IGBA; that is, he was a "mere custodian" of funds.⁵⁷ The *Atiyeh* court brushed aside this defense, since the jury had found that Atiyeh's conduct violated state gambling laws. However, *Atiyeh* is not directly on point, because the defendant in that case was involved in a bookkeeping operation.⁵⁸ Because bookkeeping is classified as "gambling" for purposes of the IGBA under section (b)(2), the defendant business was undoubtedly a gambling business.

In *United States v. Sacco*, the Ninth Circuit expressed dicta possibly unfavorable to DiCristina's argument. There, the court held that the term "gross revenue" referred to the total amount wagered by

52. *Id.* at 1343–44.

53. *United States v. Gordon*, 464 F.2d 357, 357 (9th Cir. 1972).

54. *Id.*

55. *Id.*

56. *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974).

57. *United States v. Atiyeh*, 402 F.3d 354, 372 (3d Cir. 2005).

58. *Id.* at 359.

participants in one day, not the net profits of an illegal gambling business. In doing so, it noted that Congressional intent “was to eliminate major gambling enterprises, regardless of the luck of the odds.”⁵⁹ Nevertheless, that case interpreted the term gross revenue, not gambling, so its reference to luck was not on point.

D. *The Five State Law Definitions of “Gambling”*

Because the Second Circuit in DiCristina interpreted the IGBA as exclusively referencing state law definitions of gambling, and because Judge Weinstein’s interpretation would have involved piecing together various states’ common law definitions of gambling into one general, federal, common law standard, it is necessary to begin with a short overview of state definitions. State definitions of gambling may be classified into four groups,⁶⁰ although South Carolina may be alone in a fifth group. The only mutual element shared by all four tests is that something of value must be staked on an uncertain future occurrence.

1. Predominance test

Under the predominance test, sometimes called the American Rule,⁶¹ courts consider whether skill or chance is more likely to influence the outcome of a contest.⁶² This test is used in a majority of states,⁶³ and asks whether chance or skill predominates.⁶⁴ The test imagines a continuum, with games of “pure skill,” that is, games involving total information and no randomness as to the outcome, on one end, and games of “pure chance,” such as roulette, on the other.⁶⁵ On the continuum, games similar to chess are considered games of skill, whereas games similar to roulette are deemed games of chance. Under the predominance test, wagering on a game of chance

59. *Sacco*, 491 F.2d at 995.

60. Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 390 (2009).

61. *See, e.g.*, *Town of Mount Pleasant v. Chimento*, S.E.2d 830, 836 (2012), *reh’g denied* (Jan. 10, 2013).

62. Cabot et al., *supra* note 60, at 391.

63. Chuck Humphrey, *State Gambling Law Summary*, GAMBLING LAW U.S., <http://www.gambling-law-us.com/State-Law-Summary/> (last updated 2007), shows that 36 states plus the District of Columbia use the predominance test. Further research is needed to update Humphrey’s chart, however; for instance, South Carolina should not be considered in the predominance test category after *Town of Mount Pleasant*, S.E.2d 830 at 836.

64. Cabot, *supra* note 60, at 390.

65. *Id.* at 391.

constitutes gambling, but wagering on a game of skill does not. Although this test tends to be the most predictable of any of the state tests, there are considerable gray areas. In particular, on the issue of poker, courts that apply the predominance test are split.⁶⁶

In other cases, contests that could theoretically count as skill are sometimes labeled as chance on the continuum. For instance, one court determined that shooting a hole-in-one on a golf course was an event determined by chance rather than skill, because the odds of doing so are low.⁶⁷ An additional criticism of the predominance test is that it fails to take into account the identity of the players. Because the predominance test focuses solely on the nature of the game at hand, it does not consider that the level of skill involved in some games depends entirely on whether or not the players themselves possess any skill. For example, one paper has noted that if eight-year-olds were to take a multiple-choice exam on quantum physics, the highest-scoring student would be the luckiest, not the most skillful.⁶⁸

2. “Material element” of chance test

The “material element” test, applied by eight states, asks whether the element of chance is a factor that is material to the final result.⁶⁹ The test looks to whether chance “has more than an incidental effect on the game.”⁷⁰ One scholarly work has criticized this test as being too subjective to be applied with any consistency and argues for its abandonment.⁷¹ It explains that chance being a material element essentially means that chance must have a logical connection to the outcome. This may mean that the material element test would be satisfied by a game that contains any chance at all.⁷² For instance, under the material element test, Scrabble, a game in which a professional player would defeat an amateur 100% of the time,⁷³ could be considered a gambling game because the outcome between two evenly-skilled players could come down to the luck of which tiles are drawn. Thus, the amount of chance involved in some Scrabble games could be more than incidental to the outcome.

66. *Id.* at 402.

67. *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961).

68. Cabot, *supra* note 60, at 400-01.

69. *Id.* at 392.

70. *Id.*

71. *Id.*

72. *Id.*

73. Brief of Champion Scrabble and Bridge Players as Amici Curiae Supporting Petitioner, *Dicristina v. United States*, 2013 WL 6493518, at *6 (Dec. 6, 2013).

Judge Weinstein distinguished the predominance test from the material element test when he noted that the variant of poker played by DiCristina, although not gambling by his findings under the predominance test, would certainly be gambling under the material element test.⁷⁴

Under the predominance and material element tests, whether a given game is considered gambling is usually a matter of fact, not law.⁷⁵ This allows for professional players to testify, for books of strategy to be admitted into evidence, and for mathematicians to testify as expert witnesses. Throughout DiCristina's trial, the defendant moved for Judge Weinstein to permit a jury trial on the issue of whether poker was gambling under the predominance test,⁷⁶ but Judge Weinstein instead reserved judgment for himself, ruling that it was an issue of law.⁷⁷

3. Any chance test

In a handful of states, including Texas,⁷⁸ courts apply the “any chance” test—that is, whether chance influences the outcome of the game at all. Although this approach is perhaps the most predictable of the four, it has the downside of being so broad as to include virtually any game, particularly if taken to its logical extreme. For instance, golf could be considered a game of chance because unpredictable wind patterns may influence the outcome of an occasional game. Cabot, et al., postulate that even chess could be a game of chance under this test if one player, chosen at random, was given the advantage of the first move.⁷⁹ Courts that apply the any chance test may face the disheartening task of labeling many games as gambling that the general public would consider contests of skill.

4. “Gambling Instinct” Test

A few courts apply a “gambling instincts” test that looks to

74. United States v. DiCristina, 886 F. Supp. 2d 164, 234 (E.D.N.Y. 2012).

(“The conclusion that poker is predominately a game of skill does not undermine the holding that poker is gambling as defined by New York law. While both New York State law and the IGBA require that a game involves chance, each apply different standards in determining whether a particular game is a game of chance or a game of skill. . . . The test under the federal statute is one of *preponderance*, not *material degree*.”).

75. Cabot, *supra* note 60, at 401.

76. *DiCristina*, 886 F. Supp. at 171.

77. *Id.*

78. *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993).

79. Cabot, *supra* note 60, at 390.

whether an activity appeals to the player's gambling instinct.⁸⁰ This test has been criticized as "highly subjective," "imprecise," and "not susceptible to meaningful analysis by a trier of fact."⁸¹ Courts may consider practically whatever criteria they wish: for instance, in the case of slot machines or pinball games, a court may consider whether the machine is considered "noxious" by the public, is "attractive to youth," or provides "free plays" to attract players.⁸² Because of the wide criteria considered, the gambling instincts test is unpredictable.⁸³ It also may merge with the "any wager" test, explained below, because the mere act of wagering may appeal to gambling instincts.⁸⁴

5. Any wager test

A recent decision from the Supreme Court of South Carolina places that state into a unique category, which could be christened the "any wager" test. Under § 16–19–40 of Title 16 of South Carolina's penal code, wagering on games of any sort constitutes illegal gaming if the game is taking place at a prohibited location, such as a house "used as a place of gaming."⁸⁵ Thus, under South Carolina's test, it is the presence of a wager on a game that constitutes illegal gambling, without reference to skill or to gambling instincts. Unlike the gambling instincts test, the any wager test is straightforward, objective, and predictable, since all forms of wager are criminalized. However, even more so than the any chance test, the any wager test has the downside of criminalizing broad swaths of activity.

E. Specifics of the Second Circuit's Interpretation

The Second Circuit held that the phrase illegal gambling business was defined in (b)(1)(i)–(iii).⁸⁶ It reasoned that the insertion of the word means after the phrase illegal gambling business indicated that

80. *Id.* at 394.

81. *Id.* at 394, 412.

82. *See, e.g.,* Heartley v. State, 157 S.W.2d 1 (Tenn. 1941); Hunter v. Mayor & Council of Teaneck Twp., 24 A.2d 553, 555 (N.J. 1942).

83. *Id.* at 394 ("Because this test is highly subjective, a court decision can vary widely in its application to particular games.")

84. This is certainly least the case when what is being wagered is a "thing of value." *See* State v. Mint Vending Mach. No. 195084, 85 N.H. 22, 154 A. 224, 228 (1931) ("Any incitement which would impel the player to stake his money on a chance of winning would produce the evil consequences at which the [gambling instincts] enactment is aimed.")

85. *Town of Mount Pleasant v. Chimento*, 737 S.E.2d 830, 837 (2012).

86. *United States v. DiCristina*, 726 F.3d 92, 99 (2d Cir. 2013).

(i), (ii), and (iii) were the elements of the definition.⁸⁷ Furthermore, the Second Circuit found that this explanation could be reconciled with Congress's inclusion, in Section (b)(2), of a partial definition of gambling, because this list was nonexclusive.⁸⁸ Specifically, the Court reasoned that Section (b)(2)'s purpose was only to serve "as an illustration of what may constitute running a gambling operation."⁸⁹ It also noted that "[h]ad Congress intended to create a definition of 'gambling' unique to the IGBA, or to confine the reach of the IGBA to businesses involving certain types of gambling, it could have inserted such language."⁹⁰

III. DISCUSSION

A. *Benefits of the Second Circuit's Ruling*

Before delving into the weaknesses of the Second Circuit's opinion, a couple of its strengths should also be duly noted. By choosing to use the individual state definitions of gambling, the Second Circuit's interpretation defers to state autonomy. Additionally, the interpretation potentially simplifies prosecution of the IGBA by removing the potentially costly step of proving that a particular activity is gambling under the predominance test. It also eliminates a potentially strong defense against prosecution. These benefits, however, are more limited than one might suppose. First, when a federal criminal statute incorporates state laws, state autonomy is arguably more protected when the federal criminal statute is read to require additional elements. For instance, in *United States v. Maya*, the court held that gambling offenses that constitute mere misdemeanors under state law could still be prosecuted as felonies under the IGBA, because it required illegal gambling businesses to also meet the additional revenue and size elements of (b)(1)(ii) and (iii).⁹¹ Second, prosecutions under the IGBA will only be simplified in the minority of states that do not use the predominance test. Since some form of the predominance test is used in thirty-six states,⁹² this leaves just fourteen states in which adding a separate federal definition would add a hurdle to the prosecution.

87. *Id.*

88. *Id.* at 100.

89. *Id.*

90. *Id.* at 99.

91. *United States v. Maya*, 541 F.2d 741, 748 (8th Cir. 1976).

92. *Humphrey*, *supra* note 63.

B. Arguments Against the Second Circuit's Interpretation

1. DiCristina's Arguments

DiCristina advanced numerous well-reasoned arguments against the interpretation eventually adopted by the Second Circuit. For instance, DiCristina argued that in order for the nonexhaustive list under Section 1955(b)(2) to be given effect, it had to be read as a definition—one which Texas Hold 'Em poker would not readily fit.⁹³ Additionally, DiCristina argued that the Second Circuit's construction ignored a basic principle of statutory interpretation; namely, that statutes should be read so as to give every word effect, leaving no word superfluous.⁹⁴ Had Congress intended an illegal gambling business to consist merely of the elements in (b)(1)(i)-(iii), there would have been no need for it to insert the word gambling a second time. For instance, under the Second Circuit's interpretation, the statute would have had the same effect had (b)(1) read as follows: “ ‘illegal gambling business’ means a business which—,” effectively writing the word gambling out of the statute.

DiCristina also argued another canon of statutory construction: Congress is presumed to use the language of the common law. The Second Circuit reasoned that, if Congress had wanted to create a separate federal definition of gambling, it could easily have easily stated so. However, DiCristina's argument highlights the problem with the Second Circuit's reasoning on this point: the court ignored that Congress often chooses not to remain silent on the meaning of certain words in order to allow courts to apply general common-law definitions.⁹⁵ When a common law definition of a word exists, Congress often uses that word without making any attempt to provide further clarification. As spelled out above, there are many common law definitions for the word gambling. In light of this principle, the Second Circuit should have adopted a federal common law definition of gambling.

Finally, another one of DiCristina's strong arguments was that Section 1955(e) allows churches exceptions for bingo and similar games of chance, and that it would make little sense for Congress to exempt only games of chance and not games of skill, meaning that it

93. Def. Lawrence Dicristina's Mem. of Law in Supp. of his Mot. for a J. of Acquittal under Rule 29 of the Fed. R. of Crim. P., No. 11-CR-414 (JBW), 2012 WL 8899769 (July 19, 2012, E.D.N.Y.).

94. *Id.*

95. A term “comes with a common law meaning, absent anything pointing another way.” *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58 (2007).

must have meant to adopt the predominance, material element, or any chance test. Given the comparisons to bingo and lotteries, games of pure chance, Congress likely intended the IGBA to apply to games involving little or no skill. Thus, adopting the predominance test would best comport with this intention, since games involving 51% skill would fall outside the scope of the IGBA.

2. State Law Does Not Always Define “Gambling”

The IGBA should be interpreted to include a federal definition, not just a state definition, of gambling for a number of reasons. The most novel of those reasons is that state penal codes do not always define what constitutes gambling. Although DiCristina did not make this argument, on one occasion, he came close. In the prosecution’s memorandum in opposition to DiCristina’s Rule 29 motion to dismiss, the government claimed that in 49 states, poker was legislatively or judicially classified as gambling.⁹⁶ DiCristina’s reply brief retorted that not only had the prosecution failed to provide support for this claim for 21 of those states, it also included state laws that merely regulated poker.⁹⁷

For instance, poker is considered a “controlled game” in California.⁹⁸ However, it is not directly described by statute as gambling. Although the controlled game statute appears under the “Gaming” chapter of the California Penal Code,⁹⁹ there is no definitive statutory label stating that poker is gambling in that state. By interpreting the word gambling in the IGBA according to its common law meaning, rather than state definitions, the IGBA could be read in a way to give broader latitude to prosecutors in some cases, thus keeping with both the legislative intent of the statute and its plain language.

A thought experiment may help to clarify matters. Suppose that, after the passage of the IGBA, a state supreme court ruled that, due to the rise of increased availability of statistical analysis in certain sports, bookmaking under certain circumstances and for certain sports would no longer be considered gambling under the state’s gambling laws, which employ the predominance test to define gambling. This is not a far-fetched scenario; as the prosecution

96. Gov’t’s Mem. of Law in Opp. to Def.’s Rule 29 Mot., *United States v. Dicristina*, 2012 WL 3620372, n. 3–4 (E.D.N.Y. Apr. 23, 2013).

97. Def. Lawrence DiCristina’s Rep. Mem., No. 11-CR-414 (JBW), *Dicristina*, 2012 WL 3620373 (E.D.N.Y. July 30, 2012).

98. Cal. Penal Code § 337(j) (West).

99. Cal. Penal Code, Part I, tit. 9, ch. 10.

noted, the Attorney General of New York opined that sports betting involves substantial skill,¹⁰⁰ and a professor recently contended that it is “ridiculous to call either poker or sports betting a game of chance.”¹⁰¹

Imagine that, in response to this hypothetical opinion, the state’s legislature responds by immediately outlawing bookmaking in all forms, but under a separate bookmaking act and not under the state’s gambling laws. Would a bookmaker who fulfills the requirements of (b)(1)(ii) and (iii) be prosecutable under the IGBA? Under Judge Weinstein’s interpretation, the answer is obvious: yes, because bookmaking constitutes gambling under a federal common law definition that incorporates the language of (b)(2). Under the Second Circuit’s approach, however, there is no easy answer. The hypothetical activity would clearly be a violation of state law for purposes of (b)(1)(i), but it would also not be *gambling* under state law. Therefore, under the Second Circuit’s approach, there would be no gambling business in question, and there could be no prosecutions under § 1955. Yet § 1955 was clearly intended to reach bookmaking, as it is listed under section (b)(2). By relying on section (b)(2) to define gambling, the prosecution would have an avenue to pursue bookmakers under the IGBA. However, under the Second Circuit’s analysis, the IGBA would be rendered toothless.

Yet even under the Second Circuit’s analysis, it would be possible to prosecute for some violations of state law not classified precisely as gambling. For instance, in South Carolina, the statutes refer only to betting and gaming, not gambling.¹⁰² However, the Supreme Court of that state worked around this technicality by construing gaming and gambling as synonymous.¹⁰³ However, finding controlled games to be synonymous with gambling begins to stretch the English language. The further the wording of a state statute from the term “gambling,” the more difficult it would be to prosecute under the IGBA.

100. Gov’t’s Mem. of Law in Opp. to Def.’s Rule 29 Mot., *United States v. Dicristina*, 2012 WL 3620372, citing Office of the Attorney General of the State of New York, Formal Opinion No. 84-F1, NY Op. Atty. Gen. 11 (1984).

101. Scott Van Voorhis, *Profs back online poker*, BOSTON HERALD (Oct. 22, 2007), http://www.bostonherald.com/business/business_markets/2007/10/profs_back_online_poker.

102. S.C. Code ANN. § 16-19-4, tit.16 (2014).

103. *Town of Mount Pleasant v. Chimento*, 737 S.E.2d 830, 832 (2012), *reh’g denied* (Jan. 10, 2013).

3. Adjectives Modify the Nouns that Follow Them, Not That Precede Them

A closer look at the statute reveals a serious problem with the Second Circuit's interpretation. Under a plain language interpretation, adjectives tend to modify the words following them, not ordinarily the words that precede them.¹⁰⁴ This principle is easy to demonstrate. For instance, if a statute bars certain suits against the post office for "loss, miscarriage, or negligent transmission" of postal matter, it is trite learning that the adjective "negligent" applies only to the noun "transmission," and not to "loss" and "miscarriage."¹⁰⁵

In the IGBA, the reference to violations of state law in Section (b)(1)(i) is *subsequent* to the use of the words gambling business. Although there do exist postpositive adjectives, that is, adjectives that modify the nouns preceding them, these tend to be short and fairly obvious, for instance "accounts receivable," "body politic," "fee simple," "force majeure," and "proof positive."¹⁰⁶ Many of these phrases are of foreign origin, thus explaining the tendency to place the adjective after the noun. Another common example of this phenomenon is the phrase "attorney general"—that is, a person who is really a general or all-purpose attorney.¹⁰⁷ There is no such reason for the phrase violation of the law of a State to modify the word gambling here. Therefore, the Second Circuit's "plain language" analysis is grammatically flawed.

C. Weinstein's Definition of "Gambling"

Having accepted that the IGBA requires a federal common law definition of gambling, the question remains whether Judge Weinstein's definition, which adopted the predominance test, was correct. Judge Weinstein's analysis included an evaluation of how the word gambling is used in other federal statutes. He mustered an impressive, historical list of federal gambling laws that targeted games of chance.¹⁰⁸ However, this by itself favors neither

104. For an illuminating discussion on this subject, see *Watkins v. United States*, No. 02 C 8188, 2003 WL 1906176, at *4 (N.D. Ill. Apr. 17, 2003).

105. *Id.*

106. *In re Swetic*, 493 B.R. 635, 639 (Bankr. M.D. Fla. 2013), citing BRYAN A. GARNER, *Garner's Modern American Usage* 860 (2003).

107. *Attorney*, Online Etymological Dictionary, <http://www.etymonline.com/index.php?term=attorney><http://www.etymonline.com/index.php?term=attorney> (last visited May June 12, 2015).

108. This list included 15 U.S.C. § 1171 (defining a gambling device as one which involves "the application of an element of chance"); 15 U.S.C. § 1178(2) (excluding from the statute devices that do not involve an element of chance); 18 U.S.C. § 1081 (using the term "game of chance," in the definition

DiCristina's nor the prosecution's interpretation. From the defense's perspective, prior legislation defining gambling as focusing on games of chance could be used to show that Congress understands that gambling excludes games predominantly of skill. However, the prosecution could just as plausibly argue that, because Congress did not explicitly limit gambling to games of chance in the IGBA (as it has done with other statutes in the past), it meant to use a broader definition or simply to use state definitions of gambling.

For instance, Judge Weinstein identified one federal statute, the Transportation of Gambling Devices Act of 1951, which defined gambling as including an element of chance.¹⁰⁹ The statute essentially defines a "gambling device" as a machine which delivers money or property "as the result of the application of an element of chance."¹¹⁰ However, to reach this conclusion, the reader must first decode three dense paragraphs of statutory text, suggesting that Congress intended a highly specific definition of a gambling device. Although Judge Weinstein was attempting to show a federal legislative trend defining gambling as including chance, the prosecution could have effectively argued that, if Congress wanted to exclude games predominantly of skill from the IGBA, it would have done so explicitly, as it did in the 1951 Act. The prosecution could also have argued that, since Congress has always included intricate definitions of gambling in the past, surely it would have explicitly defined gambling in the IGBA if it meant to include any definition other than the ones provided by the states.

Instead, the prosecution identified two statutes that included definitions of gambling, National Gambling Impact Study Commission Act (NGISCA) and the Indian Gambling Regulatory Act (IGRA), arguing that they were relevant to interpretation of the IGBA.¹¹¹ The prosecution insinuated that because these statutes included broad definitions of gambling, the definition of gambling in the IGBA should be broad, too. Judge Weinstein quickly distinguished the IGRA from the IGBA on grounds that the IGRA "was designed to deal with the sensitive question of regulating Indian gaming establishments," not organized crime.¹¹² However, as above, one could argue additionally that, because the IGRA defines gaming

of "gambling establishment"); 31 U.S.C. § 5362(1)(A) (defining unlawful internet gambling, in relevant part, as the placing of a bet or wager on a "game subject to chance." United States v. DiCristina, 886 F. Supp. 2d 164, 228–29 (E.D.N.Y. 2012).

109. *Id.* at 228.

110. 15 U.S.C. § 1171.

111. Br. and Special App. for the U.S., *supra* note 39, at 33–34.

112. *DiCristina*, 886 F. Supp. 2d at 229.

in a highly specific fashion, it is irrelevant to any interpretation of the IGBA. The IGRA carefully categorizes gaming into three classes, classes I, II, and III, and defines class II with a statutory segment comprising five parts, including multiple layers of subparts. Thus, the argument that the IGRA suggests a broad general federal definition for gambling is weak.

The prosecution's argument regarding then NGISCA fares little better, despite the text of the Act being added by Congress to the notes following the IGBA.¹¹³ In 1996, Congress, noting, among other things, the increasing trend by the states to legalize gambling,¹¹⁴ passed the NGISCA. The Act formed a special commission to review the current practices of federal, state, local, and Native American governments regarding the legal status of gambling and to assess "the relationship between gambling and crime," the impact of pathological gambling on the economy and society, and the extent to which gambling funds governments.¹¹⁵ The Commission, for purposes of its studies, was not to use a definition of gambling from the IGBA. Rather, the Act defined gambling as "any legalized form of wagering or betting conducted in a casino, on a riverboat, on an Indian reservation, or at any other location under the jurisdiction of the United States. . . ."¹¹⁶

Weinstein dismissed the relevance of the NGISCA because "its definition is different and substantially broader than that provided by the IGBA."¹¹⁷ However, he could have added that, because the NGISCA defines gambling as any of certain types of activities that are legalized, it is irrelevant to the IGBA. The IGBA focuses on illegal activities, not legal ones. Additionally, the Commission's purpose was to allow for a broad study of wagering activities; it is not a criminal statute. Thus, neither DiCristina nor the prosecution was able to craft a convincing argument for the interpretation of gambling under the IGBA by comparing the IGBA to other statutes.

However, Judge Weinstein's definition stands even without the aid of other federal statutes. First, when searching for a common law definition of a word, Judge Weinstein cannot be faulted for adopting the test used in a majority of states. Additionally, the predominance test is particularly suited as a common law definition because it is nicknamed the American Rule, signifying its frequent use. Also, as

113. 18 USC § 1955 (2014).

114. National Gambling Impact study Commission Act, Pub. L. 104-169, § 1019, 110 Stat. 1482, § 2.(2).

115. *Id.* at Sec. 4, "Duties of the Commission."

116. 18 U.S.C. § 1955.

117. *DiCristina*, 886 F. Supp. 2d at 229.

Judge Weinstein and the defendant point out, Congress's reference in Section 1955(e) to exemptions for a "bingo game, lottery, or similar game of *chance* conducted by an organization exempt from tax" supports a reading that evaluates the amount of chance, as opposed to the amount of skill, involved.¹¹⁸ If courts were to include games of skill under the definition of gambling, it would be strange for Congress to exempt only games of chance under Section (e).¹¹⁹ Adopting the predominance test comfortably accounts for this.

D. Should What Constitutes Gambling Be Decided by Judges or Juries?

Judge Weinstein concluded that whether a certain game constitutes gambling should be decided by judges as a matter of law.¹²⁰ This approach ignores one of the fundamental realities of game play. Games themselves cannot be classified as games of chance or games of skill without reference to the circumstances under which they are played. For instance, a game of chess between two unskilled children, or played by computers generating random moves, is merely a game of chance, despite the complexity and potential for skill inherent to the game itself. As the prosecution pointed out, even bookkeeping, one of the games listed in section (b)(2) of the IGBA, involves enough skill to allow some professionals to make a living at it.¹²¹

DiCristina countered that bookkeeping is not a true game of skill, because only a select few are good enough to wager on sports professionally; for the masses, sports betting is merely chance.¹²²

Thus, the identities and characteristics of the players matters. Certainly, when No Limit Texas Hold 'Em is played between skilled amateurs or professionals in a tournament setting, one could argue that skill predominates over luck, as DiCristina did in this case. However, this does not mean that the game nights at DiCristina's warehouse were predominately games of skill. Informal games between low-level players, where individual players may simply place a large sum on a single hand, win fortuitously, and then withdraw from the table are markedly different from tournament games, where the contestants must survive a certain number of hands

118. Br. for the Appellee, No. 12-3720, 2013 WL 1280639, at 17 (Mar. 21, 2013, 2nd Cir.) (emphasis added).

119. *Id.*

120. *DiCristina*, 886 F. Supp. 2d at 171.

121. Reply Br. of the U.S., 2013 WL 1840483, at 19–20, (Apr. 29, 2013 2nd Cir.).

122. Br. for Appellee, 2013 WL 1280639 *32, No. 12-3720, (March 21, 2013, 2nd Cir.).

before being allowed to cash out. Thus, drawing a line in the sand and declaring Texas Hold 'Em to be categorically a game of skill as a matter of law fails to account for the circumstances surrounding the game.

On the other hand, adjudicating on an *ad hoc* basis, as most states employing the predominance test do, leaves a high degree of uncertainty in the law. However, anti-racketeering statutes, with their big mouths and sharp teeth, are designed for broad interpretation. Accordingly, these statutes necessarily come with some uncertainty. And in many cases, this uncertainty already existed; because most states use the predominance test, and since IGBA prosecutions must show that the defendant violated state gambling law, imposing this test at the threshold level to determine whether an activity is gambling under federal law would not impose too great a burden. Additionally, a professional poker tournament is far less likely to be a source of revenue for organized crime than is the sort of informal warehouse games that DiCristina was running, so prosecutors could use their discretion to target only those poker games played under shadier circumstances with less skillful players.

IV. CONCLUSION

Although DiCristina appealed the Second Circuit's ruling, the Supreme Court denied certiorari.¹²³ Quite likely, the Supreme Court did not see the point in reinterpreting a statute over forty years old. Also, DiCristina focused heavily on the question of whether "including-but-not-limited-to" clauses are definitions,¹²⁴ a broad technical question that possibly took the focus away from the real issues of statutory construction to be decided in the case.

DiCristina, by switching his plea from guilty to innocent, gambled and lost. Was his roll of the dice entirely in vain? It is too early to know for sure, but it is possible that DiCristina's bold move may have paved the way for future defendants to fashion creative arguments as to what does and does not constitute gambling. However, because the Second Circuit held that an activity is gambling under the IGBA whenever state law makes it so, those arguments will necessarily focus on the definitions of gambling under state law. For instance, if the facts of the *State v. Dadanian* case, in which the defendants were convicted for running a poker business without a proper license, were ever repeated, the defense

123. *DiCristina v. United States*, 134 S. Ct. 1281 (2014).

124. Petition for Writ of Certiorari, *supra* note 9, at 18.

could contend that poker is not gambling under California law, but merely a controlled game. In this way, defendants may be able to capitalize on the murkiness inherent to state gambling laws. So, although DiCristina's legal team may have lost this hand, perhaps future defendants will be able to use the Second Circuit's ruling to stack the deck in their favor.